Meaning of Defect in Products Liability Law-A Review of Basic Principles, The

W. Page Keeton

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Recommended Citation
Available at: https://scholarship.law.missouri.edu/mlr/vol45/iss4/1

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
THE MEANING OF DEFECT IN PRODUCTS LIABILITY LAW—A REVIEW OF BASIC PRINCIPLES

W. Page Keeton*

I. Keeping Up With Technology .......................................................... 579
II. Bases For Products Liability ........................................................... 583
III. A Test For Product Defectiveness .................................................... 588
   A. The Consumer Contemplation Test .............................................. 588
   B. The Risk-Utility Test .................................................................. 592
IV. "State of the Art" ............................................................................ 594
V. Conclusion ......................................................................................... 595

I. Keeping Up With Technology

The United States, Japan, and the Common Market countries, among other advanced and industrialized societies of the modern world, have been confronted with an unparalleled profusion of new products resulting from seventy-five years of advances in technology and scientific know-how.

*W. Page Keeton Professor in the Law of Torts, University of Texas School of Law. A.B., LL.B., 1931, University of Texas; S.J.D., 1936, Harvard University; LL.D. (Hon.), 1974, Southern Methodist University; Dean, University of Texas School of Law, 1949-1974; President, Association of American Law Schools, 1961; American Bar Association’s Award of Excellence to an Educator, 1975.

†The following is adapted from a speech given by Professor Keeton at the University of Missouri-Columbia School of Law on March 19, 1980, as the Adler Foundation Lawyer-in-Residence Lecture. With the speaker’s assistance, the editors have restructured the speech given in Professor Keeton’s colloquial style into article form. Footnotes have also been added by the editors and Professor Keeton. The editors realize that there is a risk of losing emphasis and context by reorganizing a presentation which can best be described as “vintage Keeton” into an article for publication. With the assistance of Professor Keeton, however, the editors feel that such loss has been kept to a minimum.

Although some of the material contained within the text of Professor Keeton’s speech has been previously published, see note 1 infra, the editors believe that the following is a useful review of basic principles in products liability law. Additionally, Professor Keeton takes a new and fresh approach to some of the issues discussed. One point in particular is his discussion of the “state of the art.”

Readers who desire to pursue Professor Keeton’s analysis and theories in greater detail are referred to the following materials: P. Keeton & R. Keeton, CASES AND MATERIALS ON THE LAW OF TORTS (1971); Keeton, Manufacturer’s Liability: The Meaning of “Defect” in the Manufacture and Design of Products, 20 SYRACUSE L. REV. 559 (1969); Keeton, Product Liability and the Automobile, 9 FORUM 1 (1973); Keeton, Product Liability and the Meaning of Defect, 5 ST.
that have exceeded those which occurred in all the preceding history of
the human race. We probably have not seen anything yet to compare
with what we will see in the way of future technological advances in
the world. As a motto on the Museum of Natural History in Washington, D.C.,
reads, "All the past is but a prologue." If nothing else, this unrestrained
technological change has been a boon to lawyers as well as an awesome
challenge to the legal profession.

One result of this proliferation of new products has been the great
growth of new categories and dimensions of injuries, attributable to a
variety of damaging events, that we did not know existed when the law
began its development in the nineteenth century. Previously unknown
dangers such as traffic accidents, airplane accidents, workplace accidents
with machinery, home accidents with appliances, and medical mishaps
with drugs are now commonplace. For example, 20,000,000 Americans are
injured each year in their homes with consumer products. Of those injured,
30,000 are killed and 110,000 are permanently disabled. Another 7,000,000
are injured in work-related accidents.

This proliferation of products has created two serious problems for
the social order. The first is that of accident prevention. The second is
that of allocating the costs of accidents after they occur.

Mary's L.J. 30 (1973); Keeton, Products Liability—Design Hazards and the Mean-
ing of Defect, 10 Cum. L. Rev. 293 (1979); Keeton, Products Liability—Drugs and
Cosmetics, 25 Vand. L. Rev. 181 (1972); Keeton, Products Liability—Inadequacy
of Information, 48 Tex. L. Rev. 898 (1970); Keeton, Products Liability—Liability
Without Fault and the Requirement of a Defect, 41 Tex. L. Rev. 885 (1963);
Keeton, Products Liability—Problems Pertaining to Proof of Negligence, 19 Sw.
L.J. 26 (1965); Keeton, Products Liability—Proof of the Manufacturer's Negli-
gence, 49 Va. L. Rev. 675 (1963); Keeton, Products Liability—Some Observations
About Allocation of Risks, 64 Mich. L. Rev. 1329 (1966); Keeton, Products Liabil-
ity—The Nature and Extent of Strict Liability, 1964 U. Ill. L.F. 693; Keeton,
Some Observations About the Strict Liability of the Maker of Prescription Drugs:

1. Professor Keeton's March speech at the University of Missouri-Columbia
parallels his most recent law review article, Products Liability—Design Hazards
and the Meaning of Defect, 10 Cum. L. Rev. 293 (1979). While the Missouri Law
Review editors have provided footnotes to Professor Keeton's speech in order to
furnish the reader with a solid foundation for further investigation of the points
discussed, the reader is referred to the Cumberland Law Review article for a well
developed explanation of many of the same issues.

2. A. Weinstein, A. Twerski, H. Piekler & W. Donaher, Products Liabil-
ity and the Reasonably Safe Product: A Guide for Management, Design,
and Marketing § 3 (1978).

3. Id.

4. The reduction of the incidence of harm resulting from unsafe products
is often given as a justification for the imposition of liability without fault on
the manufacturer and retailer. See Escoola v. Coca-Cola Bottling Co., 24 Cal. 2d
609, 612-13, 164 S.W.2d 828, 829-30 (1942); Prosser, The Assault Upon the Citadel
(Strict Liability to the Consumer), 69 Yale L.J. 1099, 1119 (1960). For a discussion
of the fallacies of this reasoning, see Keeton, Products Liability—Some Observa-

5. Costs of product accidents are generally placed upon the manufacturer.
The principal reason given for shifting losses from consumers to manufacturers is
Accident prevention has been directly attacked in this country, especially in the last fifteen or twenty years, through government regulation of standards for products that we buy, and government regulation of the conditions under which products are made and sold. While we have experienced this host of government regulations to prevent accidents, there has also been a great revolution in the law dealing with the allocation of the cost of accidents.

Until about thirty years ago, recovery on behalf of those victimized in society was obtainable primarily against those who misused products. A theory of negligence or fault generally provided the exclusive basis for this recovery. Occasionally, but only occasionally, claims were successfully maintained against product manufacturers and retailers. This most likely occurred when a damaging event was proven to be attributable to negligence in the sale of a product with a flaw therein, or when there had been some kind of miscarriage in the construction process, as in the celebrated


MacPherson case. In that case, there was a flaw in the product, rather than a design hazard. In MacPherson, the flaw was in the wheel of an automobile. But MacPherson was a unique development for its time and such claims against a manufacturer, even as regarding flaws, were rare.

During the last twenty years, however, due in part to a more sophisticated approach by the trial bar to allocate the cost of damaging events, and in part to changes in the substantive law relating to the liability of those who are in the business of supplying products for the use of others, claims made and claims paid against suppliers have increased dramatically. A large part of these claims have been based on events resulting from the way products are designed, and not simply as a result of flaws attributable to miscarriages in the manufacturing process. This revolution in the law has been spearheaded by the judiciary, not the legislatures. In fact,


14. Id. at 385, 111 N.E. at 1051.

15. See Keeton, supra note 1, at 294 n.5.


17. See Keeton, supra note 1, at 294 n.7.


19. See Keeton, supra note 4, at 1390. See generally Henderson, Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus, 63 Minn. L. Rev. 773 (1979); Keeton, Creative Continuity
legislators have responded with a counterrevolution, a development to which I, as a supporter of most of the revolutionary changes herein discussed, do not subscribe. This counterrevolution, taking place in Congress and in the state legislatures, focuses on efforts to undo what the courts have done;\textsuperscript{20} the belief being that liability has expanded beyond what society can afford.\textsuperscript{21}

It is not yet possible to fully assess the impact of this counterrevolution. It is more important for now to discuss the revolution which has occurred in this area of the law and to formulate direction for new developments consistent with these innovative changes.

\section*{II. BASES FOR PRODUCTS LIABILITY}

Presently there are two systems for liability under our legal structures: one applicable to those who supply products for the use of others, and one applicable to those who use products. Prior to 1960, recovery was sometimes available against the merchant-seller or manufacturer of a "defectively dangerous product" pursuant to a so-called contract-warranty theory or a tort-negligence theory.\textsuperscript{22}

A person who was physically harmed seldom recovered, however, on contract-warranty theory because of two obstacles. The first obstacle resulted from the fact that under contract law it was recognized that a party to the contract could disdain all warranty obligations,\textsuperscript{23} could limit the duration of those warranty obligations,\textsuperscript{24} and could limit the remedy for those warranty obligations, such as agreeing only to replace defective

\begin{flushright}
\textit{in the Law of Torts, 75 HARV. L. REV. 463 (1962); Owen, supra note 16. For a discussion of the development of tort law leading up to strict liability, see Daly v. General Motors Corp., 20 Cal. 3d 725, 731-33, 575 P.2d 1162, 1165-66, 144 Cal. Rptr. 380, 583-84 (1978).}
\end{flushright}

\textbf{20. See generally Keeton, supra note 1; Prosser, supra note 4.}


\textbf{24. See id.}
parts. Under warranty law, the parties were free to contract out all liability for harm resulting from defective products because of notions about “freedom of contract.”

The second obstacle to recovery, which could be even more profound for those victimized by dangerous products, was that under contract law only those who were privy to a contract of purchase or sale could recover for breach of warranty. Thus, a manufacturer was virtually immune from all responsibility because he seldom sold his product directly to the people who were victimized by the product. These two obstacles to recovery virtually made contract law a worthless remedy in products cases.

There were also two serious obstacles to recovery on a tort-negligence theory. One was the difficulty of proving negligence in a products liability case. In some situations, such as with traffic accidents, it is not too difficult to prove existing negligence. But even when negligence is present in defective products cases, the job of proving it can be quite difficult.

Another serious obstacle to recovery on a tort-negligence theory was that, at least prior to 1960, the defendant could satisfy any duty of care that he owed as regards design hazards by warning about nonobvious dangers. No recovery was allowed for harm resulting from an obvious

25. See id. The Uniform Commercial Code contained a specific provision allowing a seller to disclaim both express and implied warranties. U.C.C. § 2-316 (1966 version).
28. See Keeton, supra note 23, at 560.
29. See id.
30. See id. See generally Ashe, So You’re Going to Try a Products Liability Case, 13 Hastings L.J. 66 (1961); articles cited note 8 supra.

For a discussion of the manufacturer’s duty to warn, see generally Dillard & Hart, Products Liability: Directions for Use and the Duty to Warn, 41 Va. L. Rev.
hazard. If the danger or defect was latent, the duty of care could be satisfied by warning about it. There are many cases prior to 1960 where the jury was entrusted with evaluating design hazards, but nearly all of them are failure to warn cases. The basic theory was that if the purchaser knew what he was buying in terms of the risk or hazard, then the manufacturer had fulfilled his duty under the law.

Today, however, in nearly all states, the supplier (merchant-seller or manufacturer) of a product that was defective and unreasonably dangerous at the time possession was surrendered is subject to liability without proof of negligence to all those to whom harm is likely to result from the kind of defect that is established. As I have expressed the matter for some years, the product must be defective as marketed. It can be defective as marketed for one of three reasons.

First, the product can be defective as marketed because of a flaw. Courts will often use the term "construction defect" to refer to what is best characterized as a flaw. Flaws can develop in the marketing process, as distinguished from the construction process. For example, when bottles are cracked as a result of mishandling and an explosion results, the flaw

32. A similar limitation on recovery is presently used in many jurisdictions. See RESTATEMENT (SECOND) OF TORTS § 388, Comment k (1965). See also Messina v. Clark Equip. Co., 263 F.2d 291 (2d Cir. 1959) (liability limited to hidden defects and concealed dangers); Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968) (no duty to warn about automobile's capability for excessive speeds) (Schemel, insofar as it relied on Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966), was overruled in Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977)); Sowles v. Urschel Labs., Inc., 595 F.2d 1361 (8th Cir. 1979) (no duty to warn of obvious danger); Murphy v. Cory Pump & Supply Co., 47 Ill. App. 2d 382, 197 N.E.2d 849 (1964) (obvious that no guard was in front of lawnower blades).
33. See cases cited note 31 supra.
38. See Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 33 (1973) ("The plaintiff is no longer required to impugn the maker, but he is required to impugn the product. Simply stated, the product must be defective as marketed . . ."); Keeton, Products Liability—Liability Without Fault and the Requirement of a Defect, 41 Tex. L. Rev. 855, 858 (1965).
is in the marketing process, not the construction process. A flaw in a product is defined as an abnormality or a condition that was unintended, and makes the product more dangerous than it would have been as intended.\(^{38}\) This is a very important definition even though it often requires drawing a difficult line or making a hard distinction.

An example of a flaw under this definition would be the rotten wood in the wheel in *MacPherson.\(^{40}\)* Other examples are a bubble in a tire that causes it to blow out,\(^{40}\) an "uningredient" in a drug that causes it to be toxic and poisonous,\(^{41}\) broken glass in a bottle of Coca-Cola,\(^{42}\) or a decomposed mouse in the bottom of a bottle of Coca-Cola.\(^{43}\) A flaw is unreasonably dangerous per se, *i.e.*, to recover, a plaintiff need not prove anything more than a flaw in the product which caused the accident.\(^{44}\)

Second, a product may be defective as marketed because of a *failure to adequately warn*, or a failure to use proper means to warn about a risk or hazard related to the way the product was designed.\(^{45}\) Although this begins to involve design hazards, liability is imposed on the ground that the seller or manufacturer failed adequately to warn about some risk or hazard, or failed adequately to instruct about how to avoid the risk or harm. Under this approach, the product is allegedly defective as marketed because of the failure to properly present it to purchasers and users.

Notwithstanding what some courts have said,\(^{46}\) in establishing this ground of recovery, the plaintiff in most states must prove negligence in the failure to warn properly.\(^{47}\) There will be no liability in these cases

---

38. See Keeton, *supra* note 1, at 297.
42. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).
46. See, *e.g.*, Teagle v. Fischer & Porter Co., 89 Wash. 2d 149, 155, 570 P.2d 438, 442 (1977) (failure to warn can be a "defect").

https://scholarship.law.missouri.edu/mlr/vol45/iss4/1
without a showing that the defendant knew or should have known of the risk or hazard about which he failed to warn. Moreover, there will be no liability unless the seller or manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public.\textsuperscript{48}

Although this ground of recovery is sometimes referred to as strict liability,\textsuperscript{49} it is really nothing more than a ground of negligence liability better described as the sale of a product in a defective condition. For example, in \textit{Moran v. Williams},\textsuperscript{50} a bottle of cologne contained an ingredient which was pleasantly scented, but highly inflammable. A group of teenage children were having a good time after a party and decided that a few burning candles would be improved if they gave off nice odors. The teenagers poured the cologne on the lighted candles. One of the teenagers was seriously burned and disfigured as a consequence. The product, as designed, was not defective per se, but there was no warning about the inflammability of the cologne. A good warning would have prevented liability.\textsuperscript{51}

This is a difficult problem for manufacturers because there is hardly any warning that could not be improved. The plaintiff nearly always can allege with some certainty that the warning could have been made better. On the other hand, if you had warnings to take care of all the risks in products, you would have two or three pages that no one would read, \textit{i.e.}, the warning that goes into too much detail would be counterproductive. Probably the best warning for the cologne in \textit{Moran v. Williams} would have been printed in large letters as follows: \textbf{HIGHLY INFLAMMABLE. DON'T GET NEAR FLAMES.}\textsuperscript{52}

Finally, a product may be defective as marketed because of a \textit{defective design}. There has been great confusion, controversy, and uncertainty among judges and commentators with respect to the scope of liability for harm flowing from hazards attributable to the way products are designed.\textsuperscript{53} Appellate judges have often been imprecise and vague in their opinions about the standards for evaluation of product designs and about the respective functions of judge and jury in determining whether the

\textsuperscript{48} See, \textit{e.g.}, Torrogrossa \textit{v. Towmotor Co.}, 44 N.Y.2d 709, 376 N.E.2d 920, 405 N.Y.S.2d 448 (1978) (no liability for absence of warning about careful driving).

\textsuperscript{49} See \textit{Keeton, supra} note 23, at 563; \textit{Keeton, supra} note 35, at 399-412.

\textsuperscript{50} 19 Md. App. 546, 313 A.2d 527 (1974).

\textsuperscript{51} See, \textit{e.g.}, \textit{Teagle v. Fischer & Porter Co.}, 89 Wash. 2d 149, 555 P.2d 438, 442 (1977) (product may be flawless but still not reasonably safe without adequate warning).

\textsuperscript{52} \textit{See generally} Dillar \& Hart, \textit{supra} note 31; \textit{Keeton, supra} note 35; \textit{Noel, supra} note 31; \textit{Noel, Products Defective Because of Inadequate Directions or Warnings}, 25 Sw. L.J. 256 (1969); \textit{Noel, Recent Trends In Manufacturer's Negligence as to Design, Instructions or Warnings}, 19 Sw. L.J. 43 (1965).

\textsuperscript{53} \textit{See generally} Carsey, \textit{What Constitutes a Design Defect in Products Liability Cases}, 21 Fed'n Ins. Counsel Q. 107 (1970); \textit{Henderson, Design Defect Litigation Revisited}, 61 Cornell L. Rev. 541 (1976); \textit{Keeton, supra} note 23; \textit{Keeton, supra} note 44; \textit{Keeton, supra} note 35.
design hazard in a product is more dangerous than it should be. A large part of the difficulty regarding design hazards is a consequence of the fact that liability was originally based on a breach of warranty theory. The whole notion underlying warranty was that the seller was representing something that was not true about his product, that he was misrepresenting the safety characteristics of his product. These early cases held that the warranty disclaimer was unconscionable and unenforceable, and that the usual privity of contract rules would not apply. A source of considerable confusion was that the language used to articulate the kind of hazardous condition that would constitute a defect for a prima facie torts claim was often the same language that was used to describe a breach of warranty claim.

It is imperative that a test for defectiveness of design be well reasoned and clearly articulated if this confusion is to be resolved. To that task, I now turn.

III. A TEST FOR PRODUCT DEFECTIVENESS

There are essentially two different approaches to the question of how to evaluate design hazards in determining whether or not they are more dangerous than they should be. One is the so-called purchaser or consumer contemplation test, and the second is what I refer to as the danger versus utility balancing test or risk-utility test.

A. The Consumer Contemplation Test

Under the consumer contemplation test, and as so stated in section 402A of the Restatement (Second) of Torts, a product is defectively dangerous if it is dangerous to an extent beyond that which would be con-
templated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product's characteristics.\(^6\) In other words, if the product was more dangerous than the consumer contemplated in some respect, then it is defective in that respect. This test reflects the origins of strict liability, and unfortunately, those origins were rooted in contract law and were designed to deal with commercial losses. The test is a good test for dealing with commercial losses.\(^6\) It is inadequate, however, for dealing with the problem of personal injuries resulting from accidents. The warranty of merchantability was an obligation imposed on the seller to protect against intangible economic losses and commercial losses.\(^6\) The theory behind the warranty was that a merchant, in offering his goods for sale, was making an implied representation that his goods were fit for the ordinary purposes for which those goods were intended.\(^6\)

One of the difficulties with products liability law today is that the consumer contemplation test has been used repeatedly in judicial opinions. Section 402A of the Restatement (Second) of Torts and its sponsor, the American Law Institute, is much to blame for this.\(^6\) The consumer contemplation test is inadequate as a test for defectiveness for at least three reasons.

First, under this test a victim could never recover for harm suffered as a result of a design hazard that was open or obvious, or one with respect to which the purchaser was adequately informed, because under these conditions he could not have been deceived about what he was buying. The purchaser received what he expected to buy, regardless of injurious results. This indeed has been the result reached by many courts.\(^6\) Fortunately, however, there is a trend away from this conclusion.

---

60. Restatement (Second) of Torts § 402A, Comment i (1965). Section 402A reads:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.


62. See Keeton, supra note 1, at 301-02.

63. Id. See generally Fischer, supra note 61.

64. See Keeton, supra note 44, at 32.

As previously discussed, on a negligence theory it was commonly held that a seller’s duty could be satisfied by giving adequate warnings of risks and hazards that were not otherwise obvious. The idea supporting this result was that a seller’s responsibility for design hazards was satisfied so long as people knew what they were getting. The manufacturer’s responsibility was to see to it that the purchaser was an informed purchaser, and that satisfied his duty. There are many today who still urge that judges and juries should not be attempting to determine how safely farm machinery should be designed, how safely industrial machinery should be designed, and how safely motor equipment should be designed, so long as purchasers know what they are buying. That is a reasonable argument to make, but one with which I do not agree. I do not think the marketplace will give us the kind of safety that we need to have.

The idea that was behind the law, and the idea that many people now have, is that as long as the purchaser knows what he is buying, it is his responsibility in using the product to avoid accidents. But what if it just takes a few dollars more to make something safer? For example, what if a ten-thousand dollar piece of machinery is being produced and it takes only two or three hundred dollars more to prevent a number of accidents? The consumer contemplation test is inadequate for not taking into account this kind of situation. Using this test, the manufacturer is not responsible for failing to add the relatively inexpensive safety device if the purchaser knows that it does not exist and that there is a resulting danger.

Second, this test can result in the identification of products as being defectively dangerous which are clearly not. For example, consider the situation where a product, such as a drug, produces a harmful side effect which was unknown by either the seller or the user. There is hardly any drug that does not have side effects which are unknown when it first is put on the market. So there is an unknown risk, a hazard that is not contemplated. Penicillin was that kind of a product, but it was also a great benefit to humanity. Was it a bad product? By any reasonable definition it was not, but it had a risk about it—now knowable—which made it more

66. See notes 31-35 and accompanying text supra.
67. See Keeton, supra note 35, at 400-12.
68. Id.
dangerous than contemplated, and some people were victimized by this danger. The danger still exists, only now we are aware of it. One can argue that we ought to have liability in such cases, but that is a rather far-reaching argument to which I do not subscribe.

Third, there is a fallacious assumption underlying the consumer contemplation test that the ordinary purchaser knows what he is buying. In most cases, the purchaser does not have any idea about the safety or danger of what he is buying. He is generally buying on price, on beauty, and on function.

Consider the case of Heaton v. Ford Motor Co. as an example. Plaintiff was injured in an accident caused by the rim of a wheel separating from the interior portion of the wheel. There was evidence at trial that a short time prior to the accident a rock about five inches in diameter hit the wheel. It was the plaintiff's theory that the wheel was defectively designed if it could not withstand the impact of the rock. The court was trying to use the consumer contemplation test, but finally realized that this test might not apply to all fact situations. Thus, one major defect with the test is that sometimes consumers have no definite expectations about what they are purchasing, and in these instances the jury can only speculate as to a product's defectiveness. It is, however, possible to get expert testimony about such products as the wheel and rim to assist the jury in making a determination as to whether the product was defectively designed, an approach suggested by the court in Heaton.

In General Motors Corp. v. Simmons, a Texas case which was decided in 1976, but which does not represent the current law in Texas, the plaintiff lost his eyesight when the side window of his automobile shattered and small, dull particles of glass became lodged in his eye. The side window of the car involved in the collision was made of so-called tempered glass, as are virtually all side windows of automobiles. This kind of glass shatters, but unlike plate glass, it shatters into small, dull particles. The trial judge charged the jury pursuant to the consumer contemplation test, and the jury found for plaintiff and awarded damages of one million dollars. The appellate court upheld the verdict, reduced the damage award to five hundred thousand dollars, and concluded that "[t]here is testimony from which the jurors as reasonable persons could have concluded that

---

72. See generally Hubbard, Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products, 29 MERCER L. REV. 465 (1978); Keeton, supra note 44; Rheingold, What Are the Consumer's "Reasonable Expectations?", 22 BUS. LAW. 589 (1967).
73. 248 Or. 467, 435 P.2d 806 (1967) (appellate court affirmed trial court's dismissal of plaintiff's suit on ground that evidence was insufficient to establish defectiveness).
74. Id. at 472, 435 P.2d at 808.
75. Id. at 473-74, 435 P.2d at 809.
General Motors made a decision in designing its 1962 model cars to use tempered glass rather than laminated glass in the door windows of all cars it assembled. The court went on to point out that "[t]he jury could have concluded that as a result of a slight collision the tempered glass shattered and flew about in the car with sufficient force to penetrate Mr. Simmons' eyes."

It is clearly true that the injury would not have been suffered had laminated glass been used. The jury apparently concluded that the tempered glass would be unknown to the ordinary user and therefore more dangerous than would be contemplated. In other words, all plaintiff had to prove was an uncontemplated accident for the jury to find liability.

I called an engineer when I read this case and asked him why a manufacturer would make side windows out of tempered glass instead of laminated glass. He answered simply, "It costs a good deal less." His answer raises a very good question. How much are we willing to pay for safety features in products? The consumer contemplation test fails to take into account such factors as the cost of additional safety features, and the test is inadequate for that reason.

B. The Risk-Utility Test

The second test, and in my opinion the preferred test, for finding a defective design is the risk-utility test, sometimes called the danger versus utility balancing test. The theory underlying this approach is that virtually all products have both risks and benefits. I propose that there is no way to go about evaluating design hazards without weighing these factors. Some form of the risk-utility approach has been adopted in recent years as the sole basis for ascertaining whether or not a product is unreasonably dangerous as designed in at least two states, Pennsylvania and Texas. Under the test a product is defective as designed in some aspect if a reasonable person would conclude that the magnitude of the danger-in-fact, as proved at trial, outweighs the utility of the product. In other words, if a reasonable person would conclude that the danger-in-fact in using the product outweighs the utility, then the product is defective. Please note that the test considers the danger-in-fact, not whether the manufacturer perceived the danger, because the purpose is to evaluate the product itself, not the manufacturer's conduct.

The utility of the design is affected by three important considerations. The first and most important consideration is an evaluation of the needs,
wants, or desires that are served by the product. For example, a drug often satisfies a very important need; therefore, the mere fact that it has some side effects which are harmful does not automatically mean that the danger outweighs the great benefits. I mentioned to a student in class that cigarettes are probably the worst product on the market. I was challenged on that, and rightly so. I had overlooked the fact that many people derive considerable pleasure and satisfaction from smoking. The needs, wants, or desires that a product serves should always be taken into account in evaluating defectiveness. Even breathing has its hazards, but it has not yet been declared defective.

Second, utility of design is affected by the technological and economic feasibility, and practicability, of serving the need with alternative products. For example, consider cosmetics, to which three percent of the population is allergic. If you could devise a cosmetic that would serve the need just as well, to which only one percent of the people would be allergic, then one would be more likely to conclude that cosmetics as presently designed are defective products. The extent to which the needs or wants of society can be satisfied by alternative products which produce less harm is quite relevant.

Third, utility of design is affected by the technological and economic feasibility of serving society's needs with a safer product. The standard meat-cutting machine could be designed with a safety device that would make it virtually impossible for a person's hand to get caught in the cutting mechanism. The device might, however, impair the usefulness and serviceability of the machine. This is certainly an important consideration in evaluating product utility. In my opinion, eighty percent of the design cases ought to be litigated on the question of whether or not it would have been feasible, technologically and economically, to do a better job in designing the product.

In essence, the risk-utility test directs the attention of attorneys, trial judges, and juries to the necessity of weighing the danger-in-fact of a particular feature of a product against its utility. The only way to ascertain whether or not a design is good or bad is to inquire about the danger inherent in it and the justification for this danger.

---

83. Ross v. Up-Right, Inc., 402 F.2d 943, 946 (5th Cir. 1968).
84. See Keeton, supra note 44, at 38.
87. See generally Keeton, supra note 1; Keeton, supra note 44.
IV. "State of the Art"

As can be seen by a review of the cases, the risk-utility test is not always the test used to determine liability.\textsuperscript{88} In fact, it is often difficult to tell whether or not any particular test is used at all.\textsuperscript{89} It, therefore, seems worthwhile to digress from my discussion on defining defectiveness and address a problem which is presently hindering litigation in the area of products liability. The problem centers around the use of the term "state of the art."

"State of the art" is a term used very frequently in products liability litigation.\textsuperscript{90} The problem is that the term is used to mean different things at different times; the resulting confusion is not surprising. It has been urged, both in the courtroom and in legislative halls, that if a machine, drug, or any other product has been designed in conformity with the "state of the art" at the time possession was surrendered by the manufacturer, then either (1) the product should not be regarded as defective,\textsuperscript{91} or (2) if the product is found to be defective, then the manufacturer should be excused from strict liability on the ground that he conformed to the "state of the art" as best he could.\textsuperscript{92} The validity of this argument depends on how the term "state of the art" is used. I have perceived at least three different usages of the term.

"State of the art" has often been used to refer to the customary practices employed in designing a product. In \textit{Gonzales v. Caterpillar Tractor Co.},\textsuperscript{93} for example, a Caterpillar tractor was designed with a step to assist the employee in getting up into the rider's seat. The problem with the step was that it became muddy when the tractor was used in wet weather. The step was the only way the user had of getting on and off the tractor. In this case, the plaintiff fell when getting off the tractor, and seriously injured his back. At trial, the defense presented evidence that this tractor was designed exactly like all other tractors. There was also evidence in the record presented by plaintiff's safety expert, who testified that for about the same cost and without impairment of the use of the tractor, a retractable step could have been designed to eliminate this hazard. The trial court held, correctly in my opinion, that custom does not control as regards the issue of negligence, and the manufacturer was found liable. Business or industrial custom should not control the determination as to whether a product has been properly designed. A defendant's conformance with the "state of the art," when the term is used in the sense of business or industrial custom, should not absolve him from liability for a defective product.

\textsuperscript{88} Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 493 (1972), discussed in Keeton, \textit{supra} note 44, at 30-32.
\textsuperscript{89} See generally Keeton, \textit{supra} note 44; Traynor, \textit{supra} note 54.
\textsuperscript{90} See Keeton, \textit{supra} note 26, at 677-78.
\textsuperscript{91} See generally Keeton, \textit{supra} note 26.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} 571 S.W.2d 867 (Tex. 1978).
“State of the art” is also frequently used to mean that which is feasible in light of the technology which existed at the time the product was designed. This is the definition that I use. This definition requires consideration of what was reasonably capable of being done technologically and economically to reduce the risk of hazard. While a defendant’s compliance with what was technologically and economically feasible does not necessarily mean that his product is not defective, a product’s design should normally be measured in terms of whether or not it was feasible to do a better job in the light of the technology that was available at the time. In other words, while not conclusive, this is a relevant factor.

“State of the art” is also sometimes used to refer to the technological capability of an industry to discover a risk or hazard in a product. In my view, however, it does not necessarily make any difference whether a hazard is discovered or not. The fact that a manufacturer may be incapable of discovering a risk is irrelevant. We judge the effectiveness of a product on the basis of the danger-in-fact, whether realized or not. For example, there was a vaccine that was put on the market some years ago called quadrigen; it was a four-in-one vaccine, for whooping cough, diptheria, tetanus, and polio. Prior to the time this vaccine was composed, there was a three-in-one vaccine for whooping cough, diptheria, and tetanus. It was then decided to add polio to the list of diseases which one vaccine would protect against. The new vaccination gave some children a high fever, and even caused mental retardation in some. Assume that there was room for the jury to believe that it was scientifically unknowable that this would happen. In my opinion, that would not matter because it was such a dangerous product. The harm done just to a few people outweighed all the benefits because the only benefit was that the vaccine could be given once, instead of on two different occasions.

V. Conclusion

Weighing benefit against harm is not peculiar to products liability law. If you have a dangerous railroad crossing, you measure benefits against danger in making a decision as to whether or not there should be

---

94. For a state products liability statute which bears resemblance to Professor Keeton’s preferred use of the term “state of the art,” consider the following language from Neb. Rev. Stat. § 25-21,182 (1979):

In any product liability action based upon negligent or defective design, testing, or labeling, proof establishing that such design, testing, or labeling was in conformity with the generally recognized and prevailing state of the art in the industry at the time the specific product involved in the action was first sold to any person not engaged in the business of selling such product shall be a defense. State of the art as used in this section shall be defined as the best technology reasonably available at the time.

95. See generally Keeton, supra note 44.


97. See Keeton, supra note 71, at 148.
an overpass. It costs a great deal of money to have an overpass. How many people will be killed before the decision is made to build? It is a difficult problem. As far as products liability law is concerned, we should be talking about what the danger-in-fact really was, and not what was perceived to be the danger under the "state of the art."

While many factors are relevant in determining whether a product is defectively designed, the focus must be on two points: the risk inherent in the product and the utility of the product. By weighing these factors, attorneys, judges, and juries can reach fair and reasonable conclusions in products liability cases.