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Reasonable Alternative - Should Wyoming Adopt the Restatment (Third) of Torts: Products Liability, A

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COMMENT

A Reasonable Alternative? Should Wyoming Adopt the Restatement (Third) of Torts: Products Liability?

INTRODUCTION

The *Restatement (Third) of Torts: Products Liability* has created a great stir around the country.[1] Some Courts have begun to adopt the *Restatement (Third)*, while others have declined to do so.[2] Similarly, the response by commentators to the *Restatement (Third)* has been mixed; while some laud it for the uniformity it would bring to the law, others have criti-

1. Geoffrey C. Hazard Jr., *Forward* to RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, at xv, xvi (1998) (*Restatement (Third)*) (acknowledging that in some areas, the reporters set forth some concepts that were not well settled principles of law and, consequently did more than simply restate or codify the law followed in a majority of jurisdictions).

2. *See* James Henderson & Aaron Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 WM. MITCHELL L. REV. 7 (2000) (explaining the status of portions of the *Restatement (Third)* in the courts).

cized it for being too difficult of a burden on the plaintiffs.[3] Despite the criticism, portions of the *Restatement (Third)* have begun to see gradual acceptance.[4] Wyoming has not adopted any portion of the *Restatement (Third)* since its publication in 1998.[5] This is not surprising, as Wyoming has generally been slower than the rest of the country in addressing issues related to products liability law.[6] Much of the problem stems from the sheer lack of products liability cases that arise in Wyoming.[7]

This comment will examine the potentially problematic issues surrounding the *Restatement (Third)*. Specifically, this comment will closely examine the issues surrounding the adoption of Section 2 of the *Restatement (Third)*, focusing on the requirement of a reasonable alternative design found in Section 2(b). Most states have struggled with this aspect of the *Restatement (Third)*.[8] Other issues that generally will be examined include the open and obvious danger rule, and the interplay between failure to warn issues and design defect issues found in *Restatement (Third)*. Finally, this comment will determine whether adoption of the *Restatement (Third)* would provide uniformity and consistency for Wyoming law, or whether it would be merely redundant.

BACKGROUND

I. Brief History of Products Liability Law

A. The Beginning of Products Liability

Products liability, unlike other areas of law, has a relatively short history. Originally, a person injured by a product had no cause of action against a manufacturer unless that person was in privity of contract with the

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3. *See* John F. Vargo, *The Emperors New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects – A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 507-19 (1996) (criticizing the *Restatement (Third)* as too difficult of a burden on the plaintiffs); Denny Shupe & Todd Steggerda, *Toward a More Uniform and "Reasonable" Approach to Products Liability Litigation: Current Trends in the Adoption of the Restatement (Third) and its Potential Impact on Aviation Litigation*, 66 J. AIR L. & COM. 129, 166 (2000) (stating that the *Restatement (Third)* shows great promise for restoring the needed predictability, consistency, and rationality to products liability law).

4. *See* Henderson, *supra* note 2, at 8.

5. *See* Covington v. Grace-Conn. Inc., 952 P.2d 1105 (Wyo. 1998); Campbell v. Studer, Inc., 970 P.2d 389, 392 n.1 (Wyo. 1998).

6. *See* Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 341 n.8 (Wyo. 1986) (acknowledging that Wyoming is one of the last states to adopt strict liability in products liability actions).

7. Vargo, *supra* note 3, at 948. The author only notices two relevant products liability cases in Wyoming as of 1996. *Id.* at 948-49.

8. Aaron Twerski & James Henderson, *Introduction* to RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY 3, 4 (1998).

manufacturer.[9] American courts generally followed this rule, but have developed a number of exceptions.[10] The rule of privity in products liability cases, however, remained steadfast until 1916.[11]

In 1916, the landmark case of *McPherson v. Buick Motor* brought about a significant change in products liability cases.[12] In *McPherson*, the defendant, an automobile manufacturer, sold a vehicle to a retail dealer under privity of contract.[13] The plaintiff bought the vehicle at the retail dealership and subsequently sued the defendant manufacturer after the car's wooden wheel collapsed.[14] Justice Cardozo, finding for the plaintiff, extended the manufacturer's duty to all persons in fact harmed by products if "the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made".[15] Justice Cardozo further reasoned that a manufacturer is negligent if it can foresee danger to the consumer caused by the product it manufacturers.[16] He concluded that liability should follow in this situation regardless of privity of contract.[17] *McPherson* marked the first departure from the privity rule in American courts.[18] Most American courts accepted the Cardozo analysis.[19]

Even with the publication of the *Restatement of Torts*, the negligence rule set forth in *McPherson* remained intact for a period of time.[20] The *Restatement of Torts* was an outgrowth of the 1920s, when products

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9. Winterbottom v. Wright, 152 Eng. Rep. 402 (1842). Plaintiff drove a coach serviced by the defendant. *Id.* The court held that since there was no privity of contract between the parties, public policy dictated holding for the defendant. *Id.* at 403. The court stated "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." *Id.* at 405.

10. *See* Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 870-71 (8th Cir. 1903). The three exceptions to the privity requirement are:

> 1) an act of negligence which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life,
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> 2) an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises,
>
> 3) one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities.

Id. at 870-71.

11. Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1327 (Conn. 1997).
12. 111 N.E. 1050 (N.Y. 1916).
13. *Id.* at 1051.
14. *Id.*
15. *Id.* at 1053.
16. *Id.* at 1055.
17. *Id.*
18. John W. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965).
19. *Id.*
20. Shupe, *supra* note 3, at 131.

liability law was in its infancy, and thus barely noted the existence of the burgeoning field of products liability law.[21] Throughout the years as society and industry progressed, it became more and more difficult for the plaintiff to prove his case.[22] The close relationship between the manufacturer and the consumer, which was once commonplace, began to disappear from the market landscape.[23] Moreover, as manufacturers got larger, they kept their secrets closer.[24] Plaintiffs no longer had the means or skill to investigate the soundness of a product for themselves, and thus were required to rely on manufacturers' disclaimers.[25] Furthermore, this decreased accessibility to manufacturers' information made it increasingly more difficult for plaintiffs to prove manufacturer negligence.[26]

B. Strict Liability Realized

In response to the proof problems, plaintiffs increasingly relied on the negligence doctrine of *res ipsa loquitur* in products liability cases.[27] *Res ipsa loquitur* does not apply unless: 1) the defendant had exclusive control over the thing causing the injury, and 2) the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant.[28]

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21. Harvey S. Perlman & Gary Schwartz, *General Principles*, 10 KAN. J.L. & PUB. POL'Y 8 (2000).

22. Escola v. Coca Cola Bottling Co., 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring).

23. *Id.* at 443 (Traynor, J., concurring).

24. *Id.* (Traynor, J., concurring).

25. *See* Crist v. Art Metal Works, 175 N.E. 341 (N.Y.1931); Baxter v. Ford Motor Co., 12 P.2d 409 (Wash. 1932) (excusing liability to dealer because of a disclaimer).

26. *Escola*, 150 P.2d at 443.

27. *See generally* Payne v. Rome Coca-Cola Bottling Co., 73 S.E. 1087 (Ga. App. Ct. 1912); Bradley v. Conway Springs Bottling Co., 118 P.2d 601 (Kan. 1941); Ortego v. Nehi Bottling Works, 6 So. 2d 677 (La. 1942); Macres v. Coca-Cola Bottling Co., 287 N.W. 922 (Mich. 1939); Stolle v. Anheuser-Busch, 271 S.W. 497 (Mo. 1925); McPherson v. Canada Dry Ginger Ale, Inc., 29 A.2d 868 (N.J. 1943). All these cases dealt with exploding bottles and apparent negligence on the part of the bottling company where the plaintiff used *res ipsa loquitur* and prevailed.

28. Honea v. City Dairy, Inc., 140 P.2d 369, 370 (Cal. 1943). Some courts applying *res ipsa loquitur*, however, still did not did not find liability in some cases where, under a strict liability regime, a manufacturer would normally be liable. For courts applying *res ipsa loquitur*, but failing to find manufacturer liability where under strict liability the manufacturer would be liable, *see generally Stewart v. Crystal Coca-Cola Bottling Co.*, 68 P.2d 952 (Ariz. 1937) (holding that the negligent act was not under the defendant's control); *Gerber v. Faber*, 129 P.2d 485 (Cal. Dist. Ct. App. 1942) (reasoning that it was no more likely that the plaintiff caused an explosion of a root beer bottle than the manufacturer); *Berkens v. Denver Coca-Cola Bottling Co.*, 122 P.2d 884 (Colo. 1942) (exploding bottle attributable to other causes other than negligence of the manufacturer); *Slack v. Premier-Pabst Corp.*, 5 A.2d 516 (Del. Super. Ct. 1939) (dismissing plaintiff's claim because of a lack of specific facts of defendant's negligence); *Loebig's Guardian v. Coca-Cola Bottling Co.*, 81 S.W.2d 910 (Ky. 1935) (refusing to draw inference that defendant controlled the product); *Wheeler v. Laurel Bottling Works*, 71 So. 743 (Miss. 1916) (holding that *res ipsa loquitur* does not apply to unforeseen accidents).

Murmurs began to stir urging the replacement of negligence with strict liability.[29]

The idea of strict liability in products liability cases was first introduced in the 1944 California decision of *Escola v. Coca Cola Bottling Co.*[30] In *Escola,* the plaintiff, a waitress, sued the defendant bottling company after a soda bottle delivered to her employer by the defendant exploded in her hand.[31] The majority held for the plaintiff using *res ipsa loquitur* principles.[32] Justice Roger Traynor, however, in a concurring opinion urged the adoption of strict liability in products liability actions.[33] He reasoned that "even if there is no negligence [on the part of the manufacturer] public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[34] For Justice Traynor strict liability was the only way to approach a products liability case.

Although Justice Traynor was not in the majority in 1944, he wrote for the majority twenty years later in *Greenman v. Yuba Power Products.*[35] In *Greenman,* the plaintiff sought damages against the manufacturer of a combination power tool that could be used as a saw, drill, and wood lathe.[36] The plaintiff sued after he was injured when a piece of wood flew out of the machine while he was using it.[37] The trial court found that the setscrews were inadequate, and normal vibration caused the tailstock of the lathe to move away from the piece of wood being shaped, permitting portions of wood to fly out of the lathe.[38] The California Supreme Court held the manufacturer strictly liable because its defective product caused injury to the plaintiff.[39] The *Greenman* court set forth the *prima facie* case for strict liability actions against the manufacturer: "1) Plaintiff was injured, 2) While using the product in a way it was intended to be used, 3) As a result of defect in design and manufacture, 4) Made the product unsafe for its intended use."[40]

Following *Greenman,* the publication of the *Restatement (Second) of Torts* (*Restatement (Second)*) further persuaded most of the country to fol-

29. Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).
30. *Id.* (Traynor, J., concurring).
31. *Id.* at 437 (Traynor, J., concurring).
32. *Id.* at 440 (Traynor, J., concurring).
33. *Id.* (Traynor, J., concurring).
34. *Id.* at 440 (Traynor, J., concurring).
35. 377 P.2d 897 (Cal. 1963).
36. *Id.* at 898.
37. *Id.*
38. *Id.* at 899.
39. *Id.* at 900.
40. *Id.* at 901.

low California's reasoning.[41] Section 402A of the *Restatement (Second)*, setting forth the strict liability rule in *Greenman*, has been one of the most influential Restatement sections ever written.[42] Every state supreme court has addressed Section 402A in some form, even if it ultimately decided to take a position different from the section itself.[43] As a result of Section 402A, most of the country has adopted strict liability as set forth in the *Restatement (Second)*.[44]

Over the years, courts developed many diverse ways to interpret Section 402A.[45] As a result, the American Law Institute (ALI) decided to revisit the *Restatement (Second)* in the early 1990s.[46] The *Restatement (Third)* was published in 1998. Since 1998, states have had few opportunities to consider the propositions set forth in the *Restatement (Third)*. Products liability law today stands at a crossroads, not knowing to which *Restatement* to look for guidance.

II. Restatement Analysis

The Restatements of the law are a product of the twentieth century.[47] The First *Restatement of Torts* was published in 1938.[48] It said nothing about products liability law.[49] In 1965, the ALI, led by William Prosser, completed the *Restatement (Second)*, Volume 1.[50] It contained Section 402A, which proposed strict liability in products liability cases.[51] Section 402A is the only section devoted to products liability in the *Restatement (Second)*.[52] Finally, the *Restatement (Third)* arrived in 1998.[53] The *Restatement (Third)* seeks to address many of the products liability issues the authors of Section 402A had not even contemplated.[54] It is a complete overhaul of the *Restatement (Second)* with regards to products liability.[55]

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41. Harvey S. Perlman, *Delaware and the Restatement (Third) of Torts: Products Liability*, 2 DEL. L. REV. 179 (1999).
42. *Id.*
43. *Id.*
44. *See generally* Vargo, *supra* note 3, at 589-99, 918-19 (noting that the only two states that have yet to adopt strict liability in products liability cases are Delaware and Virginia).
45. Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995); Shupe, *supra* note 3, at 132.
46. Perlman, *supra* note 41, at 183.
47. *See* Perlman, *supra* note 21, at 8.
48. *Id.*
49. *Id.*
50. *Id.*
51. RESTATEMENT (SECOND) OF TORTS § 402A (1995).
52. Perlman, *supra* note 21, at 8.
53. THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).
54. Aaron Twerski & James Henderson, *Introduction* to THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY 3 (1998).
55. *Id.* at 4.

A. Section 402A Analysis

Originally Section 402A sought "to eliminate privity so that a user or consumer, without having to establish negligence, could bring an action against a manufacturer."[56] Section 402A provides:

> (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.[57]

Section 402A sets forth three basic product liability actions where strict liability would apply: manufacturing defects, design defects, and failure to warn cases.[58] Courts around the country universally adopted strict liability actions in these types of cases.[59] From its inception, however, Section 402A lacked the detail necessary to guide the doctrine of strict liability beyond its infancy.[60] As a result, courts varied greatly in their interpretation of Section 402A. Section 402A had other problems as well. Courts had difficulty defining the terms "defective" and "unreasonably dangerous."[61] Other problems include the lack of direction concerning liability for inadequate warnings and instructions, along with determining the proper test to apply in de-

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56. *Id.* at 3.
57. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
58. Shupe, *supra* note 3, at 132.
59. *Id.*
60. *Id* at 131-32.
61. *See* George W. Conk, *Is There a Design Defect in the Restatement (Third) Of Torts: Products Liability,* 109 YALE L.J. 1087 (2000) (discussing the objective in *Restatement (Third)* to resolve the problem of the meaning of the word 'defect,' a problem that has haunted the law of torts since Section 402A of the ALI's 1965 *Restatement (Second)* ushered in the era of strict liability for defective products).

sign defect cases.[62] Nevertheless, Section 402A has been called "the most widely accepted distillation of the common law of torts."[63]

States interpreted Section 402A in a variety of different ways, straying from the original intent of the drafters.[64] In design defect cases, for example, states developed three different types of tests to determine a defect: the consumer expectations test, the risk utility test, and a combination of the two tests.[65] The three tests were developed because *Restatement (Second)* gave no guidance as to what to do in a design defect case.[66] The departure from the original intent of Section 402A, necessarily, did not please the drafters of the *Restatement (Second)*.[67] The *Restatement (Third)* was published to clarify what the drafters had intended in the *Restatement (Second)*.[68]

B. Restatement (Third) Analysis

The *Restatement (Third)* seeks to clarify and to constrict the scope of products liability law as it has evolved in the United States over the past thirty-five years.[69] Admittedly, the authors of the *Restatement (Third)* sought to straighten the development of Section 402A.[70] The *Restatement (Third)* was adopted by the ALI membership without a dissenting vote in 1997.[71] Unlike Section 402A, which is only one section with limited commentary, the *Restatement (Third)* contains twenty-one separate sections with extensive commentary.[72] Up to this point, however, its reception in courts has been lukewarm at best.[73]

The most significant controversy surrounding the Third Restatement lies within the language of Section 2.[74] Section 2 states:

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62. *See* Shupe, *supra* note 3, at 131-32; James A. Henderson & Aaron Twerski, *Products Liability*, 10 KAN. J.L. & PUB. POL'Y 21 (2000).
63. Thomas V. Van Flein, *Prospective Application of the Restatement (Third) of Torts: Products Liability in Alaska*, 17 ALASKA L. REV. 1, 2 (2000).
64. Shupe, *supra* note 3, at 131.
65. Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1329 (Conn. 1997).
66. Shupe, *supra* note 3, at 131.
67. Geoffrey C. Hazard Jr., *Foreword* to RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY, at XV (1998).
68. Shupe, *supra* note 3, at 130.
69. *Id.* at 131.
70. *Id.*
71. *Id.*
72. Henderson, *supra* note 2, at 8.
73. *See generally* Vargo, *supra* note 3 (challenging reporters claim that Draft Restatement [Third]'s reasonable alternative design constitutes a consensus among jurisdictions).
74. Henderson, *supra* note 2, at 9; Shupe, *supra* note 3, at 135; Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1331 (Conn. 1997).

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.[75]

Section 2 makes a tripartite-type division for defective products.[76] First are manufacturing defects, where the products fail to meet the manufacturer's own standards, such as the Coke bottle in the *Escola* case.[77] Second are design defects. A design defect occurs when the manufacturer intended the product to go out on the market as designed, but because the design itself was faulty or poor, the product injured a consumer.[78] Liability in design defect cases is defined in terms of whether the manufacturer reasonably could have provided a safer product.[79] Finally, failure to warn cases occur when a manufacturer fails to warn about foreseeable risks or harms of its product.[80] A manufacturer generally has a duty to warn the consumer of the possible risks its product may create.[81] As in design defect cases, liability in failure to warn cases is defined in terms of foreseeability and reasonable-

75. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).
76. Henderson, *supra* note 62, at 22.
77. *Id.*
78. David Owen, *Products Liability Restated*, 49 S.C. L. REV. 273, 284 (1998).
79. *Id.*
80. *Id.* at 285.
81. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1998).

ness.[82] The three liability standards in Section 2 provide the foundation for most modern products liability law.[83]

Previously, when applying Section 402A, courts around the country adopted three different tests for deciding design defect cases: a risk utility test, a consumer expectation test, or the combination of the two.[84] The drafters of *Restatement (Third)* only adopted the risk utility analysis followed by some jurisdictions.[85]

1) Risk Utility Test

The traditional risk utility test states that a product is defective and its design embodies excessive preventable danger unless "the benefits of the design outweigh the risks inherent in such a design."[86] Generally, the risk utility analysis involves a weighing of a number of relevant factors. All decisions involve weighing the advantages and disadvantages of a contemplated course of action.[87] The most common form of the risk utility test involves:

> A balancing of the probability and seriousness of the harm against the costs of taking precautions. Relevant factors to be considered include the availability of alternative designs, the cost and feasibility of adopting alternative designs, and the frequency or infrequency of injury resulting from the design.[88]

Many states have adopted the risk utility test for design defect cases.[89]

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82. Owen, *supra* note 78, at 285.
83. *Id.* at 282.
84. *See* Dart v. Wiebe Mfg., Inc., 709 P.2d 876, 879 (Ariz. 1985) (applying the third test – a combination of both risk utility and consumer expectations); Barker v. Lull Eng'g Co., 573 P.2d 443, 452 (Cal. 1978) (stating two tests for design defect liability (1) the consumer expectation analysis (which states a manufacturer is strictly liable for any condition not contemplated by the ultimate consumer that will be unreasonably dangerous to the consumer), and (2) a balancing test that inquires whether a product's risks outweigh its benefits (risk utility)). *See also* Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1331 (Conn. 1997).
85. Henderson, *supra* note 62, at 22.
86. Barker v. Lull Eng'g Co., 573 P.2d 443, 452 (Cal. 1978).
87. Harold P. Green, *Cost – Risk-Benefit Assessment and the Law: Introduction and Perspective*, 45 GEO. WASH. L. REV. 901, 903 (1977).
88. Raney v. Honeywell, Inc., 540 F.2d 932, 935 (8th Cir. 1976).
89. *See, e.g.*, Peck v. Bridgeport Mach., Inc., 237 F.3d 614 (6th Cir. 2001) (applying Michigan law); White v. Smith and Wesson Corp., 97 F. Supp. 2d 816 (N.D. Ohio 2000) (applying Ohio law); Armentrout v. FMC Corp., 842 P.2d 175, 183 (Colo. 1992); Warner Fruehauf Trailer Co., Inc., v. Boston, 654 A.2d 1272, 1276 (D.C. 1995); Radiation Tech., Inc. v. Ware Constr. Co., 445 So. 2d 329, 331 (Fla. 1983); Banks v. ICI Americas, Inc., 450 S.E.2d 671 (Ga. 1994); Nichols v. Union Underwear Co., Inc., 602 S.W.2d 429 (Ky. 1980); St. Germain v. Husqvarna Corp., 544 A.2d 1283, 1286 (Me. 1986); Sperry-New Holland v.

Peck v. Bridgeport Machines, a case decided by the United States Court of Appeals for the Sixth Circuit, applying Michigan law, is a good illustration of the risk utility test applied in a design defect setting.[90] In *Peck*, the plaintiff was injured when his hand was inadvertently caught in a lathe that was accidentally activated.[91] The plaintiff claimed that the lever which put the lathe into gear was defectively designed.[92] The Sixth Circuit Court of Appeals panel held that before the plaintiff could proceed under a risk utility analysis, the plaintiff must produce evidence of the "magnitude of the risks involved and the reasonableness of the proposed alternative design."[93] To survive a motion for summary judgment under this formulation of risk utility, the plaintiff must show:

> (1) that the severity of the injury was foreseeable by the manufacturer;
>
> (2) that the likelihood of [the] occurrence of the injury was foreseeable by the manufacturer at the time of the distribution of the product;
>
> (3) that there was a reasonable alternative available;
>
> (4) that the available alternative design was practicable;
>
> (5) that the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by the defendant's product; and
>
> (6) that the omission of the available and practicable reasonable alternative design rendered the defendant's product not reasonably safe.[94]

The plaintiff's experts testified that they would have designed the lever differently, but admitted that they had never seen or made any of their proposed alternative designs for the lever.[95] Therefore, the court held that the plain-

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Prestage, 617 So. 2d 248, 255 (Miss. 1993); Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978); Foley v. Clark Equip. Co., 523 A.2d 379 (Pa. Super. Ct. 1987); Ford Motor Co. v. Miles, 967 S.W.2d 377, 386 (Tex. 1998).

90. 237 F.3d 614 (6th Cir. 2001) (applying Michigan law).

91. *Id.* at 616. A lathe is a machine used for cutting and shaping metal. *Id.* The plaintiff was injured while loading a long medal tube into the lathe. *Id.* The switch was inadvertently turned on and the plaintiff's hand was caught inside. *Id.* at 617.

92. *Id.*

93. *Id* at 617.

94. *Id* at 617-18.

95. *Id.* at 618.

tiff's proposed alternative design was not feasible and the plaintiff's claim failed.[96]

2) Consumer Expectations Test

In addition to the risk utility test, a minority of jurisdictions apply a consumer expectations test to determine the outcome of products liability suits alleging a design defect.[97] Defective condition is defined, under the most common formulation of the consumer expectations test, as "dangerous to an extent that would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[98]

Potter v. Chicago Pneumatic Tool Co., is an illustration of the consumer expectations test in practice.[99] In *Potter*, the plaintiffs used the defendant's hand pneumatic tools over a span of twenty-five years.[100] The plaintiffs, in a class action, sued the manufacturer because they suffered from permanent vascular neurological impairment as a result of using the pneumatic tools.[101] The Connecticut Supreme Court applied the consumer expectations test to the plaintiff's design defect claim.[102] The court considered a number of factors to determine the expectations of the reasonable consumer, including "the relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk to the consumer."[103] The court, applying these factors, held that the pneumatic tools were unreasonably dangerous based on the ordinary consumer expectation test, stating, "[I]t is not necessary that the plaintiff establish a specific defect as long as there is evidence of some unspecified dangerous condition."[104] Because the court found the tools' vibrations to be a dangerous condition, the plaintiffs prevailed.[105]

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96. *Id.*
97. *See* French v. Grove, Mfg. Co., 656 F.2d 295, (8th Cir. 1981) (applying Arkansas law); Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1334 (Conn. 1997); Ontai v. Straub Clinic & Hosp., Inc., 659 P.2d 734, 735 (Haw. 1983); Delany v. Deere and Co., 999 P.2d 930, 944 (Kan. 2000) (stating that Kansas still adheres to the consumer expectations test); Kudlacek v. Fiat, 509 N.W.2d 603 (Neb. 1994); Lee v. Volkswagen of Am., Inc., 688 P.2d 1283 (Okla. 1984); Sumnicht v. Toyota Motor Sales U.S.A., Inc., 360 N.W.2d 2 (Wis. 1984).
98. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).
99. *Potter*, 694 A.2d at 1319.
100. *Id.* at 1325.
101. *Id.* at 1325-26.
102. *Id.* at 1333.
103. *Id.*
104. *Id.* at 1335.
105. *Id* at 1336.

3) Multifactor Tests

While most jurisdictions adhere to either one or the other of the tests for determining design defect cases, some states use both tests.[106] This concept was introduced in *Barker v. Lull Engineering Co.*, wherein the California Supreme Court established two alternative tests for determining design defect liability.[107] The Court stated that a design is defective:

> (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or,
>
> (2) if, in light of the relevant factors, the benefits of the challenged design do not outweigh the risk of danger inherent in such design.[108]

The consumer expectations test is reserved for cases involving the product user's typical experience, which permits a conclusion that the product's design violated minimum safety assumptions.[109] Risk utility applies if the product's design embodies excessive preventable danger, unless the benefits of the design outweigh the risk of danger inherent in such a design.[110] The crucial question in design defect cases is "whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers."[111]

4) The Requirement of a Reasonable Alternative Design

Unlike *Restatement (Second)* Section 402A, the *Restatement (Third)* makes a "reasonable alternative design" a requirement in design defect cases.[112] At the time of the *Restatement (Third)*'s adoption, only a limited number of jurisdictions required a reasonable alternative design in products

106. *See* Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Dart v. Wiebe Mfg., Inc., 709 P.2d 876 (Ariz. 1985); Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978); Halliday v. Sturm, Ruger, & Co., Inc., 792 A.2d 1145-46 (Md. 2002); Knitz v. Minister Mach. Co., 432 N.E.2d 814 (Ohio 1982); Ruiz-Guzman v. Amvac Chem. Corp., 7 P.3d 795 (Wash. 2000).

107. *Barker*, 573 P.2d at 446.

108. *Id.*

109. Daniel J. Herling, *The Continuing Erosion of the 'Consumer Expectations' Test in Design Defect Claims*, 20 NO. 9 LJN'S PROD. LIAB. L. & STRATEGY, March 2002, at 1.

110. *Barker*, 573 P.2d at 454.

111. Soule v. General Motors Corp., 882 P.2d 298, 309 (Cal. 1994).

112. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

liability cases.[113] Most of the country has yet to adopt this position, but it is slowly gaining acceptance.[114]

A design defect exists under *Restatement (Third)* when there is a reasonable alternative design that could have reduced or avoided the foreseeable risks of harm posed by the product, and the product is not safe because of the omission of the alternative design.[115] Plaintiffs can establish a reasonable alternative design either by developing a working prototype using expert testimony, or by comparing the defendant manufacturer's design to similar designs in the same field used by another manufacturer.[116] Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury from the viewpoint of a reasonable person.[117]

Although the language of *Restatement (Third)* Section 2 appears to require the plaintiff, as a general rule, to prove a reasonable alternative design, the comments indicate that there are exceptions. The comments following *Restatement (Third)* Sections 2, 3 and 4 allow plaintiffs to avoid presenting a reasonable alternative design in certain circumstances.[118] Comment f to Section 2 states that a plaintiff need not establish an actual prototype of the proposed alternative design.[119] The plaintiff only needs qualified expert testimony to prove the possibility of a reasonable alternative design even though no prototype exists.[120] Moreover, Sections 3 and 4 take notice of the multifactor tests, present in a few states, which do not always require a reasonable alternative design in defect cases.[121]

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113. *See* General Motors Corp. v. Edwards, 482 So. 2d 1176, 1191 (Ala. 1985); Owens v. Allis-Chalmers Corp., 326 N.W.2d 372 (Mich. 1982); Voss v. Black and Decker, Mfg. Co., 450 N.E.2d 204 (N.Y. 1983); Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 335 (Tex. 1998); 735 ILL. COMP. STAT. § 5/2-2104 (West Supp. 1996); LA. REV. STAT. ANN. § 9:2800.56 (1991); MISS. CODE ANN. § 11-1-63 (f)(ii) (2002); OHIO REV. CODE ANN. § 2307.75 (F) (West 1994).

114. *See* Henderson, *supra* note 2, at 12-13 (listing the courts which have treated Section 2(b) favorably, and those which already require a reasonable alternative design, but have not yet adopted Section 2(b)).

115. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

116. *Id.* § 2 cmt. d.

117. *Id.*

118. *See id.* § 2 cmt. b. There are several occasions where a reasonable alternative design is not required. *Id.* Comment e to Section 2 addresses products with such a high degree of danger that no reasonable alternative design is required. *Id.* § 2 cmt. e. Section 3 provides that when circumstantial evidence supports the conclusion that a defect was a contributing cause of harm and that the defect existed at the time of the sale, it is unnecessary to meet Section 2's requirements. *Id.* § 3. Section 4 states that no reasonable alternative design is required when a product violates a statutory norm. *Id.* § 4.

119. Henderson, *supra* note 2, at 13.

120. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (1998).

121. Sixteen jurisdictions hold that a feasible alternative design is merely one of several factors in a design defects case. *See* Dart v. Wiebe Mfg., Inc., 709 P.2d 876 (Ariz. 1985);

5) Other Issues

In addition to the reasonable alternative design requirement, Section 2 presents other issues. Section 2 eliminates the traditional rule that a manufacturer has no duty to design against open and obvious dangers.[122] The principle of open and obvious danger states that if a "product is designed so that it is reasonably safe for the use intended, the product is not defective even though capable of producing injury where the injury results from an obvious or patent peril."[123] Whether a danger is open and obvious depends on an "objective view of the product; the user's perception is irrelevant."[124] This rule had fallen into disrepute over the last two decades prior to adoption of the *Restatement (Third)*.[125] Most jurisdictions now state that open and obvious danger is but one factor to consider when determining a product's reasonableness.[126] Some states, however, still hold to this position, mainly because no case has arisen within their jurisdiction addressing this issue.[127]

Another issue in Section 2 is the lack of duty to warn about obvious dangers.[128] Generally, manufacturers have no duty to warn about obvious dangers.[129] Although this is not an automatic defense, it offers some relief to the manufacturer. [130] This position, articulated in Comment j to Section 2,

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Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240 (Colo. 1987); Warner Fruehauf Trailer Co. v. Boston, 654 A.2d 1272 (D.C. 1995); Radiation Tech., Inc. v. Ware Constr. Co., 445 So.2d 329 (Fla. 1983); Banks v. ICI Americas, Inc., 450 S.E.2d 671 (Ga. 1994); Montgomery Elevator Co. v. McCollough, 676 S.W.2d 776 (Ky. 1984); McCourt v. J.C. Penney Co., Inc., 734 P.2d 696 (Nev. 1987); Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978); Cepeda v. Cumberland Eng'g Co., Inc., 386 A.2d 816 (N.J. 1978); Brooks v. Beech Aircraft Corp., 902 P.2d 54 (N.M. 1995); Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978); Claytor v. Gen. Motors Corp., 286 S.E.2d 129 (S.C. 1982); Peterson v. Safeway Steel Scaffolds Co., 400 N.W.2d 909 (S.D. 1987); Morningstar v. Black & Decker, Mfg. Co., 253 S.E.2d 666 (W. Va. 1979).

122. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998).

123. Weatherby v. Honda Motor Co., Ltd., 393 S.E.2d 64, 66 (Ga. 1990).

124. Raymond v. Amada Co., Ltd., 925 F. Supp. 1572, 1577 (N.D. Ga. 1996).

125. Henderson, *supra* note 2, at 13.

126. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d, reporter's notes (1998).

127. *Id.*

128. *Id.* § 2 cmt. j.

129. *See* McMahon v. Bunn-o-Matic Corp., 150 F.2d 651, 655 (7th Cir. 1998) (relying on comment j when holding that the defendant was not required to warn customers of obviously hot coffee); Maneely v. Gen. Motors Corp., 108 F.3d 1176, 1179 (9th Cir. 1997) (citing to comment j in holding that "a manufacturer need not provide a warning" when dangers are generally obvious); Sauder Custom Fabrication, Inc., v. Boyd 967 S.W.2d 349, 351 (Tex. 1998) (holding, in accordance with comment j, the manufacturer's duty to warn only extends to that which is not obvious to the ordinary user); Caterpillar, Inc. v. Shears, 911 S.W.2d 379, 382 n.2 (Tex. 1995) ("The warnings of obvious risks tends to undermine the effectiveness of warnings of unobvious risks.").

130. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j, reporter's notes (1998).

remains consistent with the position taken in the *Restatement (Second).*[131] The overwhelming amount of authority in the country follows Comment j.[132]

Additionally, *Restatement (Third)* Section 2 Comment l takes a position contrary to that of *Restatement (Second)* Section 402A.[133] The *Restatement (Second)* allowed a defendant manufacturer to warn its way out of a design defect case.[134] *Restatement (Third)*, however, does not allow defendant manufacturers to do this, clearly stating that "warnings are not . . . a substitute for the provision of a reasonably safe design."[135] The drafters took this position because it is consistent with the requirement of a reasonable alternative design.[136] The drafters reasoned that if a reasonable alternative design could have been adopted, the manufacturer should bear responsibility even though it adequately warned against the danger.[137] Because little controversy surrounds the remaining sections of *Restatement (Third)*, the analysis of this comment will focus exclusively on *Restatement (Third)* Section 2.[138]

III. Products Liability In Wyoming

The law of products liability in Wyoming has taken a somewhat different course than much of the rest of the country. Wyoming still adhered to the privity rule in 1963, even though most other jurisdictions by that time had done away with this requirement.[139] Plaintiffs, however, were able to overcome the rule in many ways, including by pleading the traditional negli-

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131. RESTATEMENT (SECOND) OF TORTS § 388 cmt. k (1965) (noting the manufacturer has no duty to warn of open and obvious dangers connected with an otherwise non-defective product).

132. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j, reporter's notes (1998) (listing an extensive amount of caselaw that follows the open and obvious danger rule). *But see* Michael S. Jacobs, *Toward a Process-Based Approach to Failure to Warn Law*, 71 N.C. L. REV. 121 (1992); M. Stuart Madden, *Duty to Warn in Products Liability: Contours and Criticisms*, 89 W. VA. L. REV. 221, 253-57 (1987).

133. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. l (1998); RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965); Henderson, *supra* note 2, at 17.

134. *See* Henderson, *supra* note 2, at 17; Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 U.C.L.A. L. REV. 1193, 1206-07 (1994); Aaron Twerski et al., *The Use and Abuse of Warnings in Products Liability-Design Defect Comes of Age*, 61 CORNELL L. REV. 495, 506 (1976).

135. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. l (1998).

136. Henderson, *supra* note 2, at 17.

137. *Id.*

138. *See* Shupe, *supra* note 3. The authors barely mention the other sections of the *Restatement (Third)* during an extensive analysis of its provisions. *Id. See also* Henderson, *supra* note 62, at 24. The authors note that most of the rest of the *Restatement (Third)* has stirred very little controversy. *Id.*

139. Parker v. Heasler Plumbing & Heating Co., 388 P.2d 516, 518 (Wyo. 1963) (stating that a danger other than one of common knowledge must be present in order to impose upon a manufacturer a duty to warn).

gence doctrine *res ipsa loquitur*.[140] Under Wyoming law, however, it is extremely difficult for a plaintiff to prevail on an action using *res ipsa loquitur*.[141] If the plaintiff can point to any specific acts of negligence by the defendant, then *res ipsa loquitur* is not available.[142] Until 1986, negligence actions were virtually the only cause of action that purchasers not in privity with the manufacturer could bring.[143]

Under the negligence rule, remote purchasers generally could not win on a negligence claim in Wyoming due to difficulties in proof. The only remedy available to remote purchasers without privity of contract was a claim for breach of the implied warranty of merchantability.[144] In 1980, the court lifted the privity requirement in UCC actions, reasoning that "a seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty."[145] Although the case was limited to transactions under the UCC, it was a step toward strict liability in tort actions. Until 1980, the Wyoming Supreme Court previously had been unclear as to whether privity was required in tort actions based on the UCC.[146] After

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140. Estate of Coleman *ex rel.* Coleman v. Casper Concrete Co., 939 P.2d 233 (Wyo. 1997); Goddert v. Newcastle Equip. Co., Inc., 802 P.2d 157, 159 (Wyo. 1990) (limiting the exclusive control requirement to whether or not the defendant could explain the occurrence); Stanolind Oil & Gas Co. v. Bunce 62 P.2d 1297 (Wyo. 1936) (adopting *res ipsa loquitur*, but declining to apply it). The Wyoming rule on *res ipsa loquitur* is:

> When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care.

Coleman, 939 P.2d at 237-38.

141. Langdon v. Baldwin-Lima-Hamilton Corp., 494 P.2d 537, 540 (Wyo. 1972).

142. *Id.*

143. *See* Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 341 (Wyo. 1986) (adopting strict liability in products liability). *See also* Wells v. Jeep Corp., 532 P.2d 595 (Wyo. 1975). The court found for the defendant manufacturer in a design defect case noting, "Proof of nothing more than that a particular injury would not have occurred had the product which caused the injury been designed differently is insufficient to establish a breach of the manufacturer's or seller's duty as to the design of the product." *Id.* at 597. *See also* Maxted v. Pacific Car & Foundry Co., 527 P.2d 832 (Wyo. 1974). Plaintiff sued both manufacturer and retailer, alleging failure to provide an adequate safety roll bar after tractor overturned. *Id.* at 833. The court found for the defendant stating that the manufacturer owed no duty to the plaintiff because its product was not "unreasonably dangerous." *Id.* at 836. The court also declined to adopt strict liability. *Id.*

144. W. Equip. Co., Inc. v. Sheridan Iron Works, Inc., 605 P.2d 806, 810 (Wyo. 1980); Continental Motors Corp. v. Joly, 483 P.2d 244 (Wyo. 1971).

145. *W. Equip.*, 605 P.2d at 808-09.

146. *Id.* at 810; Parker v. Heasler Plumbing & Heating Co., 388 P.2d 516, 517 (Wyo. 1964). The court noted the lack of privity of contract in failure to warn case, but did not decide on the issue. *Id.* Subsequent decisions, however, have allowed actions without privity of contract, but did not clearly decide on the issue. *See* Wells v. Jeep Corp., 532 P.2d 595

the court extended liability in UCC actions, other independent tort actions soon followed.

Also, it was not until 1978 that the Wyoming Supreme Court recognized that an automobile manufacturer should foresee the involvement of its product in collisions.[147] The rest the country recognized this fact after the holding in *McPherson* in 1916 or soon thereafter.[148] Moreover, reasonable alternative designs were not accepted as evidence in negligence actions against manufacturers until 1974.[149] The rest of the country began accepting reasonable alternative designs in the mid 1960's.[150] Wyoming, however, did not have a products liability case until 1963.[151]

A. Strict Liability in Wyoming

Although the *Restatement (Second)* recognized strict liability in 1965, the Wyoming Supreme Court declined on a number of occasions, to adopt strict liability in products liability actions.[152]

(Wyo. 1975); Maxted v. Pacific Car & Foundry Co., 527 P.2d 832 (Wyo. 1974); Shipton Supply Co. v. Bumbaca, 505 P.2d 591 (Wyo. 1973); Ford Motor Co. v. Arguello, 382 P.2d 886 (Wyo. 1963).

147. Chrysler Corp. v. Todorovich, 580 P.2d 1123, 1129 (Wyo. 1978). The court held that after the seat bracket broke during an automobile collision, the defendant manufacturer has the duty of a reasonable and prudent man designing an automobile. *Id.* Therefore, a reasonable man would anticipate collisions and the manufacturer had a duty to design against them. *Id.; see also Maxted*, 527 P.2d at 833-34. In *Maxted,* the court allowed proof of design but noted that lack of workable prototype hurt its credibility. *Id.*

148. *See* Wade, *supra* note 18, at 5 (noting that most of the country had adopted the *McPherson* reasoning by 1965).

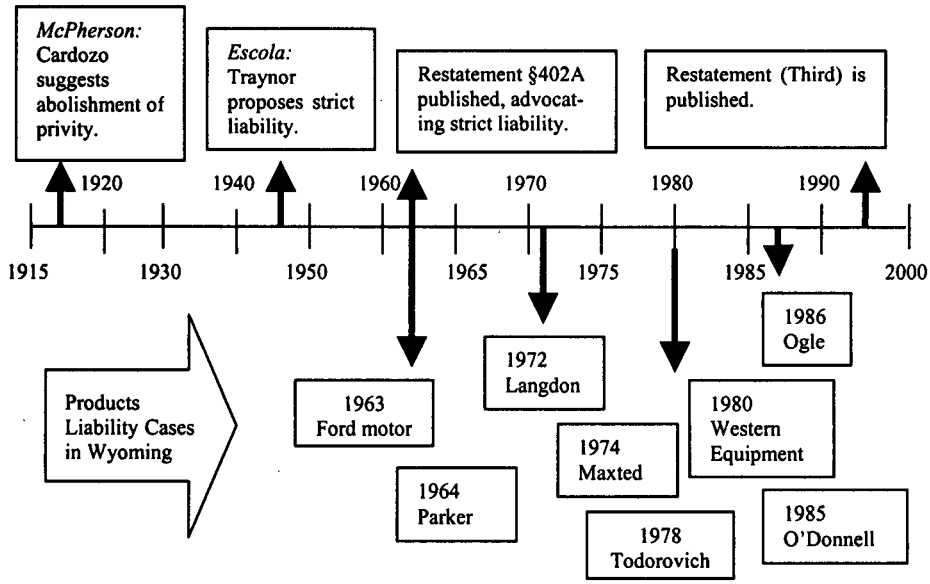
149. *Maxted*, 527 P.2d at 832. The plaintiffs offered a reasonable alternative design to the coupling device that held a tractor and trailer together. *Id.*

150. Guerdon Indus., Inc. v. Fidelity & Casualty Co., 123 N.W.2d 143 (Mich. 1963); McCormack v. Hankscraft Co., 154 N.W.2d 488 (Minn. 1967); Great Am. Ins. Co. v. Triplett, 139 So. 2d 357 (Miss. 1962); Jakubowski v. Minnesota Mining & Mfg. Co., 199 A.2d 826 (N.J. 1964); Heaton v. Ford Motor Co., 435 P.2d 806 (Or. 1967); Webb v. Zern, 220 A.2d 853 (Pa. 1966); Cudmore v. Richardson-Merrell, Inc., 398 S.W.2d 640 (Tex. Civ. App. 1965); Detrick v. Garretson Packing Co., 440 P.2d 834 (Wash. 1968).

151. Parker v. Heasler Plumbing & Heating Co., 388 P.2d 516, 517 (Wyo. 1963)

152. *See* Buckley v. Bell, 703 P.2d 1089, 1094 (Wyo. 1985); O'Donnell v. City of Casper, 696 P.2d 1278, 1288 (Wyo. 1985); Herman v. Speed King Mfg. Co., 675 P.2d 1271, 1276 (Wyo. 1984); Caldwell v. Yamaha Motor Co., 648 P.2d 519, 521 (Wyo. 1982) (applying Section 402A as law of the case, but declining to adopt as law of the state); *Wells*, 532 P.2d at 597; *Maxted*, 527 P.2d at 834.

TIMELINE: PRE-OGLE PRODUCTS LIABILITY CASES IN WYOMING:



The development of Wyoming's products liability law has been much slower than the rest of the country because there have been very few opportunities for the Wyoming court to make any significant changes in the law. [153] The first products liability case was *Ford Motor Co. v. Arguello*, in which the court first indicated that privity of contract was not required in a products liability case.[154] One year later, in *Parker v. Heasler Plumbing and Heating Co.*, the plaintiff was saddled with an additional burden in a products liability case when it was required to prove a latent defect in a duty to warn case.[155] Following *Parker*, the court declined to apply *res ipsa loquitur* in *Langdon v. Baldwin-Lima-Hamilton Corp.* because the plaintiff proved specific acts of negligence.[156] In 1974, the court declined to adopt Section 402A in *Maxted v. Pacific Car & Foundry Co.*, and dismissed the case due to a lack of a reasonable alternative design prototype.[157] After *Maxted*, the court decided *Chrysler Corp. v. Todorovich*.[158] In *Todorovich*, the court recognized the duty of an auto manufacturer to anticipate collisions.[159] Later, in 1980, the court eliminated the privity requirement in UCC products liability cases in *Western Equipment Co., Inc. v. Sheridan Iron Works, Inc.*[160]

153. *See generally Parker*, 388 P.2d at 516; Ford Motor Co. v. Arguello, 382 P.2d 886 (Wyo. 1963) (representing the first two products liability cases in Wyoming).
154. *Arguello*, 382 P.2d at 889.
155. *Parker*, 388 P.2d at 517-18.
156. Langdon v. Baldwin-Lima-Hamilton Corp., 494 P.2d 537, 540 (Wyo. 1972).
157. Maxted v. Pacific Car & Foundry Co., 527 P.2d 832, 836 (Wyo. 1974).
158. 580 P.2d 1123 (Wyo. 1978).
159. *Id.* at 1129.
160. W. Equip. Co., Inc. v. Sheridan Iron Works, Inc., 605 P.2d 806, 810 (Wyo. 1980).

In 1985, the court on two occasions declined to adopt Section 402A in *O'Donnell v. City of Casper* and *Buckley v. Bell*.[161]

Finally, in 1986, over a dissent by Justice Brown, the Wyoming Supreme Court adopted strict tort liability in *Ogle v. Caterpillar Tractor Co.*[162] In *Ogle*, the plaintiff sued the manufacturer after he fell from the hood of a Caterpillar scraper he was operating.[163] The plaintiff brought claims in breach of warranty, negligence, and strict liability.[164] The Wyoming Supreme Court held that the breach of warranty action that was previously applied in product defect cases was inadequate, and all relevant policy pointed to the adoption of strict liability in design defect, failure to warn, and manufacturing defect cases.[165] The Wyoming Supreme Court adopted the *Restatement (Second)* Section 402A in its entirety, including the comments, in products liability cases.[166] Furthermore, the Wyoming Supreme Court remanded the *Ogle* case so it could be tried under a strict liability theory.[167] Although the *Ogle* court adopted strict liability, it also recognized the continued existence of negligence claims in products liability actions.[168]

B. Post Ogle Decisions

Since the *Ogle* decision, the Wyoming Court has handled various issues surrounding the application of Section 402A. The court, however, has yet to articulate whether it follows a consumer expectation or risk utility test in design defect cases. In *Sims v. General Motors Corp.*, a design defect case from 1988, the plaintiff appealed an adverse judgment claiming error in a jury instruction on "unreasonably dangerous."[169] The instruction stated: "A product is defective when it is in an unreasonably dangerous condition. The term 'unreasonably dangerous' means unsafe when put to a use that is reasonably foreseeable considering the nature and function of the product and its uses"[170] The plaintiff argued that the instruction was improper because it imposed a risk-utility theory.[171] The court subsequently held, "[W]e admit that this Court does not follow a risk benefit theory, we cannot see how the instruction given by the trial court imposed such a burden on plain-

161. O'Donnell v. City of Casper, 696 P.2d 1278, 1288 (Wyo. 1985); Buckley v. Bell, 703 P.2d 1089, 1094 (Wyo. 1985).
162. Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 341 (Wyo. 1986).
163. *Id.* at 336.
164. *Id.*
165. *Id.* at 343.
166. *Id.* at 341.
167. *Id.* at 346.
168. *Id.*
169. Sims v. Gen. Motors Corp., 751 P.2d 357, 364-65 (Wyo. 1988). Plaintiff's daughter was injured after plaintiff's vehicle started on fire and her daughter's seat belt buckle failed to open, causing the daughter's death. *Id.* at 359. Plaintiff alleged that the seat belt buckle was defectively designed. *Id.*
170. *Id.* at 365.
171. *Id.*

tiffs or the jury."[172] The court did not explicitly adopt either the consumer expectations test or a combination of the risk utility and consumer expectations tests.[173] Wyoming has yet to adopt a test since the *Sims* case.[174]

Another post-*Ogle* decision that failed to take a position on what standard to apply is *Continental Insurance v. Page Engineering Co.*[175] In *Page,* the plaintiff attempted to recover damages when a reeving block failed, alleging design defect, failure to warn, and negligence.[176] The plaintiff sought to recover damages based on the damage to the reeving block itself, and what it would cost to repair it.[177] The court, during this discussion, peripherally addressed what test to apply in an implied warranty of merchantability action. The court, in dicta, stated, "What is true with respect to strict liability and negligence, i.e. the risk associated with a product which does not meet the expectations of a buyer is a risk better suited to resolution by agreement between sophisticated bargaining parties."[178] Again, the court left the issue of expectations up to the contracting parties and failed to take a position on what test to apply in a design defect case.[179]

A further development in Wyoming products liability law came in *McLaughlin v. Michelin Tire Corp.*[180] In *McLaughlin,* the court first stated that strict liability in products liability cases should be used as a last resort.[181] Second, the court offered its version of the definition of defect, stating that "a wrong product is not a defective product for purposes of strict liability."[182] The court explained that the defect must be a "defect in fact" (i.e. the product itself failed), and not merely the wrong product for the situation.[183] Furthermore, the court noted that the focus in strict liability actions, unlike previous negligence actions, is on the product and not on the manufacturer's actions.[184]

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172. *Id.*
173. *Id.*
174. Vargo, *supra* note 3, at 949.
175. 783 P.2d 641 (Wyo. 1989).
176. *Id.* at 646. A reeving block is a component of a dragline used in open pit mining operations. *Id.* at 645.
177. *Id.* at 647.
178. *Id.* at 650.
179. *Id.*
180. 778 P.2d 59 (Wyo. 1989).
181. *Id.* at 64.
182. *Id.* at 65.
183. *Id.* at 64.
184. *Id.*

C. Decisions Since Restatement (Third)'s Publication

The Wyoming Supreme Court has had only two occasions to adopt the *Restatement (Third)* since its publication in 1998.[185] In *Covington v. Grace-Conn., Inc.*, the plaintiff alleged that his lung cancer was caused by exposure to asbestos insulation while at his place of employment.[186] The court failed to address the *Restatement (Third)*, and instead decided the case under the Wyoming Real Estate Statute of Repose.[187] In *Campbell v. Studer, Inc.*, the plaintiff sued in strict liability when her husband died after being ejected from an asphalt compacter.[188] Although Section 2(b) of the *Restatement (Third)* applied, the court declined to adopt it because the specific facts of the case did not give rise to the reasonable alternative design requirement.[189] The court hinted that on another occasion it may accept the *Restatement (Third)*'s summation of the law, stating that a reasonable alternative design may not be required to prove a defective design according to comments b and e to Section 2.[190] The requirement of a reasonable alternative design is the subject of the majority of criticism surrounding the *Restatement (Third)*; however, the court chooses not to join in the criticism.[191] Regardless, Wyoming still follows Section 402A in products liability actions.[192]

The foregoing outlines the extent of the development of Products Liability Law in Wyoming. Wyoming still follows the court's decision in *Ogle*, which adopted Section 402A of the *Restatement (Second)*.[193] Wyoming does not have a clear test for design defect cases, adopting neither a consumer expectation nor a risk utility test.[194]

ANALYSIS

The analysis section discusses the advantages and disadvantages of adopting the *Restatement (Third)* in Wyoming. Specifically, the analysis focuses on the advantages and disadvantages of both the risk utility test set

185. Campbell v. Studer, Inc., 970 P.2d 389 (Wyo. 1998); Covington v. W.R. Grace-Conn., Inc, 952 P.2d 1105 (Wyo. 1998).
186. *Covington,* 952 P.2d at 1106.
187. *Id.* at 1105. The Wyoming Statute of Repose is found in WYO. STAT. ANN. § 1-3-111 (LEXISNEXIS 2001). The court decided this case under it because it dealt with manufactured and furnished materials that were incorporated into real estate improvement. *Covington*, 952 P.2d at 1105.
188. *Campbell*, 970 P.2d at 390.
189. *Id.* at 392 n.1.
190. *Id.*
191. *Id.* For criticisms of the *Restatement (Third), see generally* Vargo, *supra* note 3, at 518 (noting the difficulty plaintiffs will have in proving a reasonable alternative design).
192. *Campbell*, 970 P.2d at 392 n.1.
193. *Id.*.
194. Vargo, *supra* note 3, at 949.

forth in Section 2(b) and the competing consumer expectations test. The analysis also addresses why Wyoming should adopt the *Restatement (Third)*.

I. Section 2(b): Risk Utility and Consumer Expectations: A Comparison

Section 2(b) was the cornerstone of the *Restatement (Third)* from its inception.[195] Design defect cases, with which Section 2(b) deals, are at the center of products liability law.[196] Generally, a feasible alternative design lies at the heart of a design defect case.[197] This was the view taken by the authors of the *Restatement (Third)* when drafting Section 2(b).[198]

In courts today, however, there remain three different tests for design defect cases: the risk utility test, the consumer expectations test, and a combination of the two.[199] The risk utility test, the position taken by the *Restatement (Third)*, is followed in a majority of states.[200] Some courts continue to apply a combination of the two tests, using the consumer expectations test as a factor in design defect cases.[201] Other courts allow the plaintiff to choose which test to employ.[202] Finally, some courts only employ a consumer expectation test to design defect cases.[203] However, the overall trend in the law is moving toward a risk utility analysis in design defect cases.[204]

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195. Jerry J. Phillips, *Consumer Expectations*, 53 S.C. L. REV. 1047, 1064 (2002); James A. Henderson, Jr. & Aaron Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1520 (1992).

196. DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 8:5 (3d. ed. 2000).

197. *Id.*

198. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

199. Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1329 (Conn. 1997).

200. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d, reporter's notes (1998).

201. Herling, *supra* note 110, at 3 n.1. Those states are Alabama, Alaska, Arkansas, California, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Nebraska, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin. *Id.*

202. Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978); Ontai v. Straub Clinic & Hospital, Inc., 659 P.2d 734 (Haw. 1983); Lamkin v. Towner, 615 N.E.2d 1208 (Ill. 1993); Halliday v. Sturm, Ruger & Co., Inc., 792 A.2d 1145 (Md. 2002).

203. Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1331 (Conn. 1997); Delaney v. Deere & Co., 999 P.2d 930, 946 (Kan. 2000); Green v. Smith & Nephew Co. AHP, Inc., 629 N.W.2d 727, 751 (Wis. 2001).

204. *See* Warner Freuhauf Trailer Co., Inc., v. Boston, 654 A.2d 1272, 1276 (D.C. 1995) (noting that in design defect cases, most jurisdictions decide strict liability in tort using some form of risk-utility balancing test); Banks v. ICI Americas, Inc., 450 S.E.2d 671 (Ga. 1994); Nichols v. Union Underwear Co., Inc., 602 S.W.2d 429 (Ky. 1980); St. Germain v. Husqvarna Corp., 544 A.2d 1283, 1286 (Me. 1988); Sperry-New Holland v. Prestage, 617 So. 2d 248, 255 (Miss. 1993) (noting that risk utility has become the trend in most federal and state jurisdictions); Ford Motor Co. v. Miles, 967 S.W.2d 377, 386 (Tex. 1998).

A. Application of Risk Utility and Consumer Expectations Test

The traditional risk utility test states that a product is defective and its design embodies excessive preventable danger unless "the benefits of the challenged design outweigh the risk of danger inherent in such a design."[205] The trier of fact deciding a products liability case using the *Restatement (Third)* Section 2(b) essentially has to answer one question: "Which is the better design?"[206] In answering this question, the trier of fact considers a number of factors, including the availability of the alternative design, the feasibility of the alternative design, the foreseeability of harm that may be caused by the defendant's product without the design, and whether the omission of the reasonable alternative design made the defendant's product unsafe.[207] Applying these factors can be quite difficult for jurors, especially when the design is very technical and complicated.[208]

Like the risk utility test, the consumer expectations test may seem simple, but can be quite complicated in its application.[209] The consumer expectations test states that a product is defective if it is "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."[210] Taken in its most simplistic form, the trier of fact must determine only what an "ordinary consumer" would believe about the qualities of the product in question.[211] In order to determine consumer ex-

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205. Barker v. Lull Eng'g Co., 573 P.2d 443, 446-47 (Cal. 1978).

206. Henderson, *supra* note 62, at 23.

207. *See* Peck v. Bridgeport Mach., 237 F.3d 614 (6th Cir. 2001) (applying Michigan law). Examples of the difficulty of the risk utility test are the six factors the jury was asked to apply in the *Peck* case. They are:

> (1) that the severity of the injury was foreseeable by the manufacturer;
>
> (2) that the likelihood of the occurrence of the injury was foreseeable by the manufacturer at the time of the distribution of the product;
>
> (3) that there was a reasonable alternative available;
>
> (4) that the available alternative design was practicable;
>
> (5) that the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by the defendant's product; and
>
> (6) that the omission of the available and practicable reasonable alternative design rendered the defendant's product not reasonably safe.

Id. at 617-18.

208. Henderson, *supra* note 62, at 23-24.

209. *See generally* Richard L. Cupp., Jr., *The "Uncomplicated" Law of Products Liability: Reflections of a Professor Turned Juror,* 91 NW. U. L. REV. 1082 (1997) (stating that the consumer expectations test is difficult to apply in design defect cases).

210. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

211. Vargo, *supra* note 7, at 539.

pectations, the trier of fact needs to take into account several factors, including "the relative cost of the product, the gravity of the potential harm from the claimed defect, and the cost and feasibility of eliminating or minimizing the risk [to the consumer]."[212] Additionally, it can be difficult for the trier of fact to apply the consumer expectations in complex product liability cases because such expectations lie beyond the knowledge of the average consumer.[213] Both risk utility and consumer expectations tests can be exceedingly difficult to apply in certain situations because of the number of factors that should be weighed in order to reach a verdict.[214]

B. Application in Design Defect Cases

Most of the contention surrounding the *Restatement (Third)* is found in the design defect arena.[215] Both the consumer expectations test and the risk utility test have their advantages and disadvantages in design defect cases. In a design defect case, the plaintiff is contending that the product has been made precisely as intended, but is nevertheless defective because the design is defective.[216] Though it is more difficult to apply the consumer expectations test to design defects than manufacturing defects, the risk utility test is not without its difficulties as well.[217]

The biggest advantage of the risk utility test is that it's balancing of a particular product's costs and benefits makes it easier to apply in complex design cases.[218] The consumer expectations test is difficult to apply to machines and technical products about which consumers have very little information.[219] In *Soule v. General Motors Corp.*, the plaintiff claimed that frame and wheel assembly brackets of a Camaro were defectively designed, causing enhanced injury to the plaintiff driver during a collision.[220] The California Supreme Court held that the jury could not have meaningfully applied the consumer expectations test because of the case's complexity.[221] Ordinary experience and understanding, the court held, would not create expectations about the "precise behavior of several obscure components of [the plaintiff's] car under the complex circumstances of a particular accident."[222]

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212. Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1333 (Conn. 1997).
213. Phillips, *supra* note 195, at 1048-49.
214. Cupp, *supra* note 209, at 1083.
215. Henderson, *supra* note 62, at 22.
216. Robert P. Murrian, *Products Liability – Tennessee's Prudent Manufacturer Test*, 67 TENN. L. REV. 307, 324 (2000).
217. *See generally* Vargo, *supra* note 3 (criticizing the application of risk utility in design defect cases); Henderson, *supra* note 62 (criticizing the application of the consumer expectations test in design defect cases).
218. Perlman, *supra* note 41, at 198.
219. *Id.*
220. Soule v. Gen. Motors Corp., 882 P.2d 298, 301-02 (Cal. 1994).
221. *Id.* at 310.
222. *Id.*

The court noted that the consumer expectations test is reserved for cases where the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions.[223] Since such complicated design considerations were at issue, and expert testimony was necessary to illuminate how the design worked, the court held that the consumer expectations test was improperly applied in the *Soule* case.[224]

Consumer expectations, on the other hand, can be applied in certain design defect cases where risk utility cannot. Products, the use of which exposes the consumer to inherent risks, are the best example of such a situation.[225] These cases involve products such as cigarettes, alcoholic beverages, and inexpensive handguns. These consumer products cause death or injury to large numbers of users, but provide few countervailing benefits.[226] These products are so dangerous that they should be per se defective despite the absence of a safer alternative design.[227] With these products, the dangerous nature of the product is the essence of the product. For example, alcohol intoxicates and, along with nicotine, is potentially addictive, and certain inexpensive handguns serve little purpose other than facilitating the commission of violent crime.[228] Any alternative product that did not provide the same effect would not be a true alternative.[229] In short, application of the risk utility test would be impossible because there simply is no reasonable alternative design a plaintiff can adopt in these cases that still intoxicates, addicts, or assists in the commission of crime as accomplished by these products.[230]

C. Plaintiff's Burden of Proof

The biggest problem critics and courts have had with the *Restatement (Third)* is not in the adoption of risk utility, but in the requirement of a reasonable alternative design.[231] Generally, in order to prevail under a risk utility analysis, plaintiffs have to prove the existence of a reasonable alternative design, although courts do not always strictly require it. [232] Plaintiffs

223. *Id.* at 309.
224. *Id.* at 310.
225. William E. Westerbeke, *The Sources of Controversy in the New Restatement of Products Liability: Strict Liability Versus Products* Liability, 8 KAN. J.L. & PUB. POL'Y 1, 10 (1998).
226. *Id.*
227. *Id.*
228. Van Flein, *supra* note 63, at 30.
229. *Id.*
230. *Id.*
231. *See* Delany v. Deere and Co., 219 F.3d 1195, 1196 (10th Cir. 2000); Potter v. Chicago Pneumatic Tool, 694 A.2d 1319, 1332 (Conn. 1997); Vautour v. Body Masters Sports Indus., Inc., 784 A.2d 1178, 1183-84 (N.H. 2001) (criticizing the requirement of a reasonable alternative design as too restrictive).
232. *See* Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 468 (1979); Van Flein, *supra* note 63, at 29 (stating that "from a practical, trial and evi-

can establish a reasonable alternative design either by developing a working prototype, using expert testimony, or comparing the design the manufacturer adopted with similar designs in the same field used by another manufacturer.[233]

This contrasts sharply with how plaintiffs can create consumer expectations in a design defect case. Manufacturers, to a significant degree, create consumer safety expectations through product labeling and advertising.[234] The manufacturer who makes false statements about his or her product creates legitimate and reasonable consumer expectations which merit protection.[235] Therefore, instead of having to prove a reasonable alternative design to prevail under the consumer expectations test, a plaintiff will only have to assert what is already in public knowledge through product labeling and advertising.[236] Generally, plaintiffs do not have to bother with the creation of a prototype of the design or with expert testimony on the design's merit.[237] Section 2(b) requires, on the other hand, detailed proof of an alternative design, which is a much larger burden on the plaintiff's case than showing consumer expectations.[238]

Furthermore, risk utility is a negligence-based analysis.[239] The requirements of "foreseeability" and "reasonableness" in Section 2(b) effectively reconvert the products liability standard from strict liability into one of negligence.[240] By requiring the manufacturer to foresee harm and by requiring the plaintiff to prove a reasonable alternative design, the *Restatement (Third)* moved far from the strict liability standard set out in Section 402A of the *Restatement (Second)*.[241] Comment a to the *Restatement (Third)* Section 1 states that the strict liability rule developed for manufacturing defects is inappropriate for design and warnings claims.[242] The definitions of "defect" in these cases rely on a reasonableness test traditionally used in determining whether an actor has been negligent.[243] As a practical matter, the require-

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dentiary perspective, proof of a safer alternative design would present a more persuasive and compelling case than one without such proof"); Hernandez v. Tokai Corp., 2 S.W.3d 251, 257 (Tex. 1999) (stating that most states make proof of a reasonable alternative design a prerequisite to a determination of design defectiveness).

233. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d & f (1998).

234. Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1130-31 (1974).

235. Rebecca Korzec, *Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test*, 20 B.C. INT'L & COMP. L. REV. 227, 240 (1997).

236. *Id.* at 241.

237. Perlman, *supra* note 41, at 198.

238. Vargo, *supra* note 3, at 519.

239. Perlman, *supra* note 41, at 197.

240. Owen, *supra* note 78, at 285.

241. *Id.*

242. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (1998).

243. *Id.*

ment of a reasonable alternative design eliminates any possibility of strict liability for design defects.[244] No longer can the plaintiff assert that the product was not designed according to consumer expectations.[245] Instead, the plaintiff must prove that the manufacturer could foresee the harm and should have adopted a reasonable alternative design, much like a negligence claim.[246]

On the other hand, the consumer expectations test follows the strict liability principles set forth in *Restatement (Second)* Section 402A.[247] The basic policy of Section 402A was to relieve the plaintiff of the burden of proving negligence.[248] Under the consumer expectations test, the plaintiff does not have to prove negligence if the harm was foreseeable or if there was a reasonable alternative design to the product.[249] The consumer expectations test avoids the economic analysis under the risk utility test and permits the trier of fact to do what it is best at doing – resolving questions of fairness.[250]

D. Flexibility

One disadvantage to the adoption of the *Restatement (Third)* is its lack of flexibility.[251] The *Restatement (Third)* collapses the risk utility test, which typically consist of a number of factors, into a single factor: Was there a reasonable and safer alternative design at the time the product was manufactured?[252] Under a traditional risk utility analysis, the determination of whether the manufacturer reached a reasonable balance should be flexible.[253] The Minnesota Supreme Court summarized this position in *Bilotta v. Kelley Co.*, stating, "What constitutes "reasonable care" will, of course, vary with the surrounding circumstances and will involve a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm."[254] The adoption of the *Restatement (Third)* would eliminate many of the other factors that courts have taken into account during a traditional risk utility analysis in favor of one factor, a reasonable alternative design.[255]

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244. Westerbeke, *supra* note 225, at 10.
245. Owen, *supra* note 78, at 285.
246. *Id.* at 285-86.
247. Vargo, *supra* note 3, at 538.
248. *Id.* at 508.
249. Phillips, *supra* note 195, at 1048.
250. Murrian, *supra* note 216, at 323.
251. Michael V. Ciresi & Gary L. Wilson, *A Misstatement of Minnesota Products Liability Law: Why Minnesota Should Reject the Requirement that a Plaintiff Prove a Reasonable Alternative Design*, 21 WM. MITCHELL L. REV. 369, 374-75 (1995).
252. *Id.*
253. *Id.* at 374.
254. Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 621 (Minn. 1984).
255. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (1998). The reporters list traditional risk utility factors, but point out that in most cases, a reasonable alter-

In contrast, an advantage of the consumer expectations test is its flexibility.[256] The plaintiff can prove his case without providing the technical content required under *Restatement (Third)*.[257] Additionally, the plaintiff can argue that a design meeting all state-of-the-art specifications for safety is still defective if consumers had even higher expectations.[258] If the plaintiff succeeds, manufacturers will add more safety features to their products, thus accomplishing the same goal if the case were tried under the risk utility analysis.[259]

E. Fairness

There are also concerns that adoption of the *Restatement (Third)* and risk utility would at times be unfair to the plaintiff. Generally, a manufacturer stands in a superior position to recognize and cure defects.[260] The *Restatement (Third)* shifts this burden to the plaintiff, forcing him to create a reasonable alternative design.[261] The plaintiff must prove that the hypothetical alternative design would have eliminated or reduced the harm suffered by the plaintiff.[262] Generally, though the manufacturer has access to this information, it may be difficult for the plaintiff to acquire it.[263] Nevertheless, the *Restatement (Third)* requires the plaintiff to introduce information that the manufacturer could have reduced the plaintiff's harm, a burden that under Section 402A was on the manufacturer.[264]

The consumer expectations test also can be unfair to the plaintiff. The consumer expectations test eliminates liability for dangers that are open and obvious to consumers, even though it might be thought unreasonable for a manufacturer not to incorporate precautions against such dangers.[265] For example, a metal press designed without guards to protect workers might not be considered reasonably defective even though the absence of the guard is an obvious danger under the consumer expectations test.[266] In contrast, under the risk utility test, the plaintiff could prevail upon showing, for instance, that other manufacturers of the same product adopted a guard.[267]

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native design is needed to prevail under the *Restatement (Third)*. *Id.* The factors listed include: The magnitude and probability of foreseeable risks of harm, the instructions and warnings, consumer expectations, and costs of alternative design. *Id.*

256. Perlman, *supra* note 41, at 197.
257. *Id.*
258. *Id.*
259. Korzec, *supra* note 235, at 238.
260. Ciresi, *supra* note 251, at 376.
261. *Id.*
262. *Id.* at 375.
263. *Id.* at 376.
264. *Id.* at 375-76.
265. Perlman, *supra* note 41, at 196.
266. *Id.*
267. *Id.* at 196-97.

II. Reasons to Adopt the Restatement (Third)

The *Restatement (Third)* has been criticized as being too burdensome on the plaintiff.[268] Four state supreme court decisions have rejected Section 2(b) for this reason.[269] These courts overlook the many cases where a plaintiff has successfully presented a reasonable alternative design.[270] For example, in *Warner Fruehauf Trailer Co., Inc. v. Boston*, the plaintiff was injured after a truck liftgate with a single hydraulic cylinder fell on him.[271] The plaintiff proposed a back up system with an extra cylinder to prevent the gate from falling on consumers.[272] The court held that the addition of the second cylinder would have eliminated the risk, and granted a directed verdict for the plaintiff.[273]

Secondly, the consumer expectations test can at times give the trier of fact free reign to do anything it wants with a design defect case.[274] Using the consumer expectations test, the trier of fact asks: "What does the consumer expect?"[275] Obviously, the consumer expects not to be injured.[276] The

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268. Vargo, *supra* note 3, at 516.

269. *See* Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1332 (Conn. 1997) (noting that the feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration); Delany v. Deere & Co., 999 P.2d 930, 944 (Kan. 2000) (holding that Kansas is a consumer expectation state); Vautour v. Body Masters, Inc., 784 A.2d 1178, 1183 (N.H. 2001) (stating that a reasonable alternative design should not be a controlling factor or an essential element that must be proved in every case); Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 751-52 (Wis. 2001) (holding that Section 2(b) increases the burden for injured consumers not only by requiring proof of the manufacturer's negligence, but also by adding an additional – and considerable – element of proof to the negligence standard).

270. *See* Goullon v. Ford Motor Co., 44 F.2d 310 (6th Cir. 1930) (applying Kentucky law). In *Goullon*, the product was a tractor steering wheel made of rubber and fiber that broke in the driver's hands causing him to fall into the path of the tractor. *Id.* at 310-11. The reasonable alternative design, a rim made of wood or metal, would not have broken. *Id. See also* Drayton v. Jiffee Chem. Corp., 395 F. Supp. 1081 (N.D. Ohio 1975). In *Drayton*, a drain cleaner comprised of chemicals that were highly corrosive to human skin injured the plaintiff. *Id.* at 1084. A change in the chemical formulation would have made the cleaner better at cleaning drains and much more safe. *Id.* at 1085. *See also* Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956). In *Matthews*, a moving metal mechanism under the armrest of a lawn chair amputated the user's finger. *Id.* at 300. A simple housing could have shielded the mechanism. *Id.* at 301. *See also* Stazenski v. Tennant Co., 617 So. 2d 344 (Fla. Dist. Ct. App. 1993). In *Stazenski*, an industrial machine with a sharp edge cut a worker. *Id.* at 345. The sharp edge served no purpose and could easily have been rounded smooth. *Id. See also* Lindroth v. Walgreen Co., 87 N.E.2d 307 (Ill. App. Ct. 1949). In *Lindroth*, a vaporizer overheated and caught fire when the water boiled away. *Id.* at 308. A simple cutoff device could have prevented the fire. *Id.* at 309. *See also* Muller v. A.B. Kirschbaum Co., 148 A. 851 (Pa. 1930). In *Muller* a commercial coffee urn exploded, injuring the plaintiff. *Id.* at 852. A simple reducing valve could have prevented the explosion. *Id.* at 853.

271. Warner Fruehauf Trailer Co., Inc. v. Boston, 654 A.2d 1272, 1273 (D.C. 1995).

272. *Id.*

273. *Id.* at 1280.

274. Murrian, *supra* note 216, at 323.

275. Henderson, *supra* note 62, at 22.

consumer's expectation, with regard to how a product will perform, can be very hard to determine.[277] This position is summarized in *Denny v. Ford Motor Co.*:

> If the test is applied to determine the actual buyer's expectations it can result in imposing absolute liability upon manufacturers and sellers making them insurers of the product's safety merely because the product did not live up to the consumer's subjective expectations. If the test is used objectively, it is beyond the experience of most lay jurors to determine what an "ordinary consumer" expects or "how safe" a sophisticated modern product could or should be made to satisfy those expectations unless the jury is allowed to consider the cost or impracticality of alternative designs or, indeed whether any alternative design for the product was available.[278]

Next, although the *Restatement (Third)* adopted the risk utility test, the notion of consumer expectations did not disappear entirely.[279] Comment f to Section 2 states that consumer expectations can be a factor in evaluating whether an alternative design is reasonable or if its omission renders a product not reasonably safe.[280] For example, in *Crespo v. Chrysler Corp.*, the plaintiff sued the manufacturer after her son was killed by an airbag in a Dodge Caravan.[281] The plaintiff claimed that the airbag deployed with too much force and was therefore defectively designed.[282] The defendant argued that decreasing deployment force would decrease the airbag's ability to save lives.[283] Since consumers expect airbags to save lives, decreasing the force with which they deployed would frustrate consumer expectations in the airbag.[284] Therefore, the consumer expectations test, applied within the framework of a risk utility analysis, was the reason why the defendant manufacturer prevailed in that case.[285]

Although consumer expectations remain a factor in some cases dealing with products liability today, the country is clearly moving toward a risk

276. *Id.*
277. *Id.*
278. Denny v. Ford Motor Co., 662 N.E.2d 730, 743 (N.Y. 1999) (Simons, J., dissenting).
279. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (1998).
280. *Id.*
281. Crespo v. Chrysler Corp., 75 F. Supp. 2d 225, 227 (S.D.N.Y. 1999).
282. *Id.*
283. *Id.* at 229.
284. *Id.*
285. *Id.* at 232.

utility approach in products liability cases.[286] Admittedly, abandoning consumer expectations as a viable alternative in products liability cases would mark a departure from the current laws in parts of the country. Nevertheless, many of the jurisdictions that allow consumer expectations test to be used as an alternate to risk utility require a reasonable alternative design under the risk utility portion of their analysis.[287] In *Ruiz-Guzman v. Amvac Chemical Corp.*, the plaintiffs developed physical symptoms after working with the defendant's chemicals.[288] The court applied the risk utility test, and while noting that consumer expectations would be a factor, dismissed the case for lack of a reasonable alternative design.[289] Similarly, in *Cavanaugh v. Skil Corp.*, the plaintiff brought suit after being injured by the defendant's saw.[290] Upon putting the saw down, the saw moved about eighteen inches across the floor on its own and ran over the plaintiff's foot.[291] The New Jersey Supreme Court recognized the consumer expectations test, but in this case required the plaintiff to prove a reasonable alternative design.[292] The plaintiff offered a blade break as a safety feature, which would have avoided his injury, and his claim was allowed to go forward.[293]

The *Restatement (Third)* is not nearly as flexible as the consumer expectations test, but neither is it as inflexible as it appears. There are provisions in *Restatement (Third)* providing for situations when a reasonable alternative design is not required, thereby providing the plaintiff other options than attempting to prove a reasonable alternative design in every situation.[294] One such situation, described in comment e to Section 2, is when a design is so manifestly unreasonable, such that the product has low social utility and high risk of danger, that liability attaches without proof of a reasonable alternative design.[295] An example of this rule is a cigar that is meant to explode with a loud bang and emission of smoke.[296] Since this product has such a low social utility, and the risks of, for example, lighting someone's

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286. *See* Karns v. Emerson Elec. Co., 817 F.2d 1452 (10th Cir. 1987) (applying Oklahoma law); Pike v. Frank G. Hough Co., 467 P.2d 229, 236 (Cal. 1970); Couch v. Mine Safety Appliances Co., 728 P.2d 585, 587-88 (Wash. 1986).

287. Tannebaum v. Yale Materials Handling Corp., 38 F. Supp. 2d 425 (D. Md. 1999); Warner Fruehauf Trailer Co., Inc. v. Boston, 654 A.2d 1272, 1276 (D.C. 1995); Lamkin v. Towner, 615 N.E.2d 1208, 1211 (Ill. App. Ct. 1993); Simpson v. Standard Container Co., 527 A.2d 1337, 1341 (Md. Ct. Spec. App. 1987); Cavanaugh v. Skil Corp., 751 A.2d 518, 527 (N.J. 2000); Dewey v. Brown & Williamson Tobacco Corp., 542 A.2d 919, 923 (N.J. Super. Ct. App. Div. 1988); State Farm Fire & Casualty Co. v. Chrysler Corp., 523 N.E.2d 489, 495 (Ohio 1988); Ruiz-Guzman v. Amvac Chemical Corporation, 7 P.3d 795, 797 (Wash. 2000).

288. *Ruiz-Guzman*, 7 P.3d at 796-97.

289. *Id.* at 801.

290. *Cavanaugh*, 751 A.2d at 519.

291. *Id.*

292. *Id.* at 522.

293. *Id.*

294. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 2 cmt. b & e, 3 (1998).

295. *Id.* § 2 cmt. e.

296. *Id.* § 2 cmt. e, illus. 5.

beard on fire are so great, the rule in comment e could be applied, thereby avoiding the reasonable alternative design requirement.[297]

Another of the provisions that allows for subversion of the reasonable alternative design requirement is Section 3.[298] This section attaches liability without proof of a specific defect if the "incident that harmed the plaintiff was of a kind that ordinarily occurs as a result of product defect."[299] Section 3 can apply to design defect cases, but is limited to situations in which a product fails to perform its manifestly intended function.[300] The classic example would be the exploding Coke bottle in *Escola v. Coca Cola Bottling Co.*[301] The majority in *Escola* applied *res ipsa loquitur* principles where strict liability principles would be applied today.[302] There would be no need to prove a reasonable alternative design in that case simply because the product "failed to perform its manifestly intended function."[303]

Use of Section 3 and comment e to Section 2 will probably address the problem of inherent risk liability.[304] At any rate, courts have not been very receptive to the idea of inherent risk liability.[305] In the rare case that an inherent risk liability claim is available, all that is necessary for liability under the *Restatement (Third)* is already known, i.e. the products kill and injure large numbers of people without providing commensurate benefit or utility.[306] A plaintiff can effectively use comment e and Section 3 to the *Restatement (Third)* when an inherent risk liability case arises.[307] No plaintiff has attempted to use comment e and Section 3 in an inherent risk case; therefore, it is speculation whether these sections would be as effective as the consumer expectations test in this area.[308]

While adoption of the *Restatement (Third)* would probably result in placing a greater burden on the plaintiffs, it is no different than the risk utility test courts have applied in the past.[309] Courts that have been applying the

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297. *Id.*
298. Perlman, *supra* note 41, at 201.
299. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998).
300. *Id.* § 3 cmt. b.
301. Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944).
302. *Id.* at 440 (Traynor, J., concurring).
303. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. b (1998).
304. Shupe, *supra* note 3, at 137.
305. Only a couple of rare cases fit within the inherent risk category. *See, e.g.*, Halphen v. Johns Manville Sales Corp., 484 So. 2d 110 (La. 1986) (litigating asbestos claims); Kelley v. R.G. Industries, Inc., 497 A.2d 1143 (Md. 1985) (litigating claims involving the saturday night special handgun).
306. Westerbeke, *supra* note 225, at 10.
307. *Id.*
308. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 2 cmt. e, reporter's notes, 3 reporter's notes.
309. *See* Joseph W. Little, *The Place of Consumer Expectations in Product Strict Liability Actions for Defectively Designed Products*, 61 TENN. L. REV. 1189 (1994) (noting that while

risk utility test have used the "reasonableness" and "foreseeability" terms even before the publication of *Restatement (Third).*[310] For example, in *Anderson v. Owens Corning Fiberglass Corp.,* the plaintiff alleged that the defendant failed to warn about the dangers of its asbestos related product.[311] The defendant manufacturer claimed that it complied with all of the state-of-the-art methods at the time and therefore the plaintiff's injuries were not foreseeable.[312] The court held for the defendant and stated that "knowledge, actual or constructive, is a requisite for strict liability."[313]

Although adoption of the *Restatement (Third)* may, at times, make it more difficult for the plaintiff to prove its case, it is a better alternative than the consumer expectations test. Consumer expectations, standing alone, do not take into account whether the proposed alternative design could be implemented at a reasonable cost, or whether an alternative design would provide greater overall safety.[314] Even proponents of the consumer expectations test note that it does not constitute an independent standard for judging the defectiveness of product designs, and is best used as an element in the risk utility analysis.[315] Reasons for this assertion include the difficulty in determining consumer expectations, the problems in complex design cases, and the potential for inconsistent results.[316]

An example of the inconsistent results that the consumer expectations sometimes can produce is found in *Newman v. Ford Motor Co.*, decided in 1998.[317] The plaintiffs sued after their Ford Aerostar was rear ended by a truck and the front seat mechanism collapsed.[318] The issue before the court was whether the seat mechanism should have been more rigid, or whether the design, as it existed, constituted the appropriate design.[319] On the one hand, rigid design is good for a very high speed.[320] On the other hand, a non-rigid design is much safer for slow speeds.[321] The court applied the consumer expectations test and held for the plaintiff.[322] The problem with this decision lies in the reasoning the Missouri Supreme Court used to arrive at its conclusion. Under the consumer expectations test, a plaintiff injured at high speed would have the expectations that the seat would hold.

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courts often espouse the language of strict liability, they are really applying negligence principles when using the risk utility test).

310. Owen, *supra* note 78, at 286.
311. 810 P.2d 549, 550 (Cal. 1991).
312. *Id.* at 551.
313. *Id.* at 557.
314. Phillips, *supra* note 195, at 1048.
315. *Id.*; Murrian *supra* note 216, at 323.
316. Murrian, *supra* note 216, at 324.
317. 975 S.W.2d 147 (Mo. 1998).
318. *Id.* at 149.
319. *Id.*
320. *Id.* at 152.
321. *Id.*
322. *Id.* at 154.

Conversely, a plaintiff at a low speed would have the expectation that the seat would not hold because there is a lesser risk for injury with a non-rigid design at a low speed.[323] The difficulty for the manufacturer is that it cannot design the seat both ways to meet consumer expectations.[324] The consumer expectations test, therefore, allows conflicting answers to questions that ought to have one sensible answer under the law.[325]

III. Wyoming and the Adoption of the Restatement (Third)

Wyoming has yet to adopt one test or the other in its design defect cases.[326] Adoption of Section 2(b) for design defect cases would allow Wyoming to conform to the national trend.[327] The Wyoming Supreme Court has already discussed the *Restatement (Third)*'s position, as well as the exceptions to the reasonable alternative design requirement, but has failed to take a position.[328] This is probably a result of a number of factors, one of which is the sheer lack of products liability cases that arise in Wyoming.[329] Another is the previous reluctance of the Wyoming court to accept changes in products liability law.[330] Finally, adoption of the *Restatement (Third)* would mark a change in Wyoming law.[331] All of these factors would weigh into the court's decision whether to adopt the *Restatement (Third)*.

In reality, the Wyoming Supreme Court has not been confronted with the right fact situation to adopt the *Restatement (Third)*. In *Campbell v. Studer, Inc.*, the issue was not the design itself, but the existence of a defect.[332] There was no reason to apply a test, and therefore the court only gave the *Restatement (Third)* footnote treatment.[333] The court noted, "We need not enter the debate [over *Restatement (Third)* Section 2(b)] at this time

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323. Henderson, *supra* note 62, at 23.
324. *Id.*
325. *Id.*
326. *See supra* text accompanying notes 173-75.
327. *See* Warner Freuhauf 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 using some form of risk-utility balancing test."). *See also* Banks v. ICI Americas, Inc., 450 S.E.2d 671, 673 (Ga. 1994); Nichols v. Union Underwear Co., Inc., 602 S.W.2d 429, 433 (Ky. 1980); St. Germain v. Husqvarna Corp., 544 A.2d 1283, 1285 (Me. 1988); Sperry-New Holland v. Prestage, 617 So. 2d 248, 255 (Miss. 1993) (noting that risk utility has become the trend in most federal and state jurisdictions); Foley v. Clark Equip. Co., 523 A.2d 379 (Pa. Super. Ct. 1987); Ford Motor Co. v. Miles, 967 S.W.2d 377, 386 (Tex. 1998).
328. Campbell v. Studer, Inc., 970 P.2d 389, 392 n.1 (Wyo. 1998).
329. *See id.*; Covington v. W.R. Grace-Conn Inc., 952 P.2d 1105 (Wyo. 1998). These cases represent the only two products liability cases to arise in Wyoming since the *Restatement (Third)*'s publication.
330. *See* Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 341 (Wyo. 1986) (noting that the court has declined to adopt strict liability on a number of occasions prior to 1986, some twenty-five years after Section 402A's publication).
331. *Id.* at 341.
332. *Campbell*, 970 P.2d at 395.
333. *Id.* at 392 n.1.

because Campbell's allegations clearly rest on her contention that a feasible alternative design was available."[334] Although *Covington v. W.R. Grace-Conn, Inc.* was a design defect case, the court decided it under a real estate statute; again, no test was needed.[335] There have not been any cases in Wyoming since *Covington* and *Campbell* that would have enabled the Wyoming Supreme Court to adopt any position on the *Restatement (Third).*[336]

Wyoming has also had been reluctant to accept change in the product liability arena. Until 1986, the Wyoming Supreme Court had numerous occasions to adopt the *Restatement (Second)* Section 402A but failed to do so.[337] If history is any example, it appears that the court will need a perfect fact scenario before adopting a new position in a products liability case.[338] Additionally, before Section 402A was adopted, most plaintiffs only pursued negligence theories in products liability, which did not present the court with opportunities to change the law.[339] For these reasons, the Wyoming Supreme Court has been reluctant to alter the state of products liability law.

Admittedly, the adoption the *Restatement (Third)* would mark a departure for Wyoming law.[340] Wyoming completely adopted Section 402A in 1986, including all of the comments, and has made no modifications since then.[341] Adoption of the *Restatement (Third)* would require the court to decide on which test to employ in a design defect case, something it has yet to do.[342]

A test is needed, if for no other reason than to inform plaintiffs about how to prove their case.[343] Adoption of *Restatement (Third)*, with its requirement of a reasonable alternative design, would help in that respect. It is also a better alternative than the consumer expectations test. Adoption of the *Restatement (Third)* would be consistent with the trend in the rest of the

334. *Id.*
335. Covington v. W.R. Grace-Conn, Inc., 952 P.2d 1105, 1107 (Wyo. 1998).
336. *See* Vargo, *supra* note 3, at 948-49.
337. *See* O'Donnell v. City of Casper, 696 P.2d 1278 (Wyo. 1985); Buckley v. Bell, 703 P.2d 1089 (Wyo. 1985); Herman v. Speed King Mfg. Co., 675 P.2d 1271 (Wyo. 1984); Caldwell v. Yamaha Motor Co., 648 P.2d 519 (Wyo. 1982); Wells v. Jeep Corp., 532 P.2d 595 (Wyo. 1975); Maxted v. Pacific Car & Foundry Co., 527 P.2d 832 (Wyo. 1974).
338. *See Buckley,* 703 P.2d at 1094-95 (listing numerous examples of why the court did not adopt Section 402A at the time).
339. *See Herman*, 675 P.2d at 1276; *Wells*, 532 P.2d at 597; *Maxted*, 527 P.2d at 833;
340. Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 341 (Wyo. 1986).
341. *Id.*; Vargo, *supra* note 3, at 948-49.
342. Vargo, *supra* note 3, at 948.
343. *Id.* at 949.

country, which appears to slowly be coming around to the position taken in the *Restatement (Third).*[344]

CONCLUSION

The *Restatement (Third) of Torts: Products Liability* has tremendous potential to establish a more uniform body of products liability law.[345] The adoption of Section 2(b) would be a positive change for Wyoming because Wyoming has no established test for deciding design defect cases.[346] Adoption would also be consistent with the trend throughout the rest of the country.[347] Many states already apply the *Restatement (Third)* without expressly adopting it, but the process of adoption is likely to be a slow one.[348] Adoption of the *Restatement (Third)* would clarify a difficult area of the law and give the plaintiffs an idea of what is needed in order to be successful in a design defect case. Adoption of the *Restatement (Third)* is truly a reasonable alternative.

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344. *See generally* Henderson, *supra* note 2 (explaining the status of the Section 2(b) in the courts around the country and finding it is slowly gaining acceptance).
345. Shupe, *supra* note 3, at 150.
346. Vargo, *supra* note 3, at 949.
347. *See* Henderson, *supra* note 2.
348. *Id.*