

A Note on Design Defect Liability in the US

Under the Restatement 2d of Torts, as amended in the 1960s and then developed in series of court decisions during the next decades, the majority rule for design defects became the ‘consumer expectations test’ which makes the seller of a product liable if the product is in a defective condition unreasonably dangerous to the consumer.¹ The trier of fact can infer the existence of a design defect if the product fails to meet reasonable expectations of consumers. Thus, even where there is no evidence, direct or circumstantial, available to prove exactly what sort of manufacturing flaw existed, a plaintiff may establish her right to recover by proving that the product did not perform in keeping with the reasonable expectations of the user; for this reason and others, the consumer expectations test engenders critique.

A product falls beneath consumer expectations when the product fails under conditions concerning which an average consumer of that product could have fairly definite expectations, which makes it in effect a strict liability rule once that line is crossed. Importantly, however, the consumer expectations test does not apply where technical and mechanical defects are alleged which require understanding of precise behaviors of obscure components of products under complex circumstances of a particular accident.² Exactly when AIs move from machines with technical and obscure parts to devices as commonplace as cars, microwaves, or refrigerators, is an evolving and as yet largely unexplored question. Roombas are ubiquitous and surely fall into the ordinary consumer product category, as do perhaps hobby drones and robotic pets—but would the control software for a fully self-driving car, as opposed to a Tesla with Level 3 driver assistance? Or is the answer that Tesla might be estopped from arguing a lack of consumer expectations due to advertising the excellence of the software?

For many years, critics of the ‘consumer expectation’ test objected that plaintiffs could prevail without showing flaws in the design, and had no obligation to present a reasonable alternative design. Instead, if the defense wants to argue there was no better practical design, it bears the burden of production on this issue once the plaintiff has made a *prima facie* case on what consumers would expect. In response, the more recent Restatement 3d of Torts: Product Liability § 2 takes a very different view of how design defect claims and defenses should work. It abolishes the “consumer expectation” test and replaces it with a “risk utility” test. Under this test, to prevail the plaintiff must show that the risk of the design exceeded its value; commonly the only way to do this is to proffer a safer alternate design that is not (substantially) more expensive to produce and which would not have caused, or greatly reduced the chance of, the harm.

Since the defendant has all the information about how the AI was designed and made, it will be hard for most plaintiffs to meet this burden. In most cases it will require expensive experts, which makes it much harder to bring cases, and may require juries to hear very technical evidence. Critics of the 3d Restatement, including a substantial number of state supreme courts that have decided not to adopt this provision of the Restatement 3d, agree that it moves the liability standard away from strict liability by focusing on the foreseeability of the risk of harm, including

¹ Section § 402A states that anyone “who sells any product in a defective condition unreasonably dangerous to the user or consumer” is strictly liable for the damages. *Id.* Comment *i* defined “unreasonably dangerous” as being dangerous “beyond that which would be contemplated by the ordinary consumer who purchases it. *Id.* at cmt. *i*, The modern test is sometimes traced to a deeply influential article, John Wade, *On the Nature of Strict Tort Liability for Products*, 44 *MISS. L.J.* 825, 837-38 (1973) (sixth factor of multi-factor test).

² See *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 305 (Cal. 1994).

a cost-benefit analysis. “Rather than focusing on the design of the product, it focuses on the conduct of the manufacturer” (see generally Owen & Davis, 2020, at §§ 5.6, 5.7).³

Thus, at present, liability in the U.S. for many AI-caused injuries presents up to three levels of ambiguity: 1) whether the AI presents as a product or service; 2) whether the type of AI or the relevant part of it is an ordinary consumer product about which consumers have grounded expectations; 3) whether the state whose law applies uses Restatement 2d strict liability for design defects or Restatement 3d more negligence-like principles.

³ See *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 506 (Fla. 2015).