

# DIVIDED BY DESIGN: RECONCILING THE AEMLD'S "MIXED" DESIGN-DEFECT APPROACH

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## I. INTRODUCTION

As products liability law developed, determining how and why a dangerous condition in a product's design should, or should not, be characterized as "defective" was the most "baffling problem."<sup>1</sup> This problem occurred mostly because the Restatement (Second) of Torts' blanket strict liability standard proved unfit to handle complex product designs.<sup>2</sup> Accordingly, determining the proper design-defect test has been termed the "central issue in products liability law for the last four decades."<sup>3</sup>

Anyone who attended law school in the past fifty years can recall memories from first-year torts class and the concept of strict liability.<sup>4</sup> In a classic example, a manufacturer is held strictly liable in tort where a consumer product explodes, causing injury. This example describes a manufacturing defect because the product failed to meet its intended design when the product

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<sup>1</sup> David G. Owen, *Design Defects*, 73 MO. L. REV. 291, 296 (2008).

<sup>2</sup> James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1515–16 (1992).

<sup>3</sup> Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1709 (2003); see also Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK. L. REV. 807, 832 (2009) (explaining "the difficulties of a consumer expectations test for designs . . . have been well documented").

<sup>4</sup> See generally DAVID G. OWEN & MARY J. DAVIS, 1 OWEN & DAVIS ON PRODUCTS LIABILITY § 5:13 (4th ed. 2016) ("'Strict' liability may tend to connote responsibility that is absolute, liability for which there is no excuse . . . [i]n truth, however, tort law provides no home for a ground of liability so extreme as to be truly 'absolute.'"); Kysar, *supra* note 3, at 1708 ("At no point, however, did the expansion in liability reach its logical extreme of absolute manufacturer liability for all physical harms caused by consumer products.").

unexpectedly malfunctioned and exploded.<sup>5</sup> In this instance, the consumer-expectations standard will ordinarily hold the manufacturer liable because consumers have a rational assumption that their products will not explode.<sup>6</sup> Thus, the consumer-expectations standard is sufficient to impose strict liability when recognizable (sometimes indisputable) manufacturing defects in the production process cause serious or fatal injuries.<sup>7</sup> The Restatement (Second)'s drafters' primary intent related to these manufacturing defects.<sup>8</sup>

Design-defect claims arise when a product conforms to the manufacturer's intended design, but a plaintiff challenges the manufacturer's entire product line.<sup>9</sup> For instance, a plaintiff fatally injured in a rollover accident who challenges Ford Motor Company may allege that every Bronco model on the market is defectively designed because such models are prone to rollovers.<sup>10</sup> The focus shifts to the manufacturer's conduct, including: compliance with federal regulations; design engineering choices to install certain components; the manufacturer's knowledge as to the dangerous condition; whether an alternative design was available on the market; whether that alternative design was cost effective; and several other "wide-ranging inquir[ies]" into the design process.<sup>11</sup> Whether the consumer-expectations standard is adequate to assess complex design considerations, such as a mechanical engineer's professional judgment in designing a product, is a seminal issue in American products liability law. Some legal commentators compare the issue to "product liability's

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<sup>5</sup> Kysar, *supra* note 3, at 1709.

<sup>6</sup> *See id.*

<sup>7</sup> Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1235 (1993) ("It is in the context of manufacturing flaws that the intended focus of strict liability on the product, as opposed to the conduct of the manufacturer, makes the most sense.").

<sup>8</sup> *See id.*

<sup>9</sup> Kysar, *supra* note 3, at 1709.

<sup>10</sup> *See* *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 733 (N.Y. 1995). *Denny* is a well-known design-defect case in which the jury found the Ford Bronco was not a defective design because its off-road capabilities outweighed the risk of rollovers. *See id.* However, the jury found Ford breached an implied warranty because the Bronco's propensity for rollovers meant it was not fit for its ordinary purpose of operating on conventional paved roads. *Id.*

<sup>11</sup> Kysar, *supra* note 3, at 1709.

version of the rule against perpetuities,” describing consumer expectations as “a doctrine nearly universally reviled but stubbornly and inexplicably persistent.”<sup>12</sup> Alabama is a jurisdiction that retains the “persistent” consumer-expectations doctrine for design defectiveness. However, Alabama’s unique approach operates as the very risk-utility analysis it purportedly rejects.<sup>13</sup>

Across the country, federal and state courts apply and interpret Alabama’s products liability law, particularly the Alabama Extended Manufacturer’s Liability Doctrine (“AEMLD”).<sup>14</sup> Considering the current developments in mass torts, multidistrict litigation, and court system technology, federal district courts increasingly apply the AEMLD to Alabama residents’ claims.<sup>15</sup> In order to ensure consistent and uniform results, Alabama products liability law requires clarification. Specifically, Alabama lacks a clearly defined design-defect approach. Alabama should adopt the Restatement (Third) of Torts’ design-defect standard because it aligns with the AEMLD’s fundamental fault-based approach.

In Part II., this Note details Alabama’s judicially created products liability law, which created a unique construction by resisting the Restatement (Second) of Torts § 402A’s “strict”

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<sup>12</sup> *Id.* at 1701.

<sup>13</sup> *See id.* at 1704.

<sup>14</sup> *See, e.g.,* Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183, 1194 (11th Cir. 2004) (discussing the AEMLD in detail); Fenton v. Sterling Plumbing Grp., Inc., 21 F.3d 1113 (9th Cir. 1994) (interpreting the AEMLD’s liability standards and affirming trial judgment); Brownlee v. Louisville Varnish Co., 641 F.2d 397, 400 (5th Cir. 1981) (interpreting the AEMLD and reversing summary judgment for design and manufacturing defect claims); *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 981 (N.D. Cal. 2014) (addressing plaintiffs’ “comparable tort claim under the Alabama Extended Manufacturer’s Liability Doctrine”); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 139 (S.D.N.Y. 2001) (addressing Alabama products liability actions under the AEMLD in multidistrict litigation); *Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712, 722 (Tex. App. 1997) (Texas state appellate court recognizing, “Alabama law also provides a special version of product liability law known as the Alabama Extended Manufacturer’s Liability Doctrine”).

<sup>15</sup> Without delving into choice of law principles or multidistrict litigation (“MDL”) procedures, MDL courts often apply the substantive law of the plaintiff’s home state. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 906 (E.D. La. 2007) (resolving choice of law issues for multiple plaintiffs, including two Alabama residents).

component of strict products liability. Part III. discusses the two design-defect standards—consumer-expectations and risk-utility—and their independent characteristics. Next, Part IV. explores the evolution of design-defect liability and a national trend mixing the two design-defect standards into one ill-defined test. This Note argues the consumer-expectations and risk-utility standards differ fundamentally and were never intended to be merged into one design-defect standard. Finally, Part V. discusses Alabama's mixed design-defect approach and contends its consumer-expectations component is inconsistent with Alabama's founding products liability doctrine: the AEMLD.

## II. ADOPTION OF THE ALABAMA EXTENDED MANUFACTURER'S LIABILITY DOCTRINE

In the early 1900s, consumers were unable to seek redress for product-related injuries in tort.<sup>16</sup> In 1916, Judge Benjamin N. Cardozo's "landmark opinion"<sup>17</sup> eliminated manufacturer immunity by removing the common law's "privity rule," which prevented consumers from holding manufacturers liable due to a lack of a "direct contractual relationship."<sup>18</sup> In *Henningsen v. Bloomfield Motors, Inc.*, another key historical decision, the New Jersey high court eliminated the privity requirement for implied warranty of merchantability claims against manufacturers.<sup>19</sup> Justice Traynor's decision, in *Greenman v. Yuba Power Products, Inc.*,<sup>20</sup> created the final push for strict liability, prompting the

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<sup>16</sup> See *Wright v. Winterbottom*, 152 Eng. Rep. 402 (1842); see also Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1738-39 (1982) ("The privity rule of *Winterbottom v. Wright* . . . noted that it was necessary in order to prevent the 'infinity of actions' that might follow in its absence.").

<sup>17</sup> *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. Ct. App. 1916); see also William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960) (recognizing the *MacPherson* "decision swept the country").

<sup>18</sup> *Kysar*, *supra* note 3, at 1709.

<sup>19</sup> 161 A.2d 69 (N.J. 1960); see *Home Warranty Corp. v. Caldwell*, 777 F.2d 1455, 1460 (11th Cir. 1985) (explaining "there was a movement in the law to expand warranty liability . . . for other products without the necessity of privity or even negligence").

<sup>20</sup> 377 P.2d 897, 901 (Cal. 1963).

American Law Institute to construct the Restatement (Second) of Torts.<sup>21</sup>

In 1965, the American Law Institute released § 402A of the Restatement (Second) of Torts.<sup>22</sup> “No single doctrinal common law principle was ever adopted so widely and quickly in the United States as strict products liability.”<sup>23</sup> “This undoubtedly reflected the consumer age, the high level of accidents involving consumer products, and the considerable inadequacies of warranty law.”<sup>24</sup> Uniquely, “section 402A was not a ‘restatement’ of existing law. Rather, it reflected dissatisfaction with the existing state of the law that posed so many obstacles to establishing liability for dangerous products.”<sup>25</sup> The Restatement (Second) of Torts § 402A was assembled as a “progressive reform.”<sup>26</sup>

Eleven years later, in 1976, the Alabama Supreme Court judicially created the AEMLD in both *Casrell v. Altec Industries, Inc.*, and *Atkins v. American Motors Corp.*<sup>27</sup> Although Alabama recognized § 402A’s “strict liability in tort ha[d] been accepted and applied in more than thirty states,” the Alabama high court elected to take an independent approach.<sup>28</sup> Instead of adopting the Restatement (Second)’s strict product liability theory, Alabama adopted the AEMLD.<sup>29</sup> The AEMLD created a hybrid theory of strict liability.<sup>30</sup> While aligning closely the theories in the Restatement (Second) of Torts §§ 398 and 402A, the AEMLD is not a strict liability theory based upon social or economic

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<sup>21</sup> Kysar, *supra* note 3, at 1711.

<sup>22</sup> Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 713–14 (1970) (citing RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965)).

<sup>23</sup> Dominick Vetri, *Order Out of Chaos: Products Liability Design-Defect Law*, 43 U. RICH. L. REV. 1373, 1374 (2009).

<sup>24</sup> *Id.*

<sup>25</sup> Green, *supra* note 3, at 812.

<sup>26</sup> *Id.*

<sup>27</sup> 335 So. 2d 128 (Ala. 1976); 335 So. 2d 134 (Ala. 1976).

<sup>28</sup> *Atkins*, 335 So. 2d at 138.

<sup>29</sup> See *Casrell*, 335 So. 2d at 132 (First referred to as the “extended manufacturer’s liability doctrine.”)

<sup>30</sup> See *Bodie v. Purdue Pharma Co.*, 236 Fed. Appx. 511, 517 n.9 (11th Cir. 2007) (Alabama “does not adhere to a system of strict product liability, but instead follows a modified version of strict liability known as the Alabama Extended Manufacturer’s Liability Doctrine (‘AEMLD’).”).

justification.<sup>31</sup> The primary difference between the AEMLD and the Restatement (Second) is the AEMLD does not impose a no-fault or strict liability concept; instead, it adheres to the tort concept of fault.<sup>32</sup> The Supreme Court of Alabama retained the concept of fault in that “[t]he fault of the manufacturer, or retailer, is that he has conducted himself unreasonably in placing a product on the market which will cause harm when used according to its intended purpose.”<sup>33</sup> The gravamen of the action is the manufacturer’s fault in placing the product on the market when the product was unreasonably unsafe or in a dangerous condition when put to its intended use.<sup>34</sup>

Following *Casrell* and *Atkins*, in 1981, the Alabama Supreme Court further articulated the AEMLD in *Sears, Roebuck & Co. v. Haven Hills Farm, Inc.*<sup>35</sup> In *Haven Hills Farm*, a delivery truck driver was traveling from Mississippi back to Mobile, Alabama when his truck’s left tire blew out and caused the truck to roll.<sup>36</sup> The truck driver’s company brought suit under the AEMLD, alleging Sears sold the tire in a defective and unreasonably dangerous condition.<sup>37</sup> The jury returned a verdict for the company.<sup>38</sup> On appeal, the Alabama Supreme Court reversed because the truck driver’s company failed to meet its burden of proving a defect.<sup>39</sup> The court emphasized that, under the AEMLD, it was not enough to show the product failed to perform when applied to its intended use; the product must also have been sold in

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<sup>31</sup> See *Atkins*, 335 So. 2d at 137; see also RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

<sup>32</sup> J. Greg Allen et al., *The Limited Scope of Contributory Negligence in AEMLD-Crashworthiness Cases*, 73 ALA. LAW. 436, 438 (2012); see also *Batchelor v. Pfizer, Inc.*, No. 2:12-CV-908-WKW, 2013 WL 3873242, at \*2 (M.D. Ala. July 25, 2013) (“Alabama has not adopted a no-fault concept of products liability and has instead retained a fault-based system known as the [AEMLD].”).

<sup>33</sup> *Atkins*, 335 So. 2d at 140.

<sup>34</sup> See, e.g., *Clayton v. LLB Timber Co.*, 70 So. 3d 283, 287–88 (Ala. 2011) (a plaintiff must prove existence of failure or defect; a plaintiff cannot rely solely on fact that accident occurred).

<sup>35</sup> 395 So. 2d 991 (Ala. 1981).

<sup>36</sup> *Id.* at 993.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

a defective condition.<sup>40</sup> In short, Alabama rejected the doctrine of *res ipsa loquitur* and placed an affirmative obligation on the plaintiff to prove the defect.<sup>41</sup>

Following the AEMLD's creation, a trend emerged in the federal courts to "merge" products liability, negligence, and warranty claims into the AEMLD.<sup>42</sup> However, in 2003, the Alabama Supreme Court expressly overruled the merger doctrine trend.<sup>43</sup> Today, negligence and warranty claims are distinct, not merged, under the AEMLD.<sup>44</sup> Although negligence, wantonness, and breach of warranty claims are integral to a plaintiff's product liability action, this Note is exclusively limited to analyzing design defects.

### III. TWO INDEPENDENT THEORIES OF DESIGN LIABILITY

The Restatement (Second)'s consumer-expectations approach and the Restatement (Third)'s risk-utility analysis were never intended to be merged;<sup>45</sup> the two approaches exist independently because their underlying fundamentals are distinct.<sup>46</sup> The reasonable expectations of the ordinary consumer is a

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<sup>40</sup> *Id.* at 996.

<sup>41</sup> *Haven Hills Farm*, 395 So. 2d at 996 (stating the "mere failure of a product does not presuppose the existence of a defect"); *see e.g.*, *Townsend v. Gen. Motors Corp.*, 642 So. 2d 411, 415 (Ala. 1994) (proof of an accident and injury is not sufficient to establish liability under the AEMLD, as plaintiff must affirmatively prove the defect in the product); *Brooks v. Colonial Chevrolet-Buick, Inc.*, 579 So. 2d 1328, 1333 (Ala. 1991) (holding *res ipsa loquitur* is not applicable in products liability cases in Alabama); *Osmer v. Belshe Indus., Inc.*, 585 So. 2d 791, 794 (Ala. 1991) ("The fact that [the plaintiff] was killed does not by itself establish the presence of a defect.").

<sup>42</sup> *See, e.g.*, *Grimes v. Gen. Motors Corp.*, 205 F. Supp. 2d 1292, 1295 (M.D. Ala. 2002); *see also* *Wakeland v. Brown & Williamson Tobacco Corp.*, 996 F. Supp. 1213, 1218 (S.D. Ala. 1998).

<sup>43</sup> *See* *Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101; *see also* *Tillman v. R.J. Reynolds Tobacco Co.*, 871 So. 2d 28, 34 (Ala. 2003).

<sup>44</sup> *Nicholson v. Pickett*, No. 1:13-CV-322-WKW, 2016 WL 854370, at \*17 (M.D. Ala. Mar. 4, 2016) ("Under Alabama law, Plaintiffs' negligence and wantonness claims are distinct from their AEMLD claim."); *see* *Vesta Fire Ins. Corp. v. Milam & Co. Constr., Inc.*, 901 So. 2d 84, 102 (Ala. 2004) (rejecting the premise that the AEMLD subsumes common-law tort actions of negligence and wantonness).

<sup>45</sup> *See infra* Part IV.

<sup>46</sup> *See* *Owen*, *supra* note 1, at 336.

contract-law concept, specifically a warranty-law concept.<sup>47</sup> Risk-utility is a negligence standard sounding in tort.<sup>48</sup> Dean William L. Prosser, one of § 402A's drafters, explained it was "clear that the standard for both design and failure-to-warn defects sounds in classic negligence."<sup>49</sup> Other products-liability scholars suggest "Section 402A was not written with design defects in mind."<sup>50</sup> According to Professor George Priest, the "founders" of strict products liability did not contemplate liability for design defects in their proposals.<sup>51</sup> However, other prominent scholars suggest the drafters contemplated design defectiveness, particularly in § 402A's comment i., but it was certainly not their primary concern.<sup>52</sup>

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<sup>47</sup> See *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 736 (N.Y. 1995) (explaining warranty law "directs its attention to the purchaser's disappointed expectations"); see also *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 503 (Fla. 2015) (a consumer-expectations test "intrinsically recognizes that a manufacturer plays a central role in establishing the consumers' expectations for a particular product, which in turn motivates consumers to purchase the product"); *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 768 N.W. 2d 674, 680 (Wis. 2009) ("[P]roducts liability jurisprudence was firmly rooted in contract law."); John H. Chun, *The New Citadel: A Reasonably Designed Products Liability Restatement*, 79 CORNELL L. REV. 1654, 1674 (1994) ("[P]rotecting justified expectations is a fundamental policy of contract law."); Davis, *supra* note 7, at 1234 ("[Consumers' expectations] connotes, in part, a contract-based, warranty concept--consumers purchase goods expecting that they will at least be as the manufacturer intended them to be.").

<sup>48</sup> See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (referring to the most celebrated formulation of the risk-benefit test, also known as the "Hand Formula"); *Denny*, 662 N.E.2d at 738 (explaining that the "negligence-like risk/utility approach is foreign to the realm of contract law").

<sup>49</sup> James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 879 (1998) (citing WILLIAM L. PROSSER, *THE LAW OF TORTS* 644-47 (4th ed. 1971)).

<sup>50</sup> Davis, *supra* note 7, at 1233; see also James A. Henderson, Jr. & Aaron D. Twerski, *Arriving at Reasonable Alternative Design: The Reporters' Travelogue*, 30 U. MICH. J.L. REFORM 563, 572 (1997) ("The simple explanation for the drafters' reliance on a consumer-expectations test in section 402A comments g and i is that the drafters were not addressing design defect litigation.").

<sup>51</sup> George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2303 (1989).

<sup>52</sup> See Henderson & Twerski, *Achieving Consensus*, *supra* note 49, at 880; see also Kenneth S. Abraham, *Prosser's the Fall of the Citadel*, 100 MINN. L. REV. 1823, 1843-44 (2016) ("[Dean Prosser] was not focused on the difference between manufacturing and design defects, and he may well have had the paradigm of the 'shoddy' product in mind when he thought about the meaning of defectiveness.").



### A. The Consumer-Expectations Theory

The consumer-expectations doctrine, derived from the comments of Restatement (Second) of Torts § 402A, states that manufacturers are liable for product-induced harm whenever the product is considered “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”<sup>53</sup> In the Restatement (Second), the drafters defined “defective condition” as one “not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.”<sup>54</sup> Similarly, the drafters defined “unreasonably dangerous” to mean the product “must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”<sup>55</sup>

In the design-defect context, opponents of the consumer-expectations test focus on three main concerns: (1) vagueness, (2) obviously dangerous products, and (3) a reasonable consumer’s ability to ascertain defects in complex product designs. First, vagueness becomes increasingly problematic in jury instructions because the term “consumer expectations” “connotes a contract-based liability, encouraging the jury to rely intuitively on principles of bargaining and warranty.”<sup>56</sup> Second, if the product contains an “apparent or obvious” defect, a “consumer’s expectations arguably include the apparent danger, preventing liability.”<sup>57</sup> Consequently, no liability indirectly “discourag[es] product improvements which could easily and cost-effectively alleviate the danger.”<sup>58</sup>

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<sup>53</sup> Kysar, *supra* note 3, at 1701 n.1 (quoting *Giglio v. Conn. Light & Power Co.*, 429 A.2d 486, 488 (Conn. 1980)).

<sup>54</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. g. (AM. LAW INST. 1965).

<sup>55</sup> *Id.* at cmt. i.

<sup>56</sup> Davis, *supra* note 7, at 1236; *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Drug Designs Are Different*, 111 YALE L.J. 151, 178 (2001) (describing the consumer-expectations test as “a vacuous, ersatz test that allows triers of fact to decide [product] design claims on nothing more than a fact-finder’s whim”).

<sup>57</sup> Davis, *supra* note 7, at 1236.

<sup>58</sup> *Id.*

Third, and the most important criticism, is that determining consumers' reasonable expectations concerning complex product designs is problematic.<sup>59</sup> Specifically, "[t]he most troublesome situations are those in which consumer attitudes have not sufficiently crystallized to define an expected standard of performance. What, for instance, should the law do about tractors that overturn, surgical implants that break, and rear-engined automobiles that tend to swerve at high speeds?"<sup>60</sup> Defining an ordinary consumer's expectations of technical design characteristics within a product has been deemed an impossible task.<sup>61</sup>

For example, what do consumers expect of the structural soundness of one type of metal as opposed to another with slightly different characteristics that, if used, would require changes in still other aspects of the design? If the ordinary consumer can be said reasonably to expect a product to be "strong," how strong is strong? Is a general impression of strength or quality sufficient when it comes to technical design features? If so, how is that impression measurable against the actual condition of the design feature in question?<sup>62</sup>

Professor Mary Davis<sup>63</sup> explains that "[t]hese difficult questions led many courts to reject the consumer expectations test as the sole test for defective design."<sup>64</sup> Although several states,

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<sup>59</sup> See John E. Montgomery & David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 823 (1976) ("[A]n attempt to determine the consumer's reasonable expectations of safety concerning a technologically complex product may well be an exercise in futility.").

<sup>60</sup> Reed Dickerson, *Products Liability: How Good Does a Product Have To Be?*, 42 IND. L.J. 301, 307 (1967).

<sup>61</sup> Davis, *supra* note 7, at 1237.

<sup>62</sup> *Id.*

<sup>63</sup> Mary J. Davis is an influential products liability scholar, member of the American Law Institute, and Professor at the University of Kentucky College Of Law.

<sup>64</sup> Davis, *supra* note 7, at 1237.

which followed the Restatement (Second) of Torts § 402A, held that “strict liability applied with equal force to all types of product defects, it soon became evident that the rule . . . could not, without considerable difficulty, be applied to design and warning defect cases.”<sup>65</sup> Modernly, courts’ consumer-expectations tests essentially operate as confounding constructions of the “very risk-utility framework that the courts claim to reject.”<sup>66</sup>

## B. The Risk-Utility Theory

In the 1970s, courts and legal commentators searched for a workable method to evaluate a product’s design under the Restatement (Second)’s strict liability formula.<sup>67</sup> “The search resulted in a variety of tests described as ‘strict’ liability that look suspiciously like negligence.”<sup>68</sup> Seeking uniformity, in the mid-1990s, the American Law Institute “labored to erase ‘strict liability’ from thinking on design defect.”<sup>69</sup> In 1998, the Restatement (Third) of Torts adopted the risk-utility test, declaring a design is deemed defective where the foreseeable risks of the product, as designed, “could have been reduced by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.”<sup>70</sup> Instead of using “doctrinal labels of ‘strict’ liability and ‘negligence,’” the Restatement (Third) provides “separate ‘functional’ definitions of liability for each of the three forms of defect, including defects in design.”<sup>71</sup>

Under this approach, “a plaintiff must show that the utility of the product with a feasible safer alternative design . . .

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<sup>65</sup> Henderson & Twerski, *A Proposed Revision*, *supra* note 2, at 1515.

<sup>66</sup> Kysar, *supra* note 3, at 1704.

<sup>67</sup> Davis, *supra* note 7, at 1238.

<sup>68</sup> *Id.*

<sup>69</sup> See Chun, *supra* note 47, at 1681.

<sup>70</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (AM. LAW INST. 1998).

<sup>71</sup> OWEN & DAVIS, *supra* note 4, § 8:19 (4th ed. 2016).

outweighs the utility of the product as actually designed.”<sup>72</sup> Dean John Wade was first to propose seven underlying factors to be considered under the risk-utility analysis.<sup>73</sup> These factors included the following: (1) the usefulness and desirability of the product; (2) the safety aspects of the product—the likelihood that it will cause injury and the probable seriousness of the injury; (3) the availability of an alternative product that would meet the same need and not be as unsafe; (4) the manufacturer’s ability to eliminate the unsafe nature of a product without impairing its usefulness or making it too expensive to maintain its utility; (5) the user’s ability to avoid danger by the exercise of care in the use of the product; (6) the user’s anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the product’s obvious condition or of the existence of suitable warnings or instruction; and (7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the product’s price or carrying liability insurance.<sup>74</sup> In response, appellate courts promptly utilized Dean Wade’s factors for defective design.<sup>75</sup> Today, many courts consider these “now-famous seven factors” in evaluating design-defect claims.<sup>76</sup>

Although these seven factors seem vague, the analysis boils down to the costs and benefits of the specific alternative design.<sup>77</sup> It is important to note that many consider monetary economics when referring to “cost benefit”; however, “[t]he risk-utility balance in tort law has never been a mere economic summing up of the dollars and cents on each side of the equation. Rather, it is a

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<sup>72</sup> Richard C. Ausness, *Product Liability’s Parallel Universe: Fault-Based Liability Theories and Modern Products Liability Law*, 74 BROOK. L. REV. 635, 656 (2009).

<sup>73</sup> See John W. Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L.J. 825, 829 (1973).

<sup>74</sup> *Id.* at 837–38; see also R. Ben Hogan, III, *Risk/Utility or Consumer Expectation: What Should be Alabama’s Analysis for Product Liability Design Cases?*, 56 ALA. LAW. 166, 167 (1995).

<sup>75</sup> See, e.g., *Roach v. Kononen*, 525 P.2d 125, 129 (Or. 1974) (“We agree that these factors should be considered by a court before submitting a design defect case to the jury. Also, proof of these factors bears on the jury’s determination of whether or not a given design is defective.”).

<sup>76</sup> Davis, *supra* note 7, at 1238; see also OWEN & DAVIS, *supra* note 4, § 5:19.

<sup>77</sup> OWEN & DAVIS, *supra* note 4, § 8:11.

device that helps decision makers determine if the safety costs are generally worth the preventable harm.”<sup>78</sup> Under this analysis, “[t]he relevant *benefits* of a proposed alternative design are limited to the aggregate safety benefits to people suffering injury and property damage in accidents of a similar type to that which harmed the plaintiff.”<sup>79</sup> On the other side, “the *costs* of an alternative design . . . may include: (1) the monetary costs of adopting the alternative design for all such products; (2) any loss of usefulness in the product that the design alteration may cause; and (3) any new dangers that the design feature may introduce.”<sup>80</sup>

As American products liability law has continued to develop, the risk-utility test has become the majority test for design defectiveness.<sup>81</sup> Alabama was not the first state court to confusingly combine the two design-defect standards.<sup>82</sup> Several states have compounded different design-defect tests, which some commentators suggest “give the appearance of chaos in American products liability law.”<sup>83</sup> “The few jurisdictions that remain in the

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<sup>78</sup> Vetri, *supra* note 23, at 1393.

<sup>79</sup> OWEN & DAVIS, *supra* note 4, § 8:11.

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 14 (S.C. 2010) (“Some form of a risk-utility test is employed by an overwhelming majority of the jurisdictions in this country.”); *Bass v. Air Prods. & Chems., Inc.*, No. ESX-L-694-99, 2006 WL 1419375, at \*11 (N.J. Super. Ct. App. Div. 2006) (“A standard of evaluation that has gained prominence in common law design defect claims is based on a comparison of the utility of the product with the risk of injury that it poses.”); *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 170 (Iowa 2002) (adopting RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b)); *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 386 (Tex. 1998) (“The basic error in the instruction given by the trial court is that it is at odds with the risk versus utility analysis that lies at the core of products liability design defect law.”); *Warner Fruehauf Trailer Co., Inc. v. Boston*, 654 A.2d 1272, 1276 (D.C. 1995) (“In design defect cases, most jurisdictions decide [strict liability in tort] by applying some form of a risk-utility balancing test.”); *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671 (Ga. 1994) (There is “a general consensus regarding the utilization in design defect cases of a balancing test whereby the risks inherent in a product design are weighed against the utility or benefit derived from the product.”).

<sup>82</sup> Vetri, *supra* note 23, at 1373 (suggesting the bold proposition that “[p]roducts liability design-defect law appears to be in a state of disorder . . . [as t]he states have failed to develop a strong consensus on a legal test for design defects”).

<sup>83</sup> *Id.*

minority on this issue may be expected to join the majority, given time for reflection.”<sup>84</sup>

#### IV. THE HISTORY OF “MIXING” CONSUMER-EXPECTATIONS AND RISK-UTILITY STANDARDS IN AMERICAN PRODUCTS LIABILITY LAW

Early in the twentieth century, several decades before the Restatement (Second) emerged, courts were reluctant to hear any design-defect cases because of concerns about judicial oversight of a manufacturer’s design choices.<sup>85</sup> At the developmental stages, determining whether a product’s design should be deemed “defective” was the most troublesome issue in products liability law.<sup>86</sup>

In the 1960s and early 1970s, the consumer-expectations test was the most commonly utilized test for design-defect liability.<sup>87</sup> Even during this time, some courts assessed design defectiveness according to whether the safety benefits of fixing a design danger were worth the costs.<sup>88</sup> As more state courts began to apply a cost-benefit standard of liability, design-defect tests ignored the seemingly-inevitable fork in the road. Despite the general view that design defects are examined by one of the two tests, several courts combined the Restatement (Second)’s

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<sup>84</sup> Henderson & Twerski, *Achieving Consensus*, *supra* note 49, at 920.

<sup>85</sup> See Owen, *supra* note 1, at 291 (citing Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 44, 50 (1955)); see also Henderson & Twerski, *A Proposed Revision*, *supra* note 2, at 1515 (“Liability for design and warning defects was a relatively rare phenomenon until the late 1960s and early 1970s.”).

<sup>86</sup> See Owen, *supra* note 1, at 296.

<sup>87</sup> *Id.* at 307–08.

<sup>88</sup> *Id.* at 308–09; see also *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 760 (E.D. Pa. 1971), *aff’d*, 474 F.2d 1339 (3d Cir. 1973) (jury found that \$8,000 machine was defective for not being equipped with \$200–\$500 guard); *McCormack v. Hanksraft Co.*, 154 N.W.2d 488, 497–98 (Minn. 1967) (jury could find that vaporizer top could have been screwed cheaply and without diminishing vaporizer’s usefulness).

consumer expectation test with the Restatement (Third)'s risk-utility standard.<sup>89</sup> Alabama is one of those jurisdictions.<sup>90</sup>

In 1975, Washington was the first jurisdiction to mix the consumer expectation and risk-utility tests in *Seattle-First National Bank v. Tabert*.<sup>91</sup> In *Tabert*, a husband and wife were traveling less than twenty miles per hour when their Volkswagen van's front panel collapsed during a collision and killed both the driver and the passenger.<sup>92</sup> Plaintiffs, on behalf of the husband's and wife's estates, alleged design-defect claims relating to the structural strength of the van's front panel.<sup>93</sup> The court addressed the issue of whether strict liability applied to design-defect claims.<sup>94</sup> After considering other state and federal authorities, the court combined the consumer expectation considerations with a risk and utility analysis inherent in a product's use.<sup>95</sup> In mixing the two tests, the *Tabert* court reasoned that "[t]his evaluation of the product in terms of the reasonable expectations of the ordinary consumer allows the trier of the fact to take into account the intrinsic nature of the product."<sup>96</sup> For the first time in American products liability law, the Washington Supreme Court "expressly folded the consumer-expectations test into risk-utility analysis, stating that the reasonable expectations of ordinary consumers include the cost and feasibility of avoiding the risk."<sup>97</sup> The *Tabert* court effectively "blended" the two design-defect tests "by defining the design defect test in terms of consumer expectations and then

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<sup>89</sup> See Owen, *supra* note 1, at 352 ("tying the risk-utility prong to consumer expectations sows seeds of confusion for future design defect litigation").

<sup>90</sup> See *id.* at 340 n.240.

<sup>91</sup> 542 P.2d 774 (Wash. 1975).

<sup>92</sup> *Id.* at 775.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 775-76.

<sup>95</sup> See *Baughn v. Honda Motor Co.*, 727 P.2d 655, 660 (Wash. 1986) (citing *Tabert*, 542 P.2d at 779).

<sup>96</sup> *Tabert*, 542 P.2d at 779. Interestingly, the court gave an analogy that "[t]he purchaser of a Volkswagen cannot reasonably expect the same degree of safety as would the buyer of the much more expensive Cadillac." *Id.* Today, both regulation and custom require comprehensive vehicle safety measures, including seatbelts and airbag systems. Thus, it is unlikely that a reasonable consumer, evaluating two cars made in the same year, would equate increased price with increased safety components.

<sup>97</sup> Owen, *supra* note 1, at 338.

‘determining’ consumer expectations in terms of the costs and benefits of eliminating or minimizing the danger.’<sup>98</sup> As a result, the Washington Supreme Court effectively muddied the design-defect approach, likely because the court “had not worked through precisely how the two standards relate to one another.”<sup>99</sup>

In 1978, California created a new burden-shifting design-defect standard in *Barker v. Lull Engineering Co.*, allowing recovery under either the risk-utility or consumer-expectations test.<sup>100</sup> California did not necessarily “mix” the two standards but formed another novel approach by utilizing both standards for different forms of proof.<sup>101</sup> The *Barker* court placed the initial burden of proof on the plaintiff to show the product failed to conform to the expectations of the ordinary consumer; however, once the plaintiff proved the product’s design caused the harm, the court shifted the burden to the defendant to affirmatively prove the product was *not* defective under the risk-utility test.<sup>102</sup>

Throughout the 1980s, most courts ignored the newly-created approach of combining the consumer expectation and risk-utility tests. However, in the 1990s, the “mixed” consumer expectation approach found new life.<sup>103</sup> The most famous case to mix the two design-defect standards was the Connecticut Supreme Court’s decision in *Potter v. Chicago Pneumatic Tool Co.*<sup>104</sup> Recently, in 2016, Connecticut reaffirmed its trust in the *Potter* approach, retaining the “modified consumer expectations test” for complex designs and reserving the “ordinary consumer expectation test . . . for cases in which the product failed to meet the ordinary consumer’s *minimum* safety expectations, such as *res ipsa* type cases.”<sup>105</sup>

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<sup>98</sup> *Id.* at 338–39.

<sup>99</sup> *Id.* at 339 (contemplating the *Tabert* court’s rationale to mix the two tests).

<sup>100</sup> *See* 573 P.2d 443 (Cal. 1978).

<sup>101</sup> *See id.*

<sup>102</sup> *Id.* at 455. Interestingly, if courts utilized the *Barker* approach today, it would place the hurdle of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, on the defendant rather than the plaintiff. 509 U.S. 579 (1993).

<sup>103</sup> Owen, *supra* note 1, at 339–40.

<sup>104</sup> 694 A.2d 1319 (Conn. 1997); *see also* Owen, *supra* note 1, at 340–41 (explaining how the *Potter* court adopted the *Tabert* approach, then distinguished between “complex” and “simple” products).

<sup>105</sup> *Izzarelli v. R.J. Reynolds Tobacco Co.*, 136 A.3d 1232, 1244 (Conn. 2016).



Further, in the 1990s, other courts began convincing themselves that the “two independent design defect standards [were] equivalent, merely representing ‘two sides of the same coin.’”<sup>106</sup> Addressing this “two sides of the same coin” analogy, Professor David Owen<sup>107</sup> pointed to the Alabama Supreme Court’s decision in *Flemister v. General Motors Corp.*<sup>108</sup> Professor Owen referred to the Alabama Supreme Court’s 1998 opinion as a “confusing discussion of the relationship between consumer expectations and risk-utility . . . in which consumer expectations appear to be redefined in risk-utility terms, and risk-utility appears to trump consumer expectations.”<sup>109</sup>

The Restatement (Second)’s consumer expectation test and the Restatement (Third)’s risk-utility test were never intended to be “mixed,” because the two tests are fundamentally distinct. Despite a few jurisdictions’ efforts to commingle consumer expectations and risk-utility, these tests have never been equivalent. In fact, they were distinctly created as “rival standards for design defect liability.”<sup>110</sup>

## V. RECONCILING ALABAMA’S “MIXED” ANALYSIS

Products liability jurisprudence in Alabama exists in a confused state because it lacks a clear standard for defective product designs that cause injuries to consumers. Essentially, Alabama was ahead of the national trend to apply fault-based concepts to design and warning cases. Although Alabama effectively applies risk-utility balancing at the proof level, the

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<sup>106</sup> Owen, *supra* note 1, at 339–40 (quoting *Ray v. BIC Corp.*, 925 S.W.2d 527, 530 (Tenn. 1996)); *see also* *Bragg v. Hi-Ranger, Inc.*, 462 S.E.2d 321, 328 (S.C. Ct. App. 1995).

<sup>107</sup> David G. Owen is a well-known products liability scholar; Professor Owen was an adviser to the American Law Institute for the Restatement (Third) of Torts and was the American Law Institute’s Editorial Adviser for the Restatement of Products Liability.

<sup>108</sup> 723 So. 2d 25 (Ala. 1998).

<sup>109</sup> Owen, *supra* note 1, at 340 n.240. Admittedly, this footnote prompted the idea and research for this Note.

<sup>110</sup> *Id.* at 336; *see also* *Green*, *supra* note 3, at 832 (explaining that “the difficulties of a consumer expectations test for designs . . . have been well documented”).

confusion lies in Alabama's reluctance to adopt the risk-utility test for design-defect claims.<sup>111</sup> In 1998, the Alabama Supreme Court applied the risk-utility test without addressing its previous holdings that an ordinary consumer's expectations control design liability.<sup>112</sup> Due to these ambiguous judicial decisions, the proper interaction between the two design-defect standards remains an open question in Alabama. In order to correspond with its original fault-based theory of products liability, Alabama must adopt the fault-based design-defect test known as risk-utility.

### A. Design Defectiveness: The Current Approach

Alabama applies a unique form of the consumer-expectations test in determining whether a product is defectively designed.<sup>113</sup> Generally, "[s]tates which follow the consumer expectation test, other than Alabama, do not require proof of a safer, practical, alternative design in order to establish defectiveness."<sup>114</sup> The Supreme Court of Alabama stated that a plaintiff is required to establish defectiveness "by proving that a safer, practical, alternative design was available to the manufacturer at the time it manufactured the allegedly defective product."<sup>115</sup>

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<sup>111</sup> *Flemister*, 723 So. 2d at 28 (Ala. 1998) (declining to adopt risk-utility but explaining: "[Alabama Pattern Jury Instructions] No. 32.22 ultimately requires, in resolving the issue of an alleged design defect, a balancing of the risk of harm to the consumer against the utility of the product's design. The trial court's charge to the jury fairly and substantially emphasized the risk/utility balancing as the basis for analyzing the alleged design defect.").

<sup>112</sup> *See id.*

<sup>113</sup> *Id.* at 28 (declining to adopt a pure "risk utility" test and retaining Alabama's "present 'mixed' analysis").

<sup>114</sup> Hogan, *supra* note 74, at 171.

<sup>115</sup> *McMahon v. Yamaha Motor Corp., U.S.A.*, 95 So. 3d 769, 772 (Ala. 2012); *see also* *Rudd v. Gen. Motors Corp.*, 127 F. Supp. 2d 1330, 1345 (M.D. Ala. 2001) (While it is necessary to present substantial evidence in support of a defect, a plaintiff "need not have evidence specifically identifying the exact nature of the defect.").

In Alabama, an alternative design is “safer” if it would have potentially eliminated or reduced the plaintiff’s injuries.<sup>116</sup> The alternative design must be of “greater overall safety” than the design the manufacturer used.<sup>117</sup> In *Richards v. Michelin Tire Corp.*, the Eleventh Circuit stated “[t]he fact that an alternative design existed which would have reduced or eliminated [a plaintiff’s] injuries does not mean that the alternative design was of greater overall safety.”<sup>118</sup> Some commentators suggest that “greater overall safety” requires no further explanation,<sup>119</sup> however, confusion still exists as to its exact meaning.<sup>120</sup>

Whether an alternative design is “practical” requires a risk-utility balancing process.<sup>121</sup> In the balancing process, the jury should consider various factors: “the intended use of the [product], its styling, cost, and desirability, its safety aspects, the foreseeability of the particular accident, the likelihood of injury, and the probable seriousness of the injury if that accident occurred, the obviousness of the defect, and the manufacturer’s ability to eliminate the defect.”<sup>122</sup> Further, in a design-defect claim, a

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<sup>116</sup> ALA. PATTERN JURY INSTRUCTIONS COMM., ALABAMA PATTERN JURY INSTRUCTIONS—CIVIL, § 38.02 (3d ed. 2017); see *Brest v. Chrysler Corp.*, 939 F. Supp. 843, 846 (M.D. Ala. 1996).

<sup>117</sup> See ALA. PATTERN JURY INSTRUCTIONS COMM., *supra* note 116.

<sup>118</sup> 21 F.3d 1048, 1057 (11th Cir. 1994).

<sup>119</sup> Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers’ Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061, 1087 n.110 (2009) (“[T]he Restatement is quite clear on this point: When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would have introduced into the product other dangers of equal or greater magnitude.” (quoting *Tunnell v. Ford Motor Co.*, 385 F. Supp. 2d 582, 584–85 (W.D. Va. 2005))).

<sup>120</sup> See *Richards*, 21 F.3d at 1057; see also *Vines v. Beloit Corp.*, 631 So. 2d 1003 (Ala. 1994) (affirming summary judgment on design-defect claim where plaintiff presented no evidence that alternative design would reduce risks to workers, make the product safer, or have greater utility than product as presently designed); *Beech Through Beech v. Outboard Marine Corp.*, 584 So. 2d 447, 450 (Ala. 1991) (existence of a feasible, alternative design does not establish existence of a practical, safer, alternative design).

<sup>121</sup> See *Flemister*, 723 So. 2d at 28.

<sup>122</sup> *Hannah v. Gregg, Bland & Berry, Inc.*, 840 So. 2d 839, 858 (Ala. 2002) (citing *Beech*, 584 So. 2d at 450).

plaintiff must demonstrate that the alternative design could be adapted to the entire market of products.<sup>123</sup>

In 1985, in *General Motors Corp. v. Edwards*, the Supreme Court of Alabama adopted a new theory of liability called the "crashworthiness doctrine."<sup>124</sup> Under the crashworthiness doctrine, which is also referred to as the "second collision doctrine" or "enhanced injury doctrine," the focus is on whether the alleged design defect in a motorized vehicle caused or enhanced the *injury*; the focus is not whether the defect caused the *accident*.<sup>125</sup> The Alabama Supreme Court explained "collisions are a statistically foreseeable and inevitable risk within the intended use of an automobile, which is to travel on streets, highways, and other thoroughfares, and that, while the user must accept the normal risk of driving, he should not be subjected to an unreasonable risk of injury due to a defective design."<sup>126</sup>

When a crashworthiness claim arises, the plaintiff alleges the vehicle did not properly protect the driver (or passengers) during a crash, thus proximately causing or enhancing the plaintiff's injuries.<sup>127</sup> For example, a plaintiff may allege a defective airbag or an exploding gas tank was the unreasonably dangerous product that enhanced the plaintiff's injuries or led to the victim's death.<sup>128</sup> In Alabama, this distinction is essential

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<sup>123</sup> *Frantz v. Brunswick Corp.*, 866 F.Supp. 527, 534 (S.D. Ala. 1994). *But see* *Sears, Roebuck & Co. v. Harris*, 630 So. 2d 1018, 1032-33 (Ala. 1993) ("Compliance with such industry standards does not allow a manufacturer to close its eyes to injuries caused by its products and do nothing to alter their design or to warn users.").

<sup>124</sup> 482 So. 2d 1176, 1191 (Ala. 1985). The crashworthiness doctrine was first established by the decision of the Eighth Circuit Court of Appeals in *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

<sup>125</sup> *Allen*, *supra* note 32, at 437 (citing *Edwards*, 482 So. 2d at 1176).

<sup>126</sup> *Edwards*, 482 So. 2d at 1181 (citing *Larsen*, 391 F.2d at 502-05).

<sup>127</sup> *See id.* at 1181-83.

<sup>128</sup> *See Allen*, *supra* note 32, at 442 (explaining these hypotheticals are the "classic crashworthiness case[s] envisioned by *Edwards*").

because the AEMLD continues to adhere to the archaic contributory negligence doctrine.<sup>129</sup>

### **B. Back to the Future: The Original Intent is Consistent with Risk-Utility**

Since 1976, Alabama uniquely retained the tort concept of fault and rejected the concept of strict liability.<sup>130</sup> When the AEMLD was created, Alabama adopted the consumer-expectations approach for judging defectiveness by adopting a hybrid version of the Restatement (Second).<sup>131</sup> Presumably, had it been available in 1976, the Alabama Supreme Court would have adopted, or at least favorably considered, the risk-utility approach because the court took “exception to . . . the practical abolition of the distinction between the remedies of tort and contract.”<sup>132</sup> However, the risk-utility option was not available until more than twenty years later.<sup>133</sup> Presently, Alabama applies a standard greatly resembling risk-utility and should adopt the Restatement (Third) of Torts’ approach for design defects to ensure consistency with its original products liability doctrine.

“Strict liability for defective products arose from a concern that injured plaintiffs should not have the undue burden of proving fault on the part of the manufacturer.”<sup>134</sup> The Restatement (Second)’s consumer-expectations test was originally intended to

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<sup>129</sup> See *id.* at 438; see also *Dennis v. Am. Honda Motor Co.*, 585 So. 2d 1336, 1339 (Ala. 1991) (Alabama’s contributory negligence defense recognizes an exception in crashworthiness or safety-guard cases where a plaintiff does not allege the product defect caused the injury but claims the defect failed to protect him or her from an enhanced injury.). Today, forty-six states have invalidated the rigid doctrine of contributory negligence by judicial or legislative action and have adopted the doctrine of comparative negligence. VICTOR E. SCHWARTZ & EVELYN F. ROWE, *COMPARATIVE NEGLIGENCE* § 1.01, at 3–4 (5th ed. 2010) (“By 1994, comparative negligence had replaced contributory negligence as a complete defense in . . . forty-six states.”).

<sup>130</sup> *Atkins*, 335 So. 2d at 140.

<sup>131</sup> See *id.*; see also *Bodie*, 236 Fed. Appx. at 517 n.9 (Eleventh Circuit explaining Alabama “follows a modified version of strict liability”).

<sup>132</sup> *Atkins*, 335 So. 2d at 138.

<sup>133</sup> See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b).

<sup>134</sup> Chun, *supra* note 47, at 1668 (citing William J. Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 811 (1983)).

retreat from “the burdensome proof requirements of negligence law.”<sup>135</sup> Generally, states that avoid adopting the risk-utility design-defect standard fear “do[ing] so would inappropriately invite consideration of negligence concepts.”<sup>136</sup>

Since its inception, the AEMLD has invited such negligence concepts.<sup>137</sup> A majority of courts apply a risk-utility balancing test for design defects by adopting a negligence-based approach.<sup>138</sup> Under this test, liability attaches when the plaintiff proves the defendant failed to adopt a safer, cost-effective design that would have prevented all or part of the plaintiff’s harm.<sup>139</sup> The “risk-utility standard for design defects . . . is a negligence standard, pure and simple.”<sup>140</sup> Thus, adopting the risk-utility test is consistent with Alabama’s negligence-based principles in design-defect cases.<sup>141</sup>

Further, the risk-utility test parallels Alabama’s current proof requirements in establishing a prima facie case for design defectiveness.<sup>142</sup> Some commentators suggest Alabama has adopted the risk-utility approach in substance.<sup>143</sup> Professor James

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<sup>135</sup> See Vetri, *supra* note 23, at 1374.

<sup>136</sup> Chun, *supra* note 47, at 1681.

<sup>137</sup> See *id.*; see also *Batchelor*, 2013 WL 3873242, at \*2 (“Alabama has not adopted a no-fault concept of products liability and has instead retained a fault-based system known as the [AEMLD].”).

<sup>138</sup> Henderson & Twerski, *A Proposed Revision*, *supra* note 2, at 1520.

<sup>139</sup> *Id.*; see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b).

<sup>140</sup> Green, *supra* note 3, at 834; see also *Ackerman v. Am. Cyanamid Co.*, 586 N.W.2d 208, 220 (Iowa 1998) (“a growing number of courts and commentators have found that, in cases in which the plaintiff’s injury is caused by an alleged defect in the design of a product, there is no practical difference between theories of negligence and strict liability”); *Foley v. Clark Equip. Co.* 523 A.2d 379, 388–89 (Pa. Super. 1987) (“The risk/utility analysis is nothing more than a detailed version of the balancing process used in evaluating reasonable care in negligence cases . . . . Because strict liability and negligence employ the same balancing process to assess liability, proof sufficient to establish liability under one theory will in most instances be sufficient under the other.”).

<sup>141</sup> See Hogan, *supra* note 74, at 170 (“Where a product liability design case proceeds from a risk/utility analysis, there is little difference between strict liability and a negligence case.”).

<sup>142</sup> See Vetri, *supra* note 23, at 1408 (referring to all the mixed design-defect tests as an “inordinate confusion,” but explaining that the proof requirements are relatively similar in application).

<sup>143</sup> Henderson & Twerski, *Achieving Consensus*, *supra* note 49, at 919 (explaining the “Alabama Supreme Court understands” the “underlying, functional substance”).

Henderson and Professor Aaron Twerski point to *Atkins* for Alabama's understanding that "[t]he only real difference between strict tort liability and the traditional negligence theory in products liability cases is that those courts which have adopted the rule of strict liability look to the dangerous characteristics of the end product, rather than the methods or processes by which it was produced."<sup>144</sup> Recently, Henderson and Twerski reiterated that "Alabama unequivocally requires proof of a reasonable alternative design in design defect cases."<sup>145</sup>

In 1985, the Alabama Supreme Court unanimously adopted Dean Wade's seven factors for design defect in a crashworthiness case.<sup>146</sup> Through the *Edwards* decision, "Alabama law took its first step toward the weighing process of risk/utility."<sup>147</sup> In 1998, the Alabama Supreme Court recognized the national trend towards risk-utility but declined to adopt the test at that time.<sup>148</sup> Seemingly, the court left the question open in stating "whether our law for crashworthiness cases will be better served by maintaining the present 'mixed' analysis or by adopting a risk/utility analysis is not an appropriate consideration under the facts."<sup>149</sup>

In *Flemister*, the plaintiff died in a collision on the passenger side of a Chevrolet Beretta, which General Motors manufactured.<sup>150</sup> The plaintiff brought a design-defect action in the form of a crashworthiness claim, particularly related to the structural strength of the car doors.<sup>151</sup> At trial, the jury returned a verdict for General Motors.<sup>152</sup> On appeal, the plaintiff claimed the crashworthiness jury instruction was an "erroneous standard."<sup>153</sup> The plaintiff argued the design-defect test under the AEMLD should be based exclusively on a risk-utility analysis, without

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<sup>144</sup> *Id.* at 919 n.244 (citing *Atkins*, 335 So. 2d at 140).

<sup>145</sup> Twerski & Henderson, *Manufacturers' Liability*, *supra* note 119, at 1080 n. 95.

<sup>146</sup> *Edwards*, 482 So. 2d at 1188; *see also* Hogan, *supra* note 74, at 167.

<sup>147</sup> Hogan, *supra* note 74, at 168.

<sup>148</sup> *Flemister*, 723 So. 2d at 28 (citing Hogan, *supra* note 74).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 26.

<sup>151</sup> *Id.* at 25–26.

<sup>152</sup> *Id.* at 26.

<sup>153</sup> *Flemister*, 723 So. 2d at 26.

reference to consumer expectations.<sup>154</sup> The plaintiff further argued a “consumer cannot have expectations with regard to a crashworthiness design defect because only the manufacturer knows how safe a product can be made.”<sup>155</sup> The Alabama Supreme Court concluded “Alabama law . . . does not require a plaintiff alleging uncrashworthiness to prove more than that he expected that his automobile was not ‘unreasonably dangerous, that is, not fit for its intended purpose.’”<sup>156</sup> Moreover, Alabama law “requires proof of the . . . risk and utility of the automobile’s design and of any available design alternatives.”<sup>157</sup>

As Professor Owen acknowledged, the Alabama Supreme Court, in *Flemister*, retained the consumer expectation test terminology, while expressly applying risk-utility “balancing.”<sup>158</sup> *Flemister* was wrongly decided because the court lacked consideration of the fundamental distinctions between the consumer-expectations and risk-utility standards. A correct result would require the jury to solely assess the unreasonableness of the designer’s conduct, but the court’s ill-defined rationale improperly encouraged the jury to rely on warranty-based principles.<sup>159</sup> The Alabama Supreme Court’s decision is at odds with the AEMLD’s original concern over “the practical . . . distinction between the remedies of tort and contract.”<sup>160</sup> Consequently, retaining the consumer-expectations standards’ terminology conflicts with the AEMLD’s original intent in rejecting strict liability, which “look[s] to the dangerous characteristics of the end product, rather than the methods or processes by which it was produced.”<sup>161</sup>

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<sup>154</sup> *Id.* at 27.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* (quoting ALA. PATTERN JURY INSTRUCTIONS COMM., ALABAMA PATTERN JURY INSTRUCTIONS (CIVIL) INSTRUCTION § 32.22 (2d ed. 1993)).

<sup>157</sup> *Id.*

<sup>158</sup> See Owen, *supra* note 1, at 340 n.240.

<sup>159</sup> *Flemister*, 723 So. 2d at 27 (including the “not fit for its intended purpose” language); see also Davis, *supra* note 7, at 1236 (discussing the vagueness problem of consumer expectations in jury instructions).

<sup>160</sup> *Atkins*, 335 So. 2d at 138.

<sup>161</sup> *Id.* at 140.



## VI. CONCLUSION

The Alabama Supreme Court should adopt the Restatement (Third)'s risk-utility standard for design defects. Retaining the consumer-expectations language, while applying risk-utility for design defects, operates merely as a "linguistic error grounded in a *Restatement* that has now been superseded."<sup>162</sup> Alabama's proof requirements, specifically the requirement of a practical alternative design, strongly resemble the Restatement (Third)'s risk-utility approach.<sup>163</sup> At the proof level, Alabama is in accord with the majority of jurisdictions.<sup>164</sup> However, Alabama confusingly maintains its minority status by retaining the consumer-expectations label and the supposed "mixed" approach. Since Alabama's proof requirements are essentially "redefined in risk-utility terms,"<sup>165</sup> the issue is ripe for Alabama to adopt the Restatement (Third)'s risk-utility approach for design-defect cases, which would ensure consistent and uniform results in future products liability litigation. The Alabama Supreme Court should clarify this issue and preserve the consumer expectation test exclusively for manufacturing defect claims.

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<sup>162</sup> OWEN & DAVIS, *supra* note 4, § 5:5.

<sup>163</sup> See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (adopting risk-utility and requiring an alternative design).

<sup>164</sup> See Vetri, *supra* note 23, at 1373–74 ("The treatment of design-defect cases has been remarkably uniform throughout the United States at the proof level, despite what might seem to be inordinate disorder at the design-defect test and jury-instruction levels. There is a simple elegance at the proof level that does not exist at the legal test level.").

<sup>165</sup> Owen, *supra* note 1, at 340 n.240.