
Restatement (Third) of Torts: Products Liability, an Anglo-Australian Perspective

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I. INTRODUCTION

Approaching the Restatement (Third) of Torts: Products Liability¹ is a daunting experience for the non-U.S. lawyer. Its length, status, and textual configuration all sharply contrast with the corresponding features of the special legal rules on commercial suppliers of products that have been introduced across Europe,² Japan,³ and Australia.⁴ This short

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1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) [hereinafter RESTATEMENT (THIRD)].

2. See Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) [hereinafter Products Liability Directive]. For general discussion of the U.S., U.K., and European products liability regimes see JANE STAPLETON, PRODUCT LIABILITY (1994) [hereinafter PRODUCT LIABILITY] and Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 TEX. INT'L L.J. 45 (1999) [hereinafter *Products Liability in the United Kingdom*].

3. See, e.g., Toshimitsu Kitagawa & Luke Nottage, *Japan's First Judgment Under Its PL Law of 1994: Echoes of Donoghue v. Stevenson*, 10 AUSTRALIAN PRODUCT LIABILITY REP. 121 (2000); Luke Nottage, *Global Harmony and Disharmony in Accident Compensation: Japan's New Product*

article uses these contrasts to raise questions about some of the assumptions on which the Restatement (Third) seems to rest and to make some specific comments on the text of the Restatement (Third). To the extent that the discussion is comparative, it contrasts the 1985 European Directive on Products Liability ("Products Liability Directive") and its offspring such as Part 1 of the United Kingdom's Consumer Protection Act 1987⁵ ("CPA") and Part VA of the Australian Trade Practices Act 1974 ("Part VA") inserted in 1992.⁶

American lawyers are probably more familiar with the U.K. system but Australia provides an interesting halfway house for comparative purposes. On the one hand, the form of Australia's legal system is superficially close to that in the United States: it is also a federal legal system that is a descendant of the common law adversarial legal system of the United Kingdom and has an increasingly entrepreneurial plaintiffs' bar.⁷ On the other hand, it has strong similarities with the modern legal systems of the European Union ("EU")⁸ including both the United Kingdom and the major civil law jurisdictions in Continental Europe. These include a unified (i.e., nation-wide) private law controlled by one final court of appeal⁹ and working against a background of a highly de-

Liability Legislation Compared to the EC Directive and Part VA of the Australian Trade Practices Act, 66 HOSEI KENKYU F1 (1999) (Journal of Law and Politics, Kyushu University).

4. See Trade Practices Act 1974, pt. VA (Austl.). See generally PRODUCT LIABILITY IN THE ASIA-PACIFIC ch. 1 (Jocelyn Kellam ed., 2d ed. 1999); JOCELYN KELLAM, A PRACTICAL GUIDE TO AUSTRALIAN PRODUCT LIABILITY (1992); Ian Malkin, *Product Liability Under the Trade Practices Act and at common law*, 6 TORTS L.J. 204 (1998); Ian Malkin & E.J. Wright, *Product Liability Under the Trade Practices Act—Adequately Compensating for Personal Injury?*, 1 TORTS L.J. 63 (1993).

5. Consumer Protection Act 1987, pt. 1 (Eng.).

6. See Trade Practices Amendment Act 1992 (Austl.) (broadly adopting the rule established by the Products Liability Directive). Part VA of the Trade Practices Act 1974 ("Part VA") differs from the Products Liability Directive in five principal ways. First, Part VA is confined within the legislative powers granted to the federal legislature by the Constitution. The principal limitation is that it only imposes liability on corporations, though this has not proved significant because most business activity in Australia involving the manufacturing of products is carried on by corporations. Second, Part VA provides for compensation to be paid where loss is suffered by a person other than the person killed or injured, as a consequence of that other person's death or injury. But compensation is limited to cases where the loss does not come about because of a business relationship (and professional and employment relationships fall within the statutory definition of a "business relationship"). See Trade Practices Act 1974, § 75AE. Third, where the defective product damages other property (including real property), which is of a kind ordinarily acquired for personal, domestic, or household use, a person who suffers loss as a result has a claim for compensation under Part VA, even if he was only a *user or prospective user* of that property. Fourth, Part VA does not apply to a loss in respect of which a claim has or could be made under workers' compensation legislation. Fifth, the regulatory body overseeing the operation of the Trade Practices Act, the Australian Competition and Consumer Commission ("ACCC"), may commence a Part VA liability claim on behalf of one or more persons with their consent.

7. For a sketch of the full range of causes of action that can be deployed in relation to defective products in Australia, including ones such as negligence not limited (as is Part VA) to products liability see Jane Stapleton, *Comparing Australian Products Liability with the EU and U.S.*, INT'L BUS. LAW. (forthcoming 2000) [hereinafter *Comparing Australian Products Liability*].

8. See JO SHAW, LAW OF THE EUROPEAN UNION 4-8 (2d ed. 1996) (defining and giving the proper usage of the term "European Union").

9. The High Court of Australia.

veloped social security system, a ban on contingency fees,¹⁰ a loser-pays costs rule, and a non-elected judiciary. Like the United Kingdom and Continental Europe, and unlike the United States, in most Australian jurisdictions, juries are not available for the sort of claims arising out of defective products. The fact-finder is a judge who is required to give detailed written reasons for his or her determination of the dispute. The quantum of damages is subject to tight judicial control (even in the rare cases of jury trials). This control attains the professed goals of moderation, predictability, and consistency of treatment between like cases. Finally, though punitive damages are theoretically available for some forms of product liability in Australia, they are subject to such strict rules that they have not yet been awarded against the manufacturer of a defective product.¹¹

The most telling contrast between all these jurisdictions and the United States, lies in the rates at which the special product rules have been utilized. Even allowing for the considerably longer lifespan of the rule in section 402A of the Restatement (Second) of Torts and its analogues, it is remarkable that in contrast to the thousands of United States claims made under that rule, there have been a mere handful of cases relying on the special products liability in all these other jurisdictions combined.¹² For example, though it is unclear how many *claims* using Part VA have been received by product suppliers in Australia since it came into force, it is noteworthy that there is only one reported case where liability under Part VA has been imposed.¹³ In short, and just as with the experience with the Products Liability Directive throughout the EU, Part VA does not seem to have had any discernible impact one way or the other on: the rate of product claims, court filings or reported cases, availability of insurance, the level of research and de-

10. However, no-win, no-fee arrangements, whereby the lawyer agrees not to charge if the case is lost but charges on a fee scale in the case of a win, are becoming more common in Australia. This development, understandably, has occurred alongside the rise of aggressive and entrepreneurial legal firms specializing in consumer complaints. The shift to no-win, no-fee arrangements has been even more dramatic in the United Kingdom following major reforms to the civil legal aid regime and the civil justice system in general; the so-called "Woolf" reforms. See LORD WOOLF OF BARNES, ACCESS TO JUSTICE, FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996) (implementing, as of Apr. 26, 1999, new rules of civil procedure for courts in England and Wales).

11. *Cf.* *Midalco Party, Ltd. v. Rabenalt*, [1989] V.R. 461 (Vict. Sup. Ct.) (awarding Austl\$250,000 exemplary damages to plaintiffs for employers' liability resulting from asbestos exposure).

12. For example, in the first ten years of the operation of the Products Liability Directive (as enacted by the Consumer Protection Act 1987) in the United Kingdom there was only one reported case. See *AB v. South West Water Servs., Ltd.*, [1993] Q.B. 507 (1992) (Eng. C.A.) (liability was admitted). Additionally, there was only one unreported case. See *Relph v. Yamaha Motor Co.*, July 5 and 24, 1996 (unreported), discussed in Simon Pearl, 18 *PRODUCT LIABILITY INT'L* 121 (1996). See also *DIRECTIVE 85/374/EEC ON PRODUCTS LIABILITY: TEN YEARS AFTER* (M. Goynes ed., 1996); *Products Liability in the United Kingdom*, *supra* note 2, at 63-65.

13. See *Australian Competition & Consumer Comm'n v. Glendale Chem. Prods. Party, Ltd.*, 40 I.P.R. 619 (1998) (Austl. Fed. Ct.).

velopment, quality control, record-keeping and product recall strategies, content of advertising, or product warnings.¹⁴

II. HISTORY AND MUDDLE: EUROPEAN UNION, AUSTRALIA, AND THE UNITED STATES¹⁵

Before discussing some of the features of the Restatement (Third) that contrast with the corresponding laws in Australia and Europe, it is worth remembering how accidental it was that injuries caused by products supplied in the course of business should have been separated out for separate doctrinal treatment. Looked at afresh, there does not seem to be any particular moral, economic, or social reason why the victims of such injuries should have been accorded any more special treatment than, say the victims, of medical misadventures or environmental pollution—both areas in which plaintiffs find it difficult to establish liability under traditional causes of action.¹⁶

The historical path that led to the emergence of the special products rule in the United States was marked by the creativity of judges¹⁷ and the determined reforming zeal of a few prestigious academics.¹⁸ In Europe, it was marked by the galvanizing effect on the public mind of a single catastrophe of the early 1960's, the deformities caused by the pregnancy drug Thalidomide. In neither hemisphere, was concern raised about the fresh anomalies that would be created by separate rules for product injuries.

In the 1960's, American tort lawyers were attracted, probably flattered,¹⁹ by the idea that their field was sufficiently flexible and open to

14. See Friedrich Kretschmer, *The Impact of the Directive on European Industry*, in DIRECTIVE 85/374/EEC ON PRODUCTS LIABILITY: TEN YEARS AFTER (M. Goynes ed., 1996).

15. For further discussion see PRODUCT LIABILITY, *supra* note 2, at 66.

16. For a remarkably early, astute, and "against-the-orthodoxy" raising of this issue see William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 3 U. ILL. L. REV. 639 (1991). See also William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983). But see William C. Powers, Jr., *Distinguishing Between Products and Services in Strict Liability*, 62 N.C. L. REV. 415 (1984) (considering whether proof problems distinguish product injuries from environmental or medical injuries).

17. American judges began to recognize aclassical warranties before World War I: in *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1913), a vertical-non-privy plaintiff, the ultimate buyer of the food product, was allowed to sue the distant manufacturer under a theory of implied warranty. Later, in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), the implied warranty claim was made available to a horizontal-non-privy plaintiff, in other words, a product user who lay outside the formal contractual chain of supply entirely. Such developments, eroding the formal barriers presented by the traditional doctrine of privy, are still uncommon in the common law world outside the United States. Finally, in *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963), the terminology of warranty was abandoned in favor of tort. Again, no British or Australian judge would feel comfortable merely "recognizing" a new tort, particularly when it was, allegedly, one of strict liability.

18. See PRODUCT LIABILITY, *supra* note 2, at 23 (drawing special attention to the work of Prosser).

19. As Professor Robert Rabin has stated: these developments were regarded at the time as heralding "the conquest of tort over contract . . ." Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 U. MICH. J.L. REFORM 197, 201 (1997).

innovation that it could iron-out a tricky, albeit limited,²⁰ problem. This problem concerned how to regularize what, it was thought, had been happening widely but covertly under the guise of negligence claims: namely, the apparent imposition of strict liability on manufacturers for manufacturing errors that caused injury. Failing to see the explosive potential of design and warning claims, U.S. lawyers promoted an over-ambitious and ultimately unworkable rule that caught all product flaws not merely those due to manufacturing errors. Moreover, by attempting to legitimize the origins of the rule in warranty, they swept into the catchment of this wild, new liability rule, those who were mere suppliers in the middle of the commercial chain of supply—a class of defendants that courts had not hitherto been particularly concerned to target with strict liability even for manufacturing errors (except under the classical warranties such a defendant owed to its direct contractual partner down the chain of supply).

Europeans were equally “immature.” By the 1970’s, they were embarrassed by their failure to “do something” about their regimes of civil liability that had proved unable to provide a remedy for the Thalidomide victims.²¹ Public opinion was aroused by the scandal and remained high on a swell of consumer consciousness and investigative reporting into business malpractice. There were other dynamics operating as well. The Commission of the European Communities (“European Commission”), faced with a dip in its never-high popularity rating, began to promote the concept of a Community with a human face. Consumer protection initiatives began to be actively pursued and none more vigorously than the one specifically targeted on the Thalidomide controversy: reform of civil liability for product injuries.²² Given these relatively crude political pressures for reform, and the claim by many naïve commentators that section 402A and its variants were the product of a legal system more “mature” than those stagnating in Europe, it was no surprise that the resultant Products Liability Directive broadly followed the U.S. lead: disappointing but not surprising.

The Products Liability Directive also imposed what was claimed to be “strict” liability on commercial suppliers of defective products.²³ It also made no distinction between types of suppliers or product defects. And it also gave only the most circular of “definitions” of defective-

20. This was the perception at the time. See *PRODUCT LIABILITY*, *supra* note 2, at 23.

21. See generally *SUNDAY TIMES* (LONDON), *THE THALIDOMIDE CHILDREN AND THE LAW: A REPORT* (1973).

22. See, e.g., ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, REPORT, Cmnd. 7054 (1978) [hereinafter *ROYAL COMMISSION REPORT*]; LAW COMMISSION & SCOTTISH LAW COMMISSION, *LIABILITY FOR DEFECTIVE PRODUCTS*, Cmnd. 6831 (1977).

23. See *Products Liability Directive*, *supra* note 2, at art. 1 (“The producer shall be liable for damage caused by a defect in his product.”).

ness.²⁴ On neither side of the Atlantic was there any noticeable concern with issues about design standards that have come to plague the U.S. debate about products liability such as: whether and how to allow a claim of generic defect (i.e., that an intrinsic design feature of an entire category of product rendered it defective), and what to do about the claim that a chair was simply not strong enough.

Yet, in four significant respects, the Europeans departed from this meek acceptance of the section 402A precedent thereby displaying at least some capacity to decipher the lessons from the emerging U.S. experience. First, the dangers of indiscriminately targeting all parties down the chain of supply were well anticipated and effectively avoided by the creation of a two-tier system of liability, whereby the mere supplier could escape liability if it could identify a party higher up the chain. Second, free from any pressure to legitimize the new law within a sales warranty heritage, the Europeans were able to ignore transactional limits arising from the notion of sale and to frame their law to cover all forms of commercial supply. These included the so-called "sale-service hybrid transactions"²⁵ where the product was supplied along with a service. Third, the Thalidomide children were classic examples of bystanders injured by another's use of the defective product. The European central focus on such victims ensured that there was never any doubt that bystanders would be able to sue under the liability set out in the Products Liability Directive.

Finally, the European focus on the Thalidomide case also put center-stage the issue of who should bear the losses associated with undiscoverable product flaws.²⁶ Although fact situations able to support a claim that a product flaw was undiscoverable are relatively few, they are doctrinally critical because the way a legal rule treats them will show whether that rule is one of strict liability. For instance, if a person may be liable under the rule even though he has exercised all reasonable care, he is being subjected to a strict liability. By definition, a person cannot conduct himself unreasonably in relation to a risk that is unforeseeable. Conduct in relation to undiscoverable risks is necessarily reasonable. Therefore, if a rule renders one liable for an undiscoverable risk, it is a strict liability rule.²⁷ By the accidents of history, then, this critical issue was addressed explicitly in the Products Liability Directive—though in a surprising and arguably inelegant way.

The surprise was that, despite the public concern with Thalido-

24. See *id.* at art. 6. "Defect" is defined by stating: "A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account" *Id.*

25. Cf. RESTATEMENT (THIRD), *supra* note 1, § 20 cmt. d.

26. See PRODUCT LIABILITY, *supra* note 2, at 236.

27. See *Products Liability in the United Kingdom*, *supra* note 2, at 49.

mid-type cases, by the time it was finalized, the text of the Products Liability Directive allowed each member state²⁸ to decide whether it would include a defense, now known as the development risk defense, where the “state of scientific and technical knowledge at the time when [the defendant] put the product into circulation was not such as to enable the existence of the defect to be discovered.”²⁹ A large majority of states decided to include the defense.³⁰ The inelegance of the defense lay in splitting the concept between two provisions—one dealing with defectiveness and one dealing with defenses. Ironically, the resultant complexity of format allowed Europeans to be just as mesmerized by the language of the “strict” liability purportedly imposed on manufacturers by the Products Liability Directive as Americans were by the supposed effect of section 402A but with far less justification for confusion. It is true that the liability rule set out in the defect provision may hint at strict liability, but the Products Liability Directive then goes on explicitly to spell out the defense which shields manufacturers from strict liability (perhaps even in manufacturing error cases).³¹ In contrast, section 402A was ominously silent on the point, requiring a long and painful period of judicial analysis before the equivalent of the development risk defense was properly enunciated in U.S. law and the basis of design and warning recovery recognized as fault-based.

The Products Liability Directive was the model on which Australia based its special products law. Whereas the 1970’s had seen a period of genuinely innovative and coherent reforms in favor of Australian consumers,³² the Part VA reforms appear to have been adopted simply as an off-the-shelf solution adopted after a more radical and original approach had been successfully blocked by industry pressure. By 1992, it had begun to become clear that a products liability regime based on the Products Liability Directive, supported by a development risk defense, provided little more exposure to liability than could be generated under a demanding negligence standard. It was a “reform” Australian business could accept.

So, before we start noting the contrasting characteristics of these jurisdictions, it is important to note the larger point: in a way all these jurisdictions share an odd characteristic. Over the past 30 years, all

28. The European Union member states are as follows: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

29. Products Liability Directive, *supra* note 2, at art. 7(e).

30. See GERAINT G. HOWELLS, *COMPARATIVE PRODUCT LIABILITY* 40 (1993) (detailing the adoption of the development risk defense).

31. See Products Liability Directive, *supra* note 2, at art. 7(e).

32. See, e.g., Trade Practices Act 1974, § 52 (concerning “misleading or deceptive conduct”). See generally *PRODUCT LIABILITY*, *supra* note 2; *Comparing Australian Products Liability*, *supra* note 7.

have, for their own different reasons, adopted a strange reform in an area described not by some coherent moral, economic, or social rationale but produced by historical accidents and muddle. Indeed, there is something faintly comic in the time and energy we have had to expend in fine-tuning these pockets of rules.

Now turning to the micro debate, and asking why, in jurisdictions with such apparently similar formal structures and jurisprudential heritage (at least viewed from one perspective), do rules governing equivalent human controversies appear in such different formats and focus on such fundamentally different "classic cases." Indeed, even within the United States, there is the interesting issue of why the Restatement (Third) looks so very different from section 402A and whether this choice of format was wise.

III. CONTRASTS: SOME GENERAL COMMENTS

A. *Formal Status and Perceived Role*

There are certain differences between the Restatement (Third) and the Products Liability Directive/Part VA provisions that can be relatively easily observed and, to some extent, explained. First, look at formal status and perceived role. The formal status of a directive may well be unfamiliar or seem peculiar to U.S. eyes. It is an instruction, binding by virtue of the Treaty of Rome³³ and that treaty's domestic implementing legislation in each member state of the European Union, to each member state to pass domestic legislation enacting its provisions, typically within a tight time-frame. Thus, shortly after the Products Liability Directive was issued in 1985, the United Kingdom Parliament passed the Consumer Protection Act 1987, part 1 of which sought to parallel the provisions of the Products Liability Directive. Hence, in the United Kingdom, a consumer formally brings his or her claim under the domestic CPA, not under the Products Liability Directive. In effect, though, the Products Liability Directive via the CPA is a set of binding legal rules. Clearly, by a parallel, albeit informal, route of influence, the general outlines of the Products Liability Directive's provisions have become binding legal rules in Australia by the enactment of Part VA.

In the European, British, and Australian legal cultures, legislation is the principle vehicle by which reform of private law is achieved. The non-statutory law develops uniformly and only incrementally. These cultures contain formidable barriers to the pursuit of legal claims, discourage judicial creativity, and exercise effective control over such tendencies by a structure of hierarchical courts and, at least in the United

33. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

Kingdom and Australia, in a very tight system of precedent. The state of legal doctrine tends to be relatively easily and often re-stated by an academy, where a common and well-regarded achievement is the production of such doctrinal texts. The only practical route for dramatic legal change tends to be by binding legislative enactment. This route is facilitated, at least in Australia and the United Kingdom, by a strong party system giving any majority government the parliamentary discipline necessary to ensure passage of measures that it supports. Such legal systems often provide formal review bodies, typically described in Commonwealth countries as law reform commissions, to advise the legislature on when and how such change is appropriate. If such a body recommends an initiative and it is accepted by the government, statutes are passed and the change attains the status of binding law across the jurisdiction. The system promotes a facade of apolitical civil servants merely advising government on aspects of legal technicality. There is a tendency for any controversies associated with an area under investigation by law reform committees to be masked by these structures. Appointments to such bodies are uncontroversial; indeed, they typically go unmentioned, even in the legal media. The European Union system of law-making is more openly recognized as prone to political tradeoffs, but it is shrouded in a great deal more secrecy.

This all stands in considerable contrast to the U.S. legal system, which is characterized by judicial creativity, a looser regime of precedent, fifty-one final courts of appeal in matters including product claims, and a more volatile role for legislation. Naturally, there are also relatively few academic attempts to produce national doctrinal texts. Within such a legal regime, a restatement movement is an understandable project, though no less impressive for that reason. There is no doubt that the formal status of a restatement is merely advisory³⁴ but the process by which they are made and the ambiguity of their mission provide striking contrasts with the processes by which law develops in Australia and the United Kingdom. In addition, the United States has a highly litigious and entrepreneurial legal system. In contrast to the gentlemanly facade of the law commission vehicle, it is widely appreciated that stakeholders on both sides of a debate in the United States will seek to influence processes such as the formulation of restatements. Crudely, one might say, that the Restatement (Second) reflected the triumph of expansionist interests while the Restatement (Third) reflects interests concerned to retrench or restrain the application of liability to commercial suppliers of products.

34. Even though the terminology of "the black-letter sections" might, at first, suggest to the inexperienced non-U.S. lawyer that the text has binding force.

How a *restatement* can produce a law *reform* dynamic at all and how it has the potential to encourage either of an expansionist reform or a retrenching reform stems from the ambiguity of its perceived mission. It is not self-evident what approach to codification a restatement should take: even within a goal of summarizing “what the law is,”³⁵ there are choices in approach that must be made. Section 402A reflected the “outer rim” approach to restatement formation,³⁶ stating the most expansive reach to which any court had taken liability in the area, regardless of the fact that very few courts had, at the time of formation, chosen to adopt that outer rim position. The Restatement (Third), in contrast, seeks to record what the Reporters describe as the “consensus” position.³⁷ Neither approach is obviously illegitimate, for both could be encompassed by a coherent vision of what a restatement should seek to do. The outer rim approach reflects a mission to provide courts with the full palate of approaches already adopted somewhere in the United States. On the other hand, the consensus approach seeks to give a different form of guidance, namely to give an indication of where the *weight* of authority in an area lies. Of course, both approaches can mislead, and this is why they have the potential to effect legal change—law *reform*. The outer rim restatement might be misread to be a statement of where the consensus line, the weight of authority, lies. The consensus restatement might be misread as a statement of the outer limit of liability that had yet to be imposed anywhere in the United States. Section 402A, perhaps misunderstood by courts as a consensus restatement,³⁸ produced an expansionist dynamic of legal change. The Restatement (Third) has been attacked for encouraging courts to be misled in the second way by misreading its “black-letter rules” as the outer limit of liability legitimized by any precedent—thereby producing a retrenching dynamic of legal change.

The law reformist potential of a restatement was either not widely appreciated or at least did not create much appreciable concern at the time of the drafting of section 402A. For example, there seems to have been little, if any, industry lobbying. Subsequently, courts generally did

35. See James A. Henderson, Jr. & Aaron D. Twerski, *What Europe, Japan, and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INT'L L.J. 1, 5 (1999) [hereinafter *What Europe, Japan, and Other Countries Can Learn*].

36. See PRODUCT LIABILITY, *supra* note 2, at 75. See generally Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663 (1995) (reviewing JANE STAPLETON, PRODUCT LIABILITY (1994)).

37. See James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867 (1998) [hereinafter *Achieving Consensus*]. A striking departure from the consensus approach was the inclusion of categorical defect design in the Restatement (Third). See RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. e. For further discussion see *infra* Part VI.B.

38. Of course, the other rationale of the expansionist effect of the Restatement (Second) was that, although courts understood that it was not where the weight of authority lay, it gave them the confidence to expand the law.

not believe that their adoption of section 402A was controversial. This lack of controversy assisted in the success of section 402A. In contrast, the (expansionist) critics of the Restatement (Third) have been extremely vocal in emphasizing its reformist potential to retrench liability. The controversy they have successfully managed to generate may itself, alone, inhibit courts from being influenced by the document.

The heat surrounding the academic debates about the Restatement (Third) has little parallel in the United Kingdom, the rest of Europe, or Australia. Persisting barriers to justice mean that tort law is still not big business in these jurisdictions. Therefore, stakeholders are less agitated by legal change or the threat of legal change. For example, in response to public outrage over the mad cow disaster, the special protection that had been given to agri-business in the original Products Liability Directive was eventually removed in 1999.³⁹ This legal change, however, created little comment in the legal media. Given the paucity of any reported cases across the EU, this apathy is understandable: the move was in effect a symbolic gesture and little more. Similarly, the entire Products Liability Directive is now being reviewed⁴⁰ by the European Commission, yet little interest has been generated outside highly specialized journals. However, behind-the-scenes industry lobbying seems to be fairly intense. Few mainstream European or Australian academic lawyers specialize in products liability research, which is regarded as a mere subtopic of consumer protection law: itself an unfashionable subject.

B. Respect for Domestic Regimes

As we have seen, whereas a restatement is merely advisory, a directive has mandatory legal force, requiring a member state to enact equivalent domestic legislation. The power of this tool to interfere with the settled, and perhaps finely-balanced, internal regime of a member state is well-understood. A politically charged concern not to overuse this power, prompted the adoption of the Products Liability Directive as an *additional* avenue for consumer redress. Moreover, the Products Liability Directive included three optional provisions, which a state could choose to include or not. Ironically, these features of the Products Liability Directive raised issues concerning its own legitimacy. At the

39. See Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1999 O.J. (L 141) (giving member states until Dec. 4, 2000 to remove the exclusion of primary agricultural produce and game from their regimes).

40. See Liability for Defective Products: Green Paper from the Commission, COM(99)396 final. For an earlier review see First Commission Report of 13 December 1995 on the Application of the Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, COM(95)617.

time of its formation, the Products Liability Directive was claimed to derive its legitimacy from the power given to the EC by the Treaty of Rome to “harmonize” the laws of the member states to facilitate trade. It is hard to see how the *addition* of a new liability, which by no means embraced all the coverage of existing causes of action, can promote harmonization in the sense claimed.⁴¹ In Australia, the explanation of why Part VA is merely additive to the rights of consumers lies in the limited legislative powers of the federal government.

In contrast, the Reporters of the Restatement (Third) had no similar constraints. In a bold move, they have sought, at the level of something they called “functional requisites,”⁴² to amalgamate causes of action, which rely on identical facts. Whether this will succeed in producing a general simplification of products litigation is a matter of some controversy. The problem here lies not so much with the amalgamation of claims that might have previously been argued both under section 402A and negligence, for the duplicative nature of many of such claims is fairly well agreed. The difficulty lies in knowing where warranty claims fit in and whether the full extent of existing warranty entitlements is reflected in the Restatement (Third). It seems warranty must be accommodated under section 3.⁴³ Yet, section 3 would only seem to cover claims that relied on circumstantial evidence and not all warranty claims are like this. Moreover, there is a major ambiguity concerning whether section 3 accommodates claims in relation to product flaws that might have been unforeseeable design flaws—a class of case that classical warranty clearly covers.⁴⁴

C. Trade Barriers: Rules for Importers

A remarkable feature of the Products Liability Directive is that the primary focus of liability is not merely channeled to manufacturers but also to importers into the EU.⁴⁵ Although the publicly espoused rationale for this feature tended to be the facilitation of the consumer’s claim, there are grounds to suspect a wider motive. Had the given rationale

41. See PRODUCT LIABILITY, *supra* note 2, at 53.

42. See RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. n; *Achieving Consensus*, *supra* note 37, at 918 (“So long as the functional requisites of section 2 are satisfied, plaintiffs may couch their design claims in negligence, implied warranty, or strict liability in tort.”).

43. See RESTATEMENT (THIRD), *supra* note 1, § 3.

44. See *infra* Parts VI.A, VII. See also *infra* note 57. To the extent that the Restatement (Third) fails to accommodate the existing range of warranty entitlements (a range recognized by the common law and by the Uniform Commercial Code), its assertion of preemption of such causes of action dramatically lacks legitimacy. In the products field, it is well-established that plaintiffs should not be forced to abandon one cause of action in favor of another, especially one that is less favorable to the plaintiff. See, e.g., *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995).

45. See Products Liability Directive, *supra* note 2, at art. 3(2). See also Consumer Protection Act 1987, §§ 2(2)(c), 2(b) (discussing “own branders” and stating that this type of defendant falls within the definition of “producer” in article 3(1) of the Products Liability Directive).

been central, would it not have been better pursued by also channeling liability to the importer into the relevant consumer's member state? A Scot in Glasgow will find it considerably harder to identify the Greek who imported his defective lawn mower into the EU than he will find identifying the U.K. importer that thereafter imported it from Greece. By limiting the importers' rule in this way, the Products Liability Directive raises the suspicion that the indirect tariff barrier for non-EU suppliers created by this liability rule may have been intentional.

Part VA also channels liability to importers with the same potential impact on overseas traders. In Australia, however, the consumer rationale is more compelling: Perth is a long way from Sydney but the nature of the national market and our common language mean that it is no great disadvantage to the Perth consumer that liability is only channeled to the, perhaps Sydney-based, importer into Australia and not channeled to the party who imported the product from Sydney to Perth.

One of the few advantages of the U.S. "blunderbuss" approach⁴⁶ of targeting all suppliers in the chain of supply is that consumers typically have no difficulty identifying a party subject to the liability rule. There is, therefore, no call for singling out the importer class.

D. The Experience and Intellectual Caliber of the Audience

To a non-American, one of the most striking features of the Restatement (Third) when compared to the Products Liability Directive and its offspring is its great length. The identity and intellectual caliber of the target audience dictates what will be the most effective format for the statement of legal rules or other principles. In the jurisdictions of Europe and Australia civil juries are rare. In the overwhelming majority of situations, products liability claims will be determined by judges. Moreover, these judges are not elected and will have been either appointed from the upper echelons of the Bar, as in Australia and the United Kingdom, or be career civil servants, as in France. The number of trial judges needed to deal with product claims will be relatively small given the very substantial barriers that bar access to justice for many consumers in these countries. The combined result of all these features is that the intellectual quality of the judiciary in Australia and Europe is maintained at a level that is widely agreed to be both uniform and very high. Therefore, when claims *do* reach court, the parties receive, intellectually, a "Rolls-Royce" service.

The perception of one's target audience also has implications for how legal principles are most effectively formatted. In legal systems

46. See ROYAL COMMISSION REPORT, *supra* note 22, ¶ 1242 (describing the U.S. approach to products liability).

with a tight system of precedent and an academy that responds by producing detailed treatises on those precedents, the statements of binding law by the legislature can afford to be succinct. Elaboration, the equivalent of the comments and reporters' notes of a restatement, can confidently be left to these other vehicles.

A cynic might surmise that just as one of the "dirty little secrets" of the EU and Australian legal systems is how very few citizens in practice get access to this very fine service, there is a corresponding embarrassment in the U.S. system where access to justice is valued highly and results in a much higher rate of claims reaching the courts. This is that the quality of the legal services these claims receive is much more variable. This deviation is not just a reflection of the American jury system. Of course, civil juries can be volatile, in both pro-plaintiff and pro-defendant ways. They may well also be intellectually unsophisticated. And it is certainly clear that a concern to filter out radical claims before they are passed to the jury was a guiding ambition of the Reporters of the Restatement (Third). I suspect, however, there is also a firm, if typically unspoken, view in the United States that the intellectual strength of trial judges varies considerably. Given this, plus the absence of a tight system of precedent and the associated lack of authoritative doctrinal texts, it is understandable that the Restatement (Third) tries to leave little to chance and runs, with its comments and reporters' notes, over 400 pages. None of the Products Liability Directive, CPA, or Part VA covers more than eight pages. Whether the provision of this level of detail in the Restatement (Third) might backfire and hinder its success is a matter this article will address later.

IV. A FALSE CONTRAST: CONSUMER EXPECTATIONS

Two aspects regarding the Restatement (Third)'s treatment of "defect" have attracted special controversy. The first is the rejection of consumer expectations as a controlling device in evaluating defectiveness.⁴⁷ If the term "consumer expectations" is used in the descriptive sense of what people in general expect of a product, then this rejection would seem to be both sensible and even-handed. Actual expectations would be a strange legal standard to adopt. People routinely miscalculate risks: in some contexts people have an irrational expectation that nothing will or can go wrong. In other contexts, the high level of risk-taking pursued by a party may lead others to have exceptionally low expectations of safety in relation to that conduct. There is no reason why irrational optimism should be allowed to ratchet up legal entitlement in the way a consumer's expectation, as a controlling test, would allow, nor

47. See RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. g.

is there any reason why unscrupulous risk-takers should be allowed to set their own standards of conduct in a similar fashion. A legal norm cannot coherently or fairly be based on such a volatile standard.

What legal standards do is to tell us what we are *entitled* to expect. In this sense, the key provisions in the Directive and Part VA are circular:⁴⁸ “A product is defective when it does not provide the safety which a person is entitled to expect . . .”⁴⁹ “For the purposes of this Part, goods have a defect if their safety is not such as persons generally are entitled to expect.”⁵⁰

Some commentators have seized on the word “expect” and erroneously asserted that these provisions adopt the consumer expectations test for defect. Clearly, that conclusion does not necessarily follow from the text because it ignores the weight to be put on the word “entitled.” Because this error is both widespread and dangerous, it is worth emphasizing some of the reasons why it is highly unlikely that European and Australian courts will interpret these provisions as mandating the consumer expectations test. Of course, the principal reason is that they are very likely to grasp the incoherence, instability, and unfairness of a consumer expectations test. Australian and British courts, having greater access to the U.S. experience and debates through our common language, will undoubtedly perceive the relevant pitfalls of that test and adopt an explicitly normative standard based on the sort of broad variety of risk-utility factors that underlie, flesh out, and give content to the reasonableness standard.⁵¹ Of course, and the Reporters make this clear, broad community standards, or “expectations,” may well form *part* of that approach.

48. The circularity of a “definition” is not fatal to the coherence and workability of a legal rule: after all, in the United Kingdom and other common law countries, Lord Atkin is famous for defining, in *Donoghue v. Stevenson*, [1932] App. Cas. 562 (1932) (appeal taken from Scot.), the class of those in the tort of negligence whom we ought reasonably to have in contemplation as those we ought reasonably to have in contemplation! Yet, the tort of negligence has flourished and few blame Atkin’s circular dictum as the source of its instability. In fact, courts have found there can be no general test of duty of care short of one so highly abstract as to be useless, and have sensibly turned to the task of fleshing out and evaluating which of the myriad of legal concerns the facts trigger on a case by case basis. The same is true of the reasonableness “test” for breach of duty of care. The law no more provides one objective standard of liability for that determination than the Products Liability Directive and Part VA provide for the “test” of defect, yet courts have managed to administer the breach requirement of the tort of negligence without general mishap by identifying a range of factors that may on the facts be legally relevant (i.e., relevant issues of concern to the law such as risk, autonomy, economic efficiency, etc.). See Jane Stapleton, *Duty of Care Factors: A Selection from the Judicial Menus*, in *THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMING* 59 (Peter Cane & Jane Stapleton eds., 1998).

49. Products Liability Directive, *supra* note 2, at art. 6(1).

50. Trade Practices Act 1974, § 75AC.

51. See Lord Griffiths et al., *Developments in English Product Liability Law: A Comparison With the American System*, 62 TUL. L. REV. 353, 382 (1988) (suggesting that while English judges may not overtly adopt the cost/benefit approach to the notion of “defect” in the Products Liability Directive, “they would as an educated response to the facts of a particular case undertake a balancing exercise of an analogous kind”).

A second reason why Australian and European judges are likely to reject consumer expectations as a controlling test of defect is its impenetrability. Unlike juries, trial judges in the United Kingdom and Australia are required to give detailed written reasons for their determinations. In a sense, the consumer expectations test simply gives the fact-finder its head. To the extent that it asserts a false legitimacy from apparently objective phenomena, it is empirically unverifiable. As a normative concept, it is impenetrable to analysis: one may simply assert that in one's opinion the design did not meet consumer expectations. It nakedly invites the fact-finder to use his or her gut instincts to determine the dispute. This may appear to be a workable, albeit unattractive, test whereby the fact-finder is the "black-box" of a jury that is not called upon to say much more than who won. But the test's integrity and, hence, its workability, will be immediately suspect in systems where the fact-finder is required to give empirical and/or analytical justifications for its determination. Australian and European judges will be acutely aware of what is expected of them.

Yet, another reason why the consumer expectations test would be unattractive to Australian and European courts is that it tends to mask the hindsight/foresight issue on which the handling of an undiscoverable product flaw would turn. As explained earlier, the Thalidomide tragedy focused European and Australian attention on such cases and led to the most controversial provision in their product laws, the inclusion of the development risk defense. The critical issue in such cases is not what level of safety we expect, for we do not expect pregnancy drugs to deform our babies. The critical issue is *when* should we look at the product: the time it was supplied or at the time of trial when we know its ghastly effects. A standard that calls on an evaluation of various incommensurable factors of risk and utility better exposes this choice because it is more obvious that a threshold question will be *when* do we evaluate the costs of this product. This critical hindsight/foresight distinction is the one on which the development risk defense, half of the liability rule in the Products Liability Directive and Part VA, clearly rests and which gives it its force.

Although these factors point to the preferability of a risk-utility approach to the notion of defect, there is a danger that the force of the "incoherence" criticism, which was leveled at the consumer expectations test, may over-shadow an important and insoluble dilemma with allegations of defective design. At the end of the day, in the application of many a legal standard, reasonable minds can differ, and the difference cannot be coherently analyzed. Where the fact-finders are juries, this problem is well masked in the individual cases beneath the jury verdicts. The problem can re-emerge when incongruous jury verdicts

appear between cases raising the equivalent issues of fact. In jury-free jurisdictions, the judge may be able to rely on the system of precedent to bathe his or her determination with a sanctity that, thereafter, bars contrary findings by lower tribunals. In either scenario, however, the reality is that at its heart most determinations of defective design are only completed by a final step that has the same characteristic of impenetrability as the consumer expectations test. Specifically, the risk/utility test for design defect incorporates at its core a subjective judgment: it simply provides an elaborately structured path in getting there.

This can be illustrated by the simplest of examples. Say a person weighing 300 pounds sits on a dining room chair that is unable to support that weight. The chair collapses and the person is injured. Do these facts establish that the chair was defectively designed? Let us ignore for the moment the detailed provisions of the Restatement (Third) and simply compare a fact-finder using the consumer expectations test with a fact-finder using a reasonableness standard fleshed out by considerations of the risks and utility of the product. The problem this case illustrates is that in some product cases the issue is simply how much strength and safety is enough? In such cases, the issue of whether the plaintiff can show evidence of a reasonable alternative design is a red herring. In these types of cases, it is *of course* possible to make the chair stronger—it will simply cost more.⁵² The relevant question is where to draw the line. The consumer expectations test delivers the fact-finder immediately to this final impenetrable subjective step in the determination. The risk-utility test may force the fact-finder nominally to address and balance certain “objective” factors. For example, it may need to balance the utility of strong chairs, the importance of the availability of cheap chairs for the poor, and the existence of an alternative design (the marginally stronger, marginally more expensive version of the chair), which is itself a reasonable design. In the end, however, this test delivers the fact-finder to an identical question: how strong does a dining room chair need to be?

V. SEPARATION OF DEFECT TYPES: RETAINING BUT CONFINING MANUFACTURERS’ STRICT LIABILITY

The products liability provisions of Part VA and the Products Liability Directive do not distinguish defect types, nor did section 402A. But a major strategy of the Restatement (Third) is to separate out, in

52. See PRODUCT LIABILITY, *supra* note 2, at 259. For a provocative exposition of the point in the context of the Ford Pinto case see PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 42 (1988). Compare David G. Owen, *Toward a Proper Test for Design Defectiveness: “Micro-Balancing” Costs and Benefits*, 75 TEX. L. REV. 1661, 1677-79 (1997).

section 2, three types of defect: manufacturing, design, and warning defects.⁵³ The important aim of this organization is better to define and confine the situations in which the defendant-manufacturer's proof of reasonable care is no defense: namely, in manufacturing error cases. There are a number of difficulties with this approach:⁵⁴ including the concern that this approach is built both on a dubious reading of history and on an attitude about what might legitimately outweigh norms of fairness, which can be regarded as strange and inconsistent.⁵⁵

Before any of these separate product laws had developed, classical warranty had imposed formal strict liability on manufacturers for manufacturing errors in all three jurisdictions. Thus, for example, in cases such as *Frost v. Aylesbury Dairies*⁵⁶ the British courts allowed plaintiff-buyers to succeed in contractual warranty against the party that sold milk to them even though the relevant manufacturing error was undiscoverable (i.e., the seller had exercised all reasonable care in relation to that risk). Warranty was explicitly and universally recognized as imposing strict liability, so long as the defect rendered the good unmerchantable for one or more of its ordinary intended uses. Warranty claims, in relation to a product design, were feasible but did not present the difficulties that emerged later in design claims brought under a theory of negligence. This was because, in warranty, the product had to have failed in one of its intended uses. This meant that although the warranty liability for design cases was strict, it was sharply ring-fenced by this requirement. Moreover, in practice, most manufacturers would have tested their product design to ensure that it at least performed its intended function safely, so this standard tended only to be breached in the rare case where the design flaw was not easily discoverable by such testing. Given the fence provided by the "failure in intended use" requirement, there was no need or rationale for warranty to distinguish manufacturing from design cases. Additionally, there was no need to require proof, in a design case, that the manufacturer could have adopted an alternative design—the failure of the product to do what it was commercially supplied to do was enough to limit sharply the number of successful warranty claims in relation to design. The same logic can be seen in section 3 of the Restatement (Third), which, as we will

53. See RESTATEMENT (THIRD), *supra* note 1, § 2(a), (b), (c).

54. For example, many doubt whether there is a coherent line to be drawn between manufacturing and design cases. The higher the rate of manufacturing errors, the more plausible it is to describe the production line as defectively designed. Who decides the characterization of the defect and how?

55. This latter point touches on a larger argument I make elsewhere: that the incoherence of the "rationales" historically offered to support separate rules of products liability allow and invite these normative shifts, producing a system that is both internally inconsistent and unstable. See generally PRODUCT LIABILITY, *supra* note 2.

56. *Frost v. Aylesbury Dairy Co.*, [1905] 1 K.B. 608 (1905) (Eng. C.A.).

see, is enclosed by a similar fence and similarly does not (need to) distinguish types of defect nor require proof of an alternative design.⁵⁷

The anomaly that eventually led courts, commentators, and the Reporters of the Restatement (Third) to distinguish manufacturing errors from other types of defect began in the tort of negligence, when some courts seemed to ratchet up the standard of care in manufacturing error claims against manufacturers. The standard was raised to the extent that such defendants found it virtually impossible to escape liability. If the error in the product occurred during its manufacturing, then the court would hold that the quality control measures were negligent either in design or operation by the work force for whom the manufacturer was vicariously liable. The requirement of fault was never explicitly abandoned, but in the cases that came before the courts, the combination of a super-high standard of care, vicarious liability, and the operation of *res ipsa loquitur* effectively trumped any defense argument based on absence of fault.⁵⁸ In time, this phenomenon gave rise to the widespread, but misguided conclusion, that the law was in effect covert strict liability for manufacturing errors as a class, despite being disguised within the tort of negligence with its formal requirement of fault. This well-known impression overlooks the real historical accident on which it relies. Had courts, in a negligence claim, been confronted squarely with the facts of an *indisputably undiscoverable* manufacturing error⁵⁹ there is little doubt that courts, at least in Britain and Australia, would not have allowed their earlier decisions in manufacturing error cases to be construed in this “covert strict liability” manner. Instead, it is far more likely that doctrinal rigor and conservatism would have led to a decision that the defendant escaped liability for the undiscoverable manufacturing error.⁶⁰ This result would have appeared inescapable to such courts given the patently obvious fact that the plaintiff could not show fault in relation to an undiscoverable risk.

57. Though the problem here is that, without adequate rationale, the entitlement under section 3 is not limited to those who have paid for the entitled result secured by the strict liability. See RESTATEMENT (THIRD), *supra* note 1, § 3. See also *supra* note 44; *infra* notes 88, 135, 136 and accompanying text.

58. For an example of this forensic dynamic see *Hill v. James Crowe (Cases), Ltd.*, [1978] 1 All E.R. 812 (Q.B. 1977) (Eng.). See the facts in *Donoghue v. Stevenson*, [1932] App. Cas. 562 (1932) (appeal taken from Scot.). See also Christopher Newdick, *The Future of Negligence in Product Liability*, 103 LAW Q. REV. 288, 290-92 (1987).

59. See, e.g., *Frost v. Aylesbury Dairy Co.*, [1905] 1 K.B. 608 (1905) (Eng. C.A.) (undiscoverable infection in milk); *Ryan v. Great Lakes Council*, [1999] F.C.A. 177 (Mar. 5, 1999) (Austl. Fed. Ct.) (undiscoverable taint in oysters).

60. The point being made here relates to escaping liability for carelessness involving quality control in a manufacturing error case. It may, however, still be possible to prove a different type of carelessness such as careless failure to warn consumers (that pollution was unavoidable and undetectable—the form of negligence claim that succeeded in *Ryan*) or carelessness in relation to ignoring obvious pollution of the oyster beds that would have alerted the reasonable grower (and, therefore, should have alerted the defendant) to the possibility of the oysters becoming tainted. See *infra* notes 68-73 and accompanying text.

But such cases do not seem to have been presented to our courts, so the over-inclusive conclusion of “covert strict liability for manufacturing errors” was able to grip the minds of lawyers on both sides of the Atlantic and Pacific. It was a major motivation for the creation of section 402A, the espoused strategy of which was to regularize what seemed to be inappropriate masking of a pocket of strict liability. In a sense, the embrace of this over-inclusive conclusion from the case law was more understandable in the context of the United States than its embrace in the United Kingdom and Australia. The United States did not share in the Thalidomide disaster. Therefore, U.S. minds have never been as focused on the “undiscoverable defect” argument, the choices concerning what to do about it, or its role as a litmus-test for strict liability. Indeed, it seems the Restatement (Third) may not even recognize the concept of an “undiscoverable design defect.”⁶¹

There is also a self-fulfilling aspect to this story. The apparently universal consensus that courts were imposing covert strict liability for all manufacturing errors bolstered the view that in such cases the production line norm gave an appropriate and exhaustive standard. It is easy to become mesmerized by the neatness and administrative cheapness of this solution, and it is just as easy to become deaf to the fairness claims of defendants sued for a manufacturing error that they could not have discovered. It would be understandable if there were post-section 402A cases where U.S. courts were indeed persuaded, outside classical warranty, to hold manufacturers strictly liable for undiscoverable manufacturing errors. We need to be clear, however, about the deep normative anomaly this produces. According to the Reporters of the Restatement (Third), the consensus view in U.S. courts is that it would be unfair to hold manufacturers liable for design flaws they could not discover *because* they could not discover them. Yet this justice norm is jettisoned in manufacturing errors cases. Of the arguments given in support of this distinction in liability, the only one that specifically relates to manufacturing errors is the argument regarding the availability and administrative cheapness of relying on the production line norm. Is it not odd that a fundamental fairness norm can be jettisoned selectively and merely in favor of the cheapness of the production line norm?

Did the Products Liability Directive and Part VA avoid these normative anomalies? The architects of both had as a central and explicit goal that of restraining liability for design and warning flaws. They pursued this goal by introducing the so-called “development risk” defense, which, in effect, reduces the liability of product manufacturers to some-

61. See RESTATEMENT (THIRD), *supra* note 1, § 2(b) (implying that, at least under section 2(b), a product with an undiscoverable design flaw cannot be defective). See also *infra* notes 64, 90.

thing no broader than negligence liability.⁶² (In contrast, the liability of mere product suppliers emerges as a form of strict, albeit vicarious, liability.⁶³) On its face, however, the development risk defense applies to all claims not merely those in relation to design and warnings: the literal readings of the statutory provisions would appear to allow the manufacturer of a product with a manufacturing error to escape liability where the state of scientific or technical knowledge at the time when it was supplied was not such as to enable that defect to be discovered.⁶⁴ Yet, this would seem odd to many in Europe and Australia because it would mean that the Products Liability Directive and Part VA set a fault-based liability for manufacturing errors that was narrower than the “covert strict liability for manufacturing errors” that these people assumed operated in the tort of negligence. Their minds had also been gripped by the same over-inclusive conclusion that had gripped minds in the United States. In other words, to such observers, this literal reading of Part VA or the Products Liability Directive would allow the manufacturer to escape liability in circumstances where even the general law of obligations no longer gave protection. If the tort of negligence imposed strict liability for undiscoverable manufacturing errors, why would a statute allegedly designed to *improve* consumer protection be less protective in such circumstances?

This was the perspective that led to an extraordinary move by the German Federal Supreme Court in a 1995 exploding bottle case: the Court merely asserted that the development risk defense in the Products Liability Directive does not apply to manufacturing errors.⁶⁵ The striking aspect of this decision was that European Union courts are obliged, when facing an ambiguity in Community law, to refer the matter to the European Court of Justice (“ECJ”) to determine the correct statutory interpretation.⁶⁶ Once the German Federal Supreme Court was faced with the non-literal argument that the silence in the Products Liability Directive should be interpreted in a way that rendered the defense available only to certain defendants, the issue should have been

62. The standard may, in certain ways, be even narrower than a standard of negligence. See *Products Liability in the United Kingdom*, *supra* note 2, at 62-63.

63. See *PRODUCT LIABILITY*, *supra* note 2, at 242-44.

64. Note that in the Products Liability Directive a product flaw may qualify as a defect under the defectiveness provision but not attract liability because it was undiscoverable under the development risk defense. See *Products Liability Directive*, *supra* note 2, at art. 7(e). In contrast, under section 2(b) of the Restatement (Third), the undiscoverability of a design flaw prevents the product from qualifying as defective. See *RESTATEMENT (THIRD)*, *supra* note 1, § 2(b); *infra* note 90.

65. See BGHZ 129, 353, *discussed in* Christopher Hodges, *The Case of the Exploding Bottle of Water*, 18 *PRODUCT LIABILITY INT'L* 73 (1996) (discussing the German Federal Supreme Court's decision).

66. On the procedure by which national courts request the European Court of Justice to give a ruling on the interpretation of EU law see JOSEPHINE STEINER & LORNA WOODS, *TEXTBOOK ON EC LAW* (6th ed. 1998).

referred to the ECJ.⁶⁷

But not all are persuaded by this German line of reasoning. In an important Australian case, *Ryan v. Great Lakes Council*,⁶⁸ the facts presented the court squarely with the issue of what to do about an undiscoverable manufacturing error. Oysters had been supplied with an undiscoverable infection, which injured hundreds of consumers. In *Ryan*, the victims formed a federal class action and pleaded in many causes of action. They succeeded in their claim of negligence⁶⁹ but failed in their claim based on Part VA.⁷⁰ The Part VA claim failed because the Australian Federal Court saw no reason to depart from the literal interpretation of the Act, so allowing the development risk defense to operate in favor of the defendants. Specifically, the court held that the statute:

obviously intends the defence be unavailable if the goods were supplied notwithstanding the possibility of discovery of the defect. Conversely, the defence is available if the defect was not capable of discovery before supply. In the present case, discovery and supply were mutually exclusive; the only test that would reveal the defect would destroy the goods. Accordingly, it seems to me the defence applies and the s75AD claim fails.⁷¹

We might speculate that it was the sensitivity in Australia to Thalidomide and the fairness issues surrounding undiscoverable defects *in general* that led the Federal Court to adopt its approach. That approach does not distinguish between the unfairness in holding manufacturers liable for *design flaws* they could not discover and the unfairness in holding them liable for *manufacturing errors* they could not discover. It is worth emphasizing that it was the fact that the Products Liability Directive and Part VA do not distinguish between types of defect, while, at the same time, they set out a clear attitude to undiscoverable defects, that allowed this normative consistency to be available. Under the Restatement (Third) such an approach is not possible.

Ryan illustrates another message, albeit a somewhat strangled message, contained within the Restatement (Third): that negligence retains its vitality as an independent theory of recovery.⁷² This independent theory provides a way to circumvent the requirements that confine the

67. A preliminary reference may be refused by a trial judge on the basis that its timing is premature. See, e.g., *A & Others v. National Blood Auth.*, [Q.B Oct. 28, 1999] (unreported judgment of Mr. Justice Burton). This was a case concerning hepatitis C in blood transfusions. Mr. Justice Burton rejected the application of a group of U.K. patients suing Health Authorities for such a 'preliminary reference' to the ECJ for clarification of the meaning of certain key provisions of the Consumer Protection Act 1987 including the development risk defense in Article 7(e).

68. [1999] F.C.A. 177 (Mar. 5, 1999) (Austl. Fed. Ct.).

69. See *id.* The plaintiffs also succeeded on other forms of liability under the Trade Practices Act 1974, pt. V, division 2A (a classical warranty). See *id.*

70. See *id.* The plaintiffs also failed in their claims under the Trade Practices Act 1974, § 52 (misleading/deceptive conduct) and the Trade Practices Act 1974, part V, division 2 (classical warranty). See *id.*

71. *Id.*

72. See RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. n. See also *supra* note 60.

reach of the special product rules. For example, certain limitations in the Products Liability Directive and Part VA may be circumvented by framing a claim in the tort of negligence because it allows post-supply obligations to be imposed in contexts where these special product rules would not operate.⁷³ Similarly, the tort of negligence may allow allegations to be made about conduct that completely preceded the manufacturing process such as, in a case like *Ryan*, the surveillance on the quality of a water supply. This allows the development risk defense to be outflanked because although it may be true that the taint in the oysters was undiscoverable (so a Part VA claim would fail), it might be arguable that had the defendants carefully ensured a clean water supply, the oysters would *probably* not have been damaged (so a negligence claim would succeed). Similarly, a negligent failure to warn claim might succeed, as it did in *Ryan*. Such reformulation of a products liability claim into one couched in negligence, shifts the focus from the product condition to the conduct of the defendant and thereby also outflanks the reasonable alternative design (“RAD”) requirement imposed by the Restatement (Third). This might help plaintiffs suing in relation to socially useful, but dangerous, products such as asbestos. Overall, a cynic might suggest a Machiavellian motivation behind the restrictions on product-focused claims enunciated in the Restatement (Third), namely to encourage a flight back to conduct-focused negligence claims so that the field described by the Restatement would in time “wither away” through lack of use.

VI. FORMAT: SOME GENERAL COMMENTS

A. Choice of “Promotional Sequence” Sacrifices Clarity

The point has already been made that the Restatement (Third) is an exceptionally elaborate affair. It not only differentiates in places between defect types, but in topic 2 it gives special treatment to certain classes of products or product markets: component products,⁷⁴ prescription drugs and medical devices,⁷⁵ food products,⁷⁶ and used products.⁷⁷ There is, however, an even more dramatic characteristic of the Restatement (Third) that may well undermine its goals.

A central goal of the Reporters was to make clear what was the consensus of the case law concerning the numerically dominant, but troubling, type of product case they call “classic design” cases. To the

73. See *Products Liability in the United Kingdom*, *supra* note 2, at 62.

74. See RESTATEMENT (THIRD), *supra* note 1, § 5.

75. See *id.* § 6.

76. See *id.* § 7.

77. See *id.* § 8.

Reporters, classic design cases “do not involve product malfunctions, violations of safety regulations, or egregiously dangerous products.”⁷⁸ Stated differently, classic design cases are those in which “no specific safety standards apply or the designs comply with applicable standards, but the plaintiffs nevertheless plausibly claim that the designs are unacceptably dangerous, and therefore, legally defective.”⁷⁹ Analytically, however, this class is a residuary one. Only after it has been established that the case does not fall into one of a number of other classes, ones where a clear standard has been breached such as failure to perform a manifestly intended use or non-compliance with an external public standard, will the case fall into the residuary category of a classic design case.

Unfortunately, the Reporters attempted to emphasize this classic design class of cases and promote their clear advice to courts on how they should be handled, by giving it priority in the sequence of the text. Confronted with this “promotional sequence,” the reader encounters the treatment of the residuary class, in section 2, before he or she comes across the approach applicable in the other classes of cases. It comes as a considerable surprise that the format for the critical sections of the Restatement (Third) runs counter to an analytical sequence that a judge will need to follow: for a plaintiff might seek to get his or her case into each of the other classes of cases in turn, before being relegated to the classic design cases dealt with in section 2. One must wonder whether this was a dangerous format for the Reporters to have adopted—sacrificing the clarity that would have come with a text that clearly presented a court with an appropriate analytical sequence. The priority given to the residuary class is not the only example of the Reporters sacrificing analytical clarity in favor of attempting to “send messages” through the choice of format for the Restatement. The analytical possibility of judicial recognition of categorical defects, a recognition to which the Reporters are personally very hostile, is relegated to a mere comment to section 2. This formatting further complicates a judge’s task of deciphering the most efficient analytical sequence.

A restatement that sought to deal in detail with the issues arising in products claims would necessarily be a complex document. To influence courts, it needed to be as user-friendly as possible. The configuration of the Restatement (Third) is not as user-friendly as it could have been, and this flaw is likely to inhibit it having influence with U.S. courts.

78. *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 17.

79. *Achieving Consensus*, *supra* note 37, at 876-77.

B. *The Analytical Sequence*

Under topic 1 of the Restatement (Third) a case might fall into one of six classes for treatment. Appreciating what is a logical or analytical sequence of these treatments in the Restatement (Third) is important because a plaintiff may well want to argue his or her case in the alternate, trying to get the case into one of the classes that does not require a reasonable alternative design before slipping into the final residuary class of section 2.

An appropriate analytical sequence might be laid out as follows:

- If (there is sufficient evidence that) the product failed to fulfill a manifestly intended function,⁸⁰ then the plaintiff can proceed to the jury. He or she does not need to show a RAD; indeed, there is no need in this class even to characterize what type of defect caused the failure.
- If (there is sufficient evidence that) the product failed to comply with an applicable product safety statute or administrative regulation,⁸¹ then the plaintiff can proceed to the jury. He or she does not need to show a RAD.
- A jurisdiction might allow the approach that if (there is sufficient evidence that) the product had a manifestly unreasonable design,⁸² then the plaintiff can proceed to the jury. He or she does not need to show a RAD. Other names for this class of case include: “categorically defective design,” “generically defective design,” and “egregiously dangerous product type.”
- In the remainder of cases, the approach to defectiveness depends on classification of defect:
 - Where a product contains a manufacturing error it is defective;⁸³
 - 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, . . . and the omission of the alternative design renders the product not reasonably safe;”⁸⁴
 - A product “is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . and the omission of the instructions or warnings renders the product

80. See RESTATEMENT (THIRD), *supra* note 1, § 3.

81. See *id.* § 4.

82. See *id.* § 2 cmt. e.

83. See *id.* § 2(a).

84. See *id.* § 2(b).

not reasonably safe.”⁸⁵

VII. SUBSTANCE: SOME GENERAL COMMENTS

A. Failure to Fulfill a Manifestly Intended Function

There are considerable advantages for a plaintiff who can bring sufficient evidence to show that the product in his or her case failed to fulfill a manifestly intended function under section 3.⁸⁶

First, the plaintiff does not have to determine the type of product flaw involved in the malfunction. But this itself creates a major ambiguity. Section 3 is described as one concerning “circumstantial evidence” and the Reporters say that it “allows an inference of defect in much the same manner as *res ipsa loquitur* allows an inference of negligence at common law.”⁸⁷ Before we can tell if the facts support an inference of defect we need to know what “defect” means for the purposes of section 3. Courts may include within this section 3 notion of “defect” any product flaw that produced the injury (where “flaw” includes any condition where with hindsight the risks outweigh the benefits, as in Thalidomide). If that is so, then section 3 would encompass cases where the failure in a manifestly intended function was due to an undiscoverable design flaw. This would then mean that under section 3 a manufacturer could be held *strictly liable* for a design condition, contrary to the reasonableness norm for design emphasized in section 2. The theoretical justification for this pocket of strict liability is not at all clear. Under classical rules, a contractor owed a strict liability to his co-contractor *because* the latter had paid money for the product. Yet, under this reading of section 3, the manufacturer is exposed to a new strict liability (for undiscoverable design conditions) to mere users and bystanders as well. Why?⁸⁸ How is this rule, akin to an aclassical warranty, justified?

But it might be that courts will read the term “defect” in section 3⁸⁹ down to the meanings of defect in section 2—at least to the extent of requiring the risks of a design condition to be foreseeable before the condition could qualify as a “defect” under section 3.⁹⁰ Now, traditionally in law an inference, here of “defect”, would collapse once the de-

85. See *id.* § 2(c).

86. See *id.* § 3.

87. *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 8.

88. See *supra* notes 44, 57 and accompanying text. See also *infra* notes 135, 136 and accompanying text.

89. RESTATEMENT (THIRD), *supra* note 1, § 3(a).

90. It is part of the definition of a design defect, at least in section 2(b), that the relevant risks of harm were foreseeable. See *id.* § 2(b). This would suggest that a product design flaw that was undiscoverable could not be described as a “defect” and, therefore, any incident that might have been caused by such a non-defective flaw cannot qualify under section 3 as one “of a kind that ordinarily occurs as a result of product defect.” *Id.* § 3(a).

fendant brings forth a plausible explanation of the incident that does not involve defect. Under the second reading of the meaning of defect in section 3, it seems it would be very easy for a defendant-manufacturer, who may be happy to concede that the product failed in a manifestly intended function, to demolish the inference necessary for a finding of liability under section 3. All he or she needs to do is merely bring plausible evidence that the incident could have been due to a “non-defective” condition of the product, namely that it might have been due to an *unforeseeable* design condition. If this tactic is accepted by courts, and given that it would often be a tactic supportable by the facts of a case, does this mean the coverage of section 3 may in practice be trivial? If so, this exacerbates the wider complaint that the Restatement (Third) purports to provide coverage of existing warranty entitlements when in fact it fails to do so.

A second advantage for a plaintiff who can couch their claim as a failure of a manifestly intended function is the avoidance of having to show a RAD. There is a considerable potential for differing opinion on what is a *manifestly* intended function of a product. Unlike the nakedly normative question of the incidence, content, and scope of a duty of care, this question requires, at least nominally, some determination of a descriptive phenomenon: what the consensus is in society about the intended uses of the product.⁹¹ In relation to any particular product, there will be cases that clearly fall outside any possible consensus of what were its intended functions. Similarly, there will be cases where there is no doubt the failure related to such an intended function. Yet, there will be a large gray area in which plaintiffs will plausibly seek to argue that the particular product failure falls under section 3. Within this gray zone, section 3 apparently makes the judge a gate-keeper in relation to the applicability of this “failure to perform a manifestly intended function” concept. In relation to the facts of a particular case, the judge must be satisfied that there is sufficient evidence that the failure falls within the purview of section 3. It is hard to see what sort of evidence would be appropriate. Moreover, the more demanding the judge is on this matter, the more decision-making power is kept from the jury. Yet, at its heart, the issue of whether the product’s failure was a failure to perform a manifestly intended function would seem to be exactly the type of impressionistic issue of fact, not law, that is traditionally the province of the jury. As in other aspects of the Restatement (Third), the absence of clear guidance as to the division of responsibility between judge and jury raises the suspicion that the Restatement (Third)

91. This is why, both here and in classical warranty cases, a consumer expectations formulation is not inappropriate. See *supra* note 57 and accompanying text.

seeks surreptitiously to shift power to judges and away from juries.

To the extent that judges, over a range of cases, perceive a wide consensus of functions for a product, the more cases will be dealt with under section 3—outside the RAD requirement of section 2. For example, take the strength of the dining room chair example. Clearly, there is a consensus that a dining room chair should be able to support the weight of an eighty pound child: this is an agreed manifestly intended function. Similarly, there is no doubt a consensus that it is not a *manifestly* intended function of a chair to support the weight of a 600 pound person. However, in our earlier example, the plaintiff will want to argue that a manifestly intended function of a dining room chair is that it should support a weight of 300 pounds. The defendant will argue that, whatever the functions a chair might perform, it is not a *manifestly* intended function that such a product support that weight. The judge must consider whether the plaintiff has brought sufficient evidence that the range of weights constituting the *manifestly* intended uses of a dining room chair reaches as high as 300 pounds. What evidence on the issue of “manifest” is relevant here? The more generous courts are on this matter, the more cases will get to the jury under section 3 and the fewer chair cases will fall into the RAD requirements of section 2. Conversely, the more skeptical the court is that the evidence brought by the plaintiff goes to show *manifestly* intended function, the fewer cases will get to the jury under section 3.

To reiterate the sequencing point made earlier: it may well be unclear, or at least confusing, to the courts that the determination under section 3 necessarily must precede any that might take place in section 2. Specifically to design cases: one cannot tell if a chair case is a “classic design” case until the possibilities represented by section 3, section 4, and section 2 comment e have been exhausted.

B. Manifestly Unreasonable Design

The Reporters reluctantly included, albeit in a somewhat obscure location,⁹² the possibility that courts might hold “in rare instances where the product has low social utility and very high risk [the product defective] . . . without proof of a reasonable alternative design.”⁹³ There are a number of difficulties with this approach of the Reporters.

First, the Reporters have asserted that a finding of such “categorical defective design”⁹⁴ would be rare: “it would be necessary

92. For the Reporters’ defense of this positioning see James A. Henderson, Jr. & Aaron D. Twerski, *Arriving at Reasonable Alternative Design: The Reporters’ Travelogue*, 30 U. MICH. J.L. REFORM 563, 588 (1997) [hereinafter *Reporters’ Travelogue*].

93. RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. e.

94. Other names for this class of case include “generically defective design” and “egregiously

for the feature of the design that presents the risk of harm to be the very same feature upon which some persons, albeit unreasonably, place value.”⁹⁵ It is not at all clear why this should be so, though it is understandable why the Reporters slipped into making this statement. They focused on the many cases where it might be argued that the feature the plaintiff was complaining about, for example that the pellets of a toy gun were made of hard substances, was the very feature on which the user placed value (here the value of the realism of hard-pellet guns).⁹⁶ Given this was the feature giving value, so the logic goes, it should be taken as the feature that defines which alternatives were relevant: namely none.⁹⁷ Not all cases, however, are like this.

Take the following example: say there is a particular insecticide that constitutes the only technique available to destroy a type of malaria-carrying insect. It performs this intended function very efficiently, so there can be no claim of section 3-type defectiveness. However, the insecticide is known to cause side effects in a certain number of people in the vicinity. Let us imagine a range of scenarios with an increasingly grave type of side effect: a temporary irritation to the digestive tract, temporary blindness, or death. In a case where the side-effect is death, one might imagine a plaintiff, without more, wanting to argue that despite the absence of a RAD and the high social utility of the product, the risk of death rendered the product type “manifestly unreasonable” or “egregiously unacceptable.” This is not a case where “the feature of the design that presents the risk of harm . . . [is] the very same feature upon which some persons, albeit unreasonably, place value.”⁹⁸ no one values the feature of the insecticide that it kills some bystanders.

It is true, that even if courts were free to consider *any* claim of categorical defective design, such claims would rarely succeed. This low level of success is not because the claims would require that “the feature of the design that presents the risk of harm to be the very same feature upon which some persons, albeit unreasonably, place value.”⁹⁹ The real reason why courts would be reluctant to find a product without a RAD a categorically defective design is because the absence of a RAD will substantially boost the utility rating of the product. Yet, it does not follow that, despite high utility for this absence-of-RAD reason, the risks associated with a product may not also be so egregious that a court

dangerous product type.”

95. *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 8.

96. See 72 A.L.I. Proc. 201, 202 (1995) (remarks of Robert L. Habush, Attorney).

97. Tactically, this is an argument a defendant might well wish to make because if the court accepted this characterization and declared the absence of a required RAD, the latter declaration would boost the utility rating of the product making it harder to adjudge defective under a risk-utility balancing test.

98. *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 8.

99. *Id.*

might still judge, on risk-utility grounds, that there was sufficient evidence that the product was potentially defective and pass the issue to the jury. It would not be self-evidently irrational to hold that an insecticide, albeit performing a useful social function, was egregiously dangerous because it killed the neighbors.

The Reporters thought that it would be inappropriate to allow courts the freedom to consider all types of categorical defective design claim and, in a move they freely admitted was a quantitative "solution" to the problems they perceived in such claims, they explicitly limited the class recognized by section 2 comment e to cases where the utility of the product was "negligible."¹⁰⁰ The first problem the Reporters perceived in claims of a categorical defect was institutional. Referring to their claim that a RAD requirement somehow focuses the defectiveness inquiry on a mere comparison of marginal differences of the product with its RAD, the Reporters regarded defectiveness in a categorical case to be "unadjudicable" because of the unconstrained polycentric nature of the question in the absence of a RAD. The objection that might be made to this reason is that this is exactly the sort of issue that can infect the heart of section 3, which also does not require comparison with a RAD. Whether a *manifestly* intended function of a chair is to support a weight of 300 pounds is a simple, apparently descriptive question, but one on which reasonable minds will differ according to their normative judgments about what the intended functional range of the product *should* be: a polycentric and ultimately impenetrable judgment. It is also arguable¹⁰¹ that, even under section 2(b), the comparison with a RAD is merely a gateway through which the analysis must pass on its way to a final polycentric, impenetrable judgment. Adoption of a risk/utility test for design defect does not avoid or reduce the polycentricity of this final step; it simply provides an elaborately structured and demanding path to get there.

The second problem the Reporters saw in categorical defective design claims related to autonomy in consumer choice. This is well illustrated by the aboveground swimming pool case.¹⁰² In this case, there is only one feasible pool lining and its smoothness carries with it the risk that someone diving into the pool will injure his or her head as their outstretched arms splay apart on hitting the pool lining at the bottom of the pool. The Reporters assert that "it would be socially detrimental for courts to pressure manufacturers not to sell any variations of aboveground pools because, on balance, it was judged in tort litigation that

100. For the Reporters' defense of this decision see *Achieving Consensus*, *supra* note 37, at 887.

101. See *infra* pt. VI.C.

102. A hypothetical based on *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983).

such pools were not ‘good for society.’”¹⁰³ Allowing courts to make such a categorical defective design conclusion would put “undue” constraints on consumer choice. Yet, as Professor Powers has elegantly pointed out, this is not an inexorable conclusion of doctrinal logic.¹⁰⁴ It is a conclusion generated by a normative preference for individual consumer autonomy over a “collective interest” perspective on the risk-utility criterion of the “overall good of society.” The pool owner or user may well be willing to take the risk, he may judge that the utility to him outweighs the risks to *him*, but there is another perspective from which the risk-utility assessment can be made: whether the aggregate utility to society outweighs the aggregate costs to society.¹⁰⁵ The contrast in emphasis even arises where a criterion of *aggregate* costs and benefits is agreed upon because one person may value individual consumer autonomy extremely highly solely because he or she judges that it is extremely valuable *for society* as a whole. Another individual may, however, judge that it is not so critical to the good of society. In other words, one’s normative preferences infect one’s reading of social risks and benefits, even at an aggregate level. In short, the Reporters cannot *prove* that the constraints on consumer choice that might result from allowing courts an unfettered ability to find categorical defective design are necessarily socially detrimental and “not good for society” any more than the opposite can be proven. They can only assert this to be their normative, “political” judgment.

The Restatement (Third)’s “negligible social utility” limitation of categorical defective design excludes cases such as the above-ground pool¹⁰⁶ and the insecticide (both of which clearly have considerable social utility) while tolerating only a few cases such as the hard pellet gun. The limitation simply prevents a raft of claims from reaching the jury. It performs the same power-distribution function as the RAD requirement in section 2(b). Neither rule eliminates or reduces the ultimate polycentric nature of the determination. Both requirements simply filter out a batch of claims and keep them from the jury. Nor can these effects be defended on the basis that all the excluded claims were non-meritorious: a useful insecticide that nevertheless kills neighbors is, at least in the minds of those who have a certain normative perspective of the collective interest and consumer autonomy, just the sort of case that

103. *Achieving Consensus*, *supra* note 37, at 886.

104. See William Powers, Jr., *Is There a Doctrinal Answer to the Question of Generic Liability?*, 72 CHL-KENT L. REV. 169 (1996).

105. Even the Reporters consider that “[t]he operative perspective in risk-utility analysis is the objective one of achieving reasonable design safety from an overall, societal standpoint” *Achieving Consensus*, *supra* note 37, at 882.

106. See *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 10.

the law should be able to declare defective,¹⁰⁷ even though there was no substitute that could perform its socially useful role.

C. The Residuary Class of Section 2

Perhaps the most controversial aspect of the Restatement (Third) is the requirement, for design claims under the residuary class of section 2(b), that plaintiffs show that a RAD was available and that failure to adopt the alternative rendered the defendant's design not reasonably safe. Much of the controversy centers on the Reporters' claim that this requirement of a RAD was the consensus position of U.S. courts dealing with cases that did not fall into either the product malfunction class, the regulatory violation class, or the cases of "categorical liability" noted in rare dicta.¹⁰⁸ Essentially, this is a case-counting dispute. There is also concern as to how close a substitute needs to be to qualify as an "alternative design." What would have been the reasonable alternative design for asbestos? However, the critical focus of this section is on a different claim by the Reporters.

In cases that do not fall into either section 3, section 4, or section 2 comment e, the Reporters require proof of a RAD. To illustrate their point, the Reporters used an example similar to my earlier example of a chair failing to support a 300 pound person. Their example is of an axle failure where a car driven at thirty miles per hour hits an eight-inch pot-hole: a case where there is not a consensus that this was a failure in a manifestly intended design. The Reporters assert that in such a case (without evidence of a RAD) the jury should not be allowed to draw an inference of defect from the circumstances of axle failure. "To find a defect on those facts, the court will require the jury to apply some sort of general normative standard regarding how much axle strength automobile designs should require."¹⁰⁹ In other words, defectiveness would have to be determined by "macro risk-utility balancing," with the bald risk-utility principle operating as a liability rule.¹¹⁰ This would require an inquiry into the "unmanageable" issue of whether, in light of all the relevant costs and benefits, the defendant's design was "good for America."¹¹¹ This would be, the Reporters argue, so hopelessly poly-centric as to strain the workable limits of adjudication¹¹² and has been

107. This conclusion depends on a particular view of the separation of powers and the extent of legislative/regulatory paralysis.

108. See *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 8-10.

109. *Achieving Consensus*, *supra* note 37, at 877.

110. See *generally Reporters' Travelogue*, *supra* note 92, at 588.

111. See *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 20.

112. See *Achieving Consensus*, *supra* note 37, at 884-87. See also *Reporters' Travelogue*, *supra* note 92, at 584-86; *Achieving Consensus*, *supra* note 37, at 885 ("[H]ow could the litigants in individual tort cases conceivably obtain the nation-wide data necessary for the court to reach a rational judgment?").

“rightly rejected”¹¹³ by U.S. courts.

The introduction of a RAD requirement, they claim, renders manageable the risk-utility analysis.¹¹⁴ This is because “rather than being required to assess the overall costs and benefits of the defendant’s design, the court is asked to compare the actual design with the proposed alternative, assessing the marginal—typically relatively small—differences between them.”¹¹⁵ Yet, to emphasize “the comparative manageability of marginal, rather than aggregate, risk-utility analysis . . .”¹¹⁶ is misleading.

There are three ways a RAD might be relevant to the determination of defectiveness. First, at the very least,¹¹⁷ the question of whether there was a RAD available, or to put it another way, whether the defendant *could* have adopted a reasonable alternative design (“CHARAD”) is relevant to any risk-utility balancing because it is such an important factor relevant to utility. If there is no close substitute, so that the plaintiff cannot show that the defendant CHARAD, this fact tends to enhance the utility rating of a product. Of course, it does not necessarily follow that a plaintiff who cannot show that the defendant CHARAD should be barred from arguing that the product was defective: the possibility that defectiveness could rationally be found even in cases where there are no available substitutes is exactly what is argued for by those who support courts being allowed to consider categorical defectiveness.¹¹⁸ In this first role, whether a defendant *could* have adopted a reasonable alternative design is merely one possible factor influencing the risk-utility balance.

Second, the issue of a RAD may be relevant to the determination of defectiveness if by legal rule, it is made a *mandatory* requirement of the notion of defectiveness. This is exactly what, at the very least, section 2(b) does: it mandates that the plaintiff must show that the defendant CHARAD. In effect, this sets up an additional gateway through which the section 2(b) plaintiff must pass, a move that will filter out that raft of claims where the court does not accept that the plaintiff has shown sufficient evidence that the defendant CHARAD. Whether a defendant could have adopted a reasonable alternative design has been

113. See *Reporters’ Travelogue*, *supra* note 92, at 588.

114. See *Achieving Consensus*, *supra* note 37, at 886. See also *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 19.

115. *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 19. See also *Achieving Consensus*, *supra* note 37, at 886 (“Focusing on relatively small, marginal differences between the defendant’s design and the plaintiff’s proposed alternative renders manageable the risk-utility analysis of whether omission of the alternative caused the design to be unreasonably dangerous.”).

116. *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 19.

117. As noted in the influential article by John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 837 (1973).

118. See *supra* note 107 and accompanying text.

inserted as an additional requirement of, or has become part of, the expression of the risk-utility standard.¹¹⁹

Consider, however, what needs to be determined once the plaintiff has passed through this gateway. According to section 2(b), the plaintiff must still show that the failure of the defendant to adopt the alternative design rendered the product “not reasonably safe.”¹²⁰ In words that might have made the point clearer to courts, the plaintiff must go on to show that the defendant *should* have adopted the reasonable alternative design (“SHARAD”) because that is what a reasonable producer would have been *sure* to do. Just because there was a RAD does not mean that the defendant’s design was not reasonably safe. The “reasonably safe” standard is a *minimum* standard that can be satisfied even if the defendant “could have done better.” A plaintiff may well be able to show that with a little more money a chair could have been made a little stronger. The plaintiff may even be able to show that the chair could have been made a lot stronger with little additional cost. Even this will not be sufficient to show that the defendant’s design fell below the minimum standard of “reasonably safe.” SHARAD is the third way an alternative design can operate in the determination of defectiveness: as forming the “normative balancing process itself.”¹²¹

It is in this final step of determining if the defendant SHARAD that all the concerns of the Reporters about the unmanageability of aggregate risk-utility re-enter because the only way the SHARAD question can be determined is by the jury: deciding the “unmanageable” aggregate issue of whether, in light of all the relevant costs and benefits, the defendant’s design was “good for America.” The jury will be applying some sort of general normative standard regarding how much safety (e.g., axle or chair strength) should be required.

Say, in the chair case, the judge is not convinced that (there is sufficient evidence that) it was a *manifestly intended* function of a dining

119. See *Reporters’ Travelogue*, *supra* note 92, at 588 (“Risk-utility balancing has a specific meaning in the products context—a reasonable alternative design must be shown to have been available. One must prove that the danger was reasonably preventable.”). Thus, the notion of “social costs” in the risk-utility balance is redefined and narrowed accordingly:

The social costs considered in risk-utility balancing are the *costs of adopting better, safer technology* . . . a risk-utility standard for defective design renders decisions in classic design cases more manageable in court . . . the risk-utility test is relatively focused. The question in risk-utility balancing is *whether the risk . . . was reasonably preventable*.

Achieving Consensus, *supra* note 37, at 883 (emphasis added).

120. RESTATEMENT (THIRD), *supra* note 1, § 2(b). That the defendant *should* have adopted the reasonable alternative design (the “SHARAD”), is generated by the second limb of section 2(b). It is not generated (as the Reporters’ seem to suggest in *Achieving Consensus*, *supra* note 37, at 889) by the description that the alternative design must be “reasonable.” Even if the alternative is reasonable this does not mandate that the reasonable producer would have been sure to adopt it and that therefore every producer *should* have adopted the reasonable alternative design (i.e., SHARAD). Instead, it means merely that it would not be unreasonable for a producer to adopt it.

121. *Achieving Consensus*, *supra* note 37, at 889.

room chair that it should support a weight of 300 pounds. The case, therefore, fails to fall into the class under section 3. Suppose there is also no issue of non-compliance with an applicable product safety statute or administrative regulation. Clearly, the facts of this case could not support a claim of categorical defective design under section 2 comment e. The case then, by default, falls into section 2(b) and the court will demand from the plaintiff some evidence that the defendant CHARAD before the judge will allow the case to progress to the jury. Such gateway requirements will certainly filter out a raft of claims.¹²² However, these requirements will not filter out the chair case and many other cases: it will be a simple matter for the plaintiff to show that with a little more money the chair could have been made a little stronger. Section 2 (b) is not clear on its face whether the court will also be able to bar claims on the basis that, even though the plaintiff had shown sufficient proof that the defendant CHARAD, the judge believes that the plaintiff has not brought sufficient proof that the defendant SHARAD. This is fairly critical given that, as we will see, it is not obvious what evidence might be relevant to this ultimate impenetrable issue for judgment.

Regardless of whether or not courts have this power to withhold cases from the jury on the basis of insufficient evidence that the defendant SHARAD, in cases that do get to the jury, the court will need to decide whether the strength of the chair was sufficient in light of its *aggregate* risks and utility. In other words, when a jury is considering whether the defendant SHARAD, there is no obvious intelligible moral or economic reason for it to confine itself to the micro-balancing¹²³ question of whether the marginal costs of the RAD are outweighed by its marginal benefits. In fairness to the defendant, the jury must ask whether the design has met the minimum standard. For this inquiry, the marginal costs and benefits of the RAD are not determinative: aggregate risk-utility, despite its vagueness and problems of incommensurability, must be the benchmark. Thus, even if a court accepts a mandatory CHARAD requirement, this will not have eliminated this final impenetrable aggregate balancing step. It follows that the imposition of the mandatory CHARAD requirement, the most provocative aspect of the Restatement (Third), cannot be justified on the basis that it has eliminated a final step of that nature. The CHARAD requirement has

122. For example, certainly the insecticide case would be filtered out. How many cases will be filtered out depends on how demanding the judge is in relation to proof on matters such as what is a substitute.

123. Contrast the work of Professor David G. Owen, which was explicitly acknowledged by the Reporters as "invaluable" to the Restatement (Third). See RESTATEMENT (THIRD), *supra* note 1, at XVII. See, e.g., David G. Owen, *Risk-Utility Balancing in Design Defect Cases*, 30 U. MICH. J.L. REFORM 239 (1997); David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661 (1997). See also PRODUCT LIABILITY, *supra* note 2, at 266-71.

simply taken the case through an additional filtering gateway before the open-ended SHARAD question of “how much safety is enough” is reached.

Clearly, important consequences may flow from the fact that section 2 (b) and its comments do not clearly separate out the mandatory requirement of proof that the defendant CHARAD from the separate mandatory requirement that the defendant SHARAD. Similarly, important consequences may result from the Restatement (Third)’s associated failure to emphasize that the “not reasonably safe” standard is a *minimum* that can be satisfied even if the defendant “could have done better.” This latter oversight may have an ironic result: critics accuse the Reporters of surreptitiously pursuing a goal of restraining the imposition of liability, but by failing to clearly distinguish CHARAD and SHARAD, and failing forcefully to emphasize the minimum nature of the “reasonably safe” standard, the Restatement (Third) misses a critical opportunity to highlight where the outer rim of legitimate liability lies.

VIII. LEARNING LESSONS FROM OTHER LEGAL SYSTEMS

We have seen how dramatically the formats differ between the lengthy detailed Restatement (Third) on the one hand and the sparse legislation of the special products laws adopted in the EU, Japan, and Australia on the other. Recently, the Reporters of the Restatement (Third) argued that the latter are “inadequate substantive standards in the form of overly simplistic rules of decision [that] will present judges and lawyers with conceptual difficulties in trying to respond to products liability claims rationally, consistently, and fairly.”¹²⁴ Europeans’ complacency, the Reporters believe, is based on the

idea that a vague, undifferentiating standard for defect is acceptable, and even preferable, because courts will “work out the details” on a case-by-case basis. . . . But the experience in the United States over the past forty years strongly suggests that courts—even fairly sophisticated courts that confront a substantial and steady caseload of design defect cases—may require thirty or forty years to “get it right.” . . . For the European Community . . . to “leave it to the courts” is to overlook the obvious gains to be had from drawing on the American experience.¹²⁵

Not only do they claim that American courts have considered

124. *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 2-3.

125. *Id.* at 14, 15. The Reporters begin their analysis by stating:

[T]he new Restatement has much to offer by way of guidance to judges, legislators, and other policy-makers internationally. . . . [R]ecent substantive law developments in Europe, Japan, and elsewhere, taken at face value, suggest that the lessons learned the hard way in the United States have in certain important aspects been lost on the international community. The products liability law being developed outside the United States appears too simplistic to these American observers to perform adequately in the long run.

Id. at 2.

enough design and warning based claims to enable product defects to be defined in a “more sophisticated and . . . workable manner,”¹²⁶ the Reporters claim that “a modern industrialized state’s system of products liability in tort [will be driven] to accept the organization of the defect concept reflected by recent developments in . . . [the United States].”¹²⁷ The claim seems to be that not only did the United States lead the way but, by having been through the mill, the United States has emerged as a “mature” system of products liability with an approach that is sophisticated, workable, and inexorable—all manifested by the Restatement (Third).

Why do many non-Americans find this perspective less than compelling? In concluding this article, let this non-American observer make a few interrelated suggestions on this point. First, the criticism concerning format. Earlier, this article noted several reasons why a foreign jurisdiction with a uniformly high-quality judiciary, single court of final appeal, a tight system of precedent, and an active legislature can “make do” with a very sparse formulation of its binding legal rules. In brief, the foreign jurisdictions accomplish this task because the legal rules are definitively elaborated in appellate case law, and because academic treatises serve broadly the same role as the Restatement (Third)’s comments and notes.

Second, the failure of non-Americans to learn the lessons from the United States may well be because they stand appalled by the quagmire into which the Restatement (Second) led U.S. courts, and they appreciate how absent from their own systems are the structural reasons why U.S. courts were led on such a tortuous route. At the time, and for many years after its introduction, U.S. lawyers confidently promoted the Restatement (Second) as a simple, stabilizing, and rationalizing reform produced by admirable judicial and academic creativity. It is understandable that today outsiders, aware of the disastrous results of that move and the decades it took U.S. courts to decide what to do with the new liability rule, might be somewhat skeptical of claims that this time, U.S. courts have it right. Indeed, it might be argued that what has really happened in the United States over the past decades is that the courts have made a circular and wasteful journey: having “made a rather substantial mistake”¹²⁸ in creating and elaborating separate rules for products in tort, the courts then spent many years pulling the law back to negligence, albeit to the sort of complex negligence system that would

126. *Id.* at 14.

127. *Id.*

128. *Id.* at 20 (compare the equivalent accusations by the Reporters against foreign systems where they stated: “[D]rafters of the EC Directive and the Product Liability Act in Japan have made a rather substantial mistake.”).

have matured anyway as more and diverse product claims came to be made under that tort.

Moreover, the way unified foreign systems work means that the case-by-case fleshing out of the Products Liability Directive/Part VA will not take such a long-winded and disorganized route as was inevitable in the United States. For example, whether the Products Liability Directive/Part VA provides manufacturers with the development risk defense in cases of undiscoverable manufacturing errors is an issue that will eventually come before the final court of appeal (the ECJ in the EU and the High Court in Australia) and a definitive ruling will then settle the matter for all dependent jurisdictions.

The principal complaint of the Reporters seems to be that the Products Liability Directive/Part VA do not distinguish between types of defect. Thus, the non-American products regimes avoid the distinctive approach that the Reporters say U.S. courts found as "the only sensible standard for defect in classic design cases,"¹²⁹ namely the mandatory requirement of proof of a RAD. The case in favor of separating out types of defect, however, rests on the normatively dubious case for imposing strict liability for only a certain class of unforeseeable defects.¹³⁰ Foreign jurisdictions may well reject that distinction, as in the *Ryan* case. Even if they accept it, as did the German Federal Supreme Court, there may be sufficient flexibility provided by the division of the liability rule across defect and defense provisions to enable the final court of appeal to recognize this distinction. Moreover, in classic design cases the issue of what, if any, type of RAD requirement should be recognized is far less pressing where the judge is also the fact-finder. The judge's written judgment will reveal the role played by any proof of a RAD in his evaluation of the ultimate impenetrable question of how much safety is enough. The Reporters might well be right that in practice, the RAD requirement is critical to the workability of classic design cases in the United States, but, in unitary legal systems with tight precedent rules and few juries, the equivalent practical role is played by the central focus on judge-given *reasons*.

Just as the Restatement (Third) focuses on the classic case of concern¹³¹ in the United States (i.e., classic design cases), the Products Liability Directive/Part VA focus on the issue of central concern¹³² in the

129. *Id.* at 19.

130. The class separated out for the purpose of imposing strict liability is manufacturing errors. See *supra* notes 55-64 and accompanying text; *infra* note 134 and accompanying text.

131. This is generated by the volume of such claims brought by entrepreneurial plaintiffs' lawyers, exacerbated by the multiplicity of jurisdictions, and the symbolic and practical embarrassment of inconsistent verdicts.

132. Europe's concern is generated by the historical importance of the Thalidomide disaster in these systems and an astute appreciation of the pivotal theoretical role played by the treatment of undiscoverability in determining if a legal rule was strict or not.

EU and Australia: how to deal with undiscoverable product flaws, costs or benefits, and when to assess these matters. To the non-American, it is just as surprising to see how this latter issue tends to get lost in the Restatement (Third) as it is to the Reporters that the Products Liability Directive/Part VA are absolutely silent about classic design cases.

There are obvious embarrassments in the history of products liability in the foreign jurisdictions: the generally poor level of theoretical discourse, the secrecy of policy formulation, and the cost-cutting seat-of-the-pants use of impressionistic evidence from foreign systems such as the United States are clearly major ones. It is also true that in Europe and Australia, the products liability debate tends to be unduly mesmerized by the Thalidomide incident and the very narrow types of product claims that have so far managed to pierce the formidable barriers to justice that exist in these systems. The Reporters rightly dismiss the argument that the foreign products rules will remain workable because barriers to justice will prevent all but the most obvious product malfunction type cases from being brought.¹³³ Indeed, there is something very distasteful in defending the apparent crudity of a legal doctrine on the basis that one's legal system ensures virtually no one gets to push at its envelope and so reveal this characteristic of the rule. Moreover, I agree that it is inevitable that as no-win no-fee arrangements burgeon throughout the EU and Australia, more "classic design cases" such as the chair case and the axle case will emerge in these jurisdictions. They would, of course, have eventually emerged in the tort of negligence anyway, just as they would have in the United States if section 402A had not happened. So the Reporters are right to criticize foreign systems for their neglect of the important issues raised by classic design cases. The question is how well prepared are these systems to cope, and to what extent is the U.S. experience illuminating?

There are also equivalent embarrassments in the products liability story in the United States. An obvious one, as this article has noted, is the central failure of honored advocates such as Traynor and Prosser to see the explosive potential for their rule to burst out of manufacturing error cases into design and warning contexts, and to flow on with such crushing effect to non-manufacturing suppliers. There are others. At the heart of the Restatement (Third) lie two assumptions that are far from self-evident. The first, that it is fair to hold a manufacturer (strictly) liable for some product flaws he could not discover, but, not fair to do so in relation to a different set, has been examined earlier.¹³⁴ The other is a theme implicit in modern U.S. product liability law: that

133. See *What Europe, Japan, and Other Countries Can Learn*, *supra* note 35, at 2, 15.

134. See *supra* notes 55-64 and accompanying text.

the fact that the plaintiff had *paid* good money for the product does not secure for him a layer of entitlement in relation to safety additional to that enjoyed by a user or bystander.¹³⁵ In foreign systems, both assumptions would be regarded as highly debatable. On the first: we have already seen in the *Ryan* case that an Australian court regards the undiscoverability of a manufacturing error as just as good a reason for exculpation from liability as undiscoverability of a design flaw would be. Similarly, on the second issue: U.K. warranty laws are still “classical,” so that while the actual buyer can sue under warranty for the sort of undiscoverable flaw demonstrated in the *Frost* case, the user and bystander cannot sue under that cause of action. The bystander and user are relegated to a tort claim based on the explicit and coherent distinction that they have not paid for the extra layer of protection.¹³⁶

These two examples pinpoint areas in which little guidance is given from the United States. In the United States, these two assumptions have become so entrenched that few legal theorists provide the sort of rigorous justifications that might persuade the skeptical non-American of the preferability of the U.S. position. These examples alone also undermine the Reporters’ claim of the inexorability of the approach of the Restatement (Third). The very fact that the German court took a diametrically opposed view to that of the Australian court in the *Ryan* case and the fact that the United Kingdom still adheres to classical warranty law, show the rich variety of workable and defensible alternatives to the Restatement (Third) that are available to other systems.

IX. CONCLUSION

The world’s legal systems, however, are not in competition. We simply do not confront the same advantages and disadvantages. The U.S. system of products liability labors under an unresolved tension that is entirely absent in jurisdictions like the United Kingdom and Australia. On the one side are the ideals of diverse local justice reflected in the widespread, though to many non-Americans, mystifying public praise for the jury system and for the diversity of state jurisdictions. On the other hand are the needs of a unified national market where local findings of design or warning defect can have dramatic financial impact.¹³⁷

135. See *supra* notes 44, 57, 88 and accompanying text. See also *infra* note 136 and accompanying text.

136. In classical contract law, the typical entitlement, secured by an obligation that is *strict*, is one to an “entitled result,” not merely an entitlement to conduct that tries carefully to secure that result. See Jane Stapleton, *A New “Seascape” for Obligations: Reclassification on the Basis of Measure of Damages*, in *THE CLASSIFICATION OF OBLIGATIONS* 193 (Peter Birks ed., 1997); Jane Stapleton, *The Normal Expectancies Measure in Tort Damages*, 113 *LAW Q. REV.* 257 (1997).

137. Contrast this to a typical non-design or otherwise non-systemic negligence case where local variations in result are less patent and tend not have such dramatic national knock-on effects.

In the United States, this structural inability to construct firm national doctrinal standards is accompanied by a remarkable asset, the breathtaking creativity among appellate courts and academics ready and willing to try to make the apparently unworkable system work, and work well. The Restatement (Third) is a fine illustration of this creativity and of its pivotal value to the American legal system. The intellectual effort, rigor, and achievements that the Restatement (Third) reflects and the impressive debates it has generated, strike the non-American as extraordinary. Whether one agrees with the Restatement (Third)'s tactics, the fact remains it is an amazing endeavor that no body, public or private, would be likely to attempt in a foreign jurisdiction.