THE DESIGN OF PRODUCTS LIABILITY: A REPLY TO PROFESSORS HENDERSON AND TWERSKI

*Douglas A. Kysar**

In *The Expectations of Consumers*,[1] I examine a much-maligned products liability doctrine that attempts to rest manufacturer liability for defective product designs on the expectations of ordinary consumers. Although I concur with previous commentators who regard the consumer expectations doctrine to date as both undertheorized and unwieldy in application, I also observe the stubborn refusal of a significant minority of jurisdictions to abandon it. Notably, several of these jurisdictions have clung to the doctrine even after the decisive conclusion of the ALI's *Restatement (Third) of Torts: Products Liability* that consumer expectations are unworthy of recognition as an independent test for design defect.

After first describing these treacherous waters, I then enter them by offering a reinvigorated understanding of the consumer expectations doctrine that seeks to capture important aspects of public health and safety concerns that the *Restatement* formulation excludes and that courts plausibly might be groping toward in their consumer expectations jurisprudence. Rather than permit unguided conjecture by jury members regarding the content of consumer expectations, however, I recommend that the doctrine be redirected specifically toward those aspects of risk perception and evaluation that express important public values regarding the acceptability of product-caused harms, but that cannot be subsumed within a technically-oriented reasonable alternative design standard. Although I attempt to provide both a theoretical foundation for and a practical explication of the consumer expectations doctrine as reconceived in this light, I also note in the Article that the test "should be thought of as a work in progress, subject to debate and revision in the best spirit of the common law."[2] Consistent with that ambition, therefore, I am extremely grateful that Professors Henderson and Twerski, who served as Reporters for the *Third Restatement*, have offered their careful, constructive response to my proposal.[3]

Space permits me to address here only two of their critiques. The Reporters contend that the reinvigorated consumer expectations test described in *The Expectations of Consumers* reflects "elitism," first because it permits courts to make judgments that they believe should be made only by the "more populist-oriented branches of government"[4] and, second, because it substitutes the "soft technology" of psychology for the free-

* Assistant Professor of Law, Cornell Law School.

1. Douglas A. Kysar, The Expectations of Consumers, 103 Colum. L. Rev. 1700 (2003).

2. Id. at 1782.

3. James A. Henderson, Jr. & Aaron D. Twerski, Consumer Expectations' Last Hope: A Response to Professor Kysar, 103 Colum. L. Rev. 1791 (2003).

4. Id. at 1796.

ranging opinions of actual jury members to define consumer expectations.[5] With regard to the first contention, my response simply is that courts and legislatures are complementary, rather than exclusive, institutions, and more importantly that courts are the one forum in our system where the concerns of ordinary citizens must be heard and answered. Frequently, the "elitist" interventions of judges and juries better can be viewed as an indication that the supposedly more populist-oriented branches of government have failed to address a problem of serious social concern. Tort liability in that sense does not represent a moment of antidemocratic overreaching, but rather a starting point for the working out of what plagues us.

With regard to the second contention, the Reporters are correct to observe that my test would tie consumer expectations specifically to the findings of cognitive psychologists and other expert observers of human behavior and perception. However, to the extent that my proposal encourages the substitution of concrete psychological findings for juror speculation in this manner, it does so out of the same concerns of formalism and administrability that drove Professors Henderson and Twerski to endorse the reasonable alternative design requirement in the *Third Restatement*. The only difference between our views seems to be that, while the Reporters would push those concerns to the point of issuing summary judgment against a female plaintiff who raises "tangential" interests such as the distribution of deaths by gender in the air bag example, my test would allow her into the courtroom to argue before a jury of her peers. Importantly, it would do so out of a recognition that the tort system's integrity is threatened not only by giving insufficient attention to concerns of formality, but also by failing to reflect the acknowledged values and beliefs of its audience.

To be sure, my approach conceives of lay risk values of this nature as supplements to, rather than substitutes for, risk-utility analysis, given the frailty and fallibility of human safety expectations. The Reporters complain that this "double whammy" aspect of my approach only permits the use of consumer expectations as a sword for injured plaintiffs, rather than a shield for defendants. As they admit, however, the *Third Restatement* offers only the converse in its treatment of "tangential policy grounds" such as "gender neutrality."[6] That is, in the specific context exemplified by the air bag example, the *Restatement* weighs consumer expectations in favor of defendants, but not plaintiffs: All shield, no sword.

---

5. Id. at 1794.
6. Id. at 1799.