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DESIGN DEFECTS: ARE CONSUMER EXPECTATIONS UNREALISTIC?

In *LeRay v. St. Paul Fire & Marine Ins. Co.*,¹ the Louisiana First Circuit Court of Appeal rejected the plaintiff's request that the jury be instructed to decide a design defect case on the basis of the risk-utility balancing test.² Under the risk-utility balancing test, a product is defectively designed only if the risks that it creates outweigh its utility to society.³ Therefore, a product that presents substantial risks to consumers will not be defective if its utility is sufficiently high.⁴ The strict liability risk-utility balancing test is similar to a negligence balancing test⁵ in that the fact-finder must weigh considerations of social utility in deciding whether a product is defective.⁶ The major distinction between the doctrine of strict liability and that of negligence is that the defendant's use of reasonable care or his inability to know or prevent the risks created by the product is not a defense in a strict liability case, whereas, these defenses can be used to preclude a finding of negligence.⁷ The strict

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1. 444 So. 2d 1252 (La. App. 1st Cir. 1984).

2. In *LeRay*, an umbrella filter was inserted in the plaintiff's inferior vena cava to stop the migration of blood clots to the plaintiff's lungs. The filter dislodged from the vena cava and migrated to the right lung, lodging in the plaintiff's right pulmonary artery. As a result, the plaintiff suffered severe brain damage and sued the manufacturer of the filtering device, Edwards Labs, alleging that the filter was defectively designed. The jury found for the plaintiff and the first circuit, using the consumer-expectation test, affirmed the decision.

3. See 5 L. Frumer & M. Friedman, *Products Liability*, 679, 689 app. (1984); *Hunt v. City Stores*, 387 So. 2d 585, 588-89 (La. 1980).

4. 5 L. Frumer & M. Friedman, *supra* note 3, at 679, 689 (app.).

5. Professor Wade has advanced a list of factors that should be weighed against one another to determine whether a product is defectively designed:

- 1) the usefulness of the product;
- 2) the likelihood and probable seriousness of injury from the product;
- 3) the availability of a safer substitute;
- 4) the manufacturer's ability to eliminate the danger without seriously impairing the product's usefulness;
- 5) the user's ability to avoid the danger through the use of due care;
- 6) the common knowledge and expectations as to the danger the product presents; and
- 7) the feasibility, on the part of the manufacturer, of spreading the risk through increased prices. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 837 (1973).

6. *Entrevia v. Hood*, 427 So. 2d 1146, 1149 (La. 1983).

7. *Hunt v. City Stores*, 387 So. 2d 585, 588 (La. 1980).

liability action focuses on the condition of the product rather than the conduct of the manufacturer.⁸

After rejecting the balancing test, the court applied the consumer-expectation test to determine whether a product is defectively designed.⁹ Under the consumer-expectation test, a product is defective if it is dangerous beyond that which would be contemplated by an ordinary consumer.¹⁰ This writer submits that the balancing test is the proper standard to be used in a design defect case, and that the *LeRay* court applied the wrong standard.

The doctrine of strict products liability has become an important tool in helping injured consumers state a cause of action against a manufacturer that cannot be found negligent.¹¹ Strict liability is said to have been developed to alleviate the sometimes impossible problem of proving the manufacturer's negligence.¹² It is important to remember that a defendant cannot allege due care as a defense to a strict liability action because he is presumed to have knowledge of the product's dangerous condition.¹³ Some policy reasons for this development are: (1) the manufacturer is in the best position to discover any defect; (2) strict liability forces a manufacturer to improve his product and keep abreast of all the latest equipment and industry standards; and (3) the manufacturer is usually in the best position to spread the loss through price increases and insurance.¹⁴ The doctrine of *res ipsa loquitur* can help a plaintiff when specific negligence on the part of the defendant is impossible to discover, but *res ipsa loquitur* requires a logical inference from all the evidence that the defendant was negligent. Therefore, the accident must be one that ordinarily would not occur in the absence of negligence.¹⁵ The doctrine of strict liability gives a plaintiff more protection against a manufacturer than the traditional notions of negligence

8. *Id.* at 588; see also *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432-34, 573 P.2d 443, 456-57, 143 Cal. Rptr. 225, 238-39 (1978).

9. 444 So. 2d at 1255.

10. Restatement (Second) of Torts § 402A, comment (i); see also W. Keeton & W. Prosser, *Prosser and Keeton on Torts* 690, 698 (5th ed. 1984) [hereinafter cited as *Prosser*].

11. Wade, *supra* note 5, at 826.

12. Prosser, *supra* note 10, at 692; see also Keeton, *Products Liability—Proof of the Manufacturer is Negligence*, 49 Va. L. Rev. 675, 676 (1963).

13. The major difference between strict liability and negligence is that *scienter* is imputed to the defendant in strict liability actions. The question then becomes whether or not the defendant was reasonable in placing the product on the market assuming he knew of its dangerous condition. See Wade, *supra* note 5, at 834-35; *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 501 (La. 1982).

14. For a general discussion of the policy reasons behind the development of strict liability, see Prosser, *supra* note 10, at 692-94. See also Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 Tex. L. Rev. 1185, 1189; *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

15. Prosser, *supra* note 10, at 242-48.

and *res ipsa loquitur* because strict liability does not require the plaintiff to prove or even infer negligence.¹⁶

The Louisiana products liability action is based on the holding in *Weber v. Fidelity & Casualty Insurance Co.*:¹⁷

A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury caused by a defect in design, composition, or manufacture of the article. However, the plaintiff claiming injury has the burden of proving *that the product was defective, i.e., unreasonably dangerous to normal use*, and that the plaintiff's injuries were caused by reason of the defect.¹⁸

The Louisiana cause of action is similar to both products liability actions in common law states¹⁹ and to the approach taken in section 402A of the *Restatement (Second) of Torts*.²⁰

Proving that a product is defectively designed is different from proving that a product was defectively manufactured and usually more difficult for a jury to understand. A manufacturing defect can be seen easily by comparison to products without defects. The manufacturer did not make what he intended to make nor did the consumer get what he thought he was getting, (e.g.) a soft drink bottle with a chip in it would possess a manufacturing defect because the manufacturer did not intend to make a chipped bottle.²¹ In a design defect case spotting the defect is difficult because there is nothing specifically wrong or different about the injuring product that distinguishes it from the others. The manufacturer produced and sold exactly what he intended to sell in that he made a conscious choice in designing the product in a certain fashion. When the plaintiff is injured and sues the manufacturer, he alleges that the product was defective because it should have been designed in a safer manner.²² It is clear that the role of the fact-finder in deciding what is defective is more difficult in the design area than it is in the manufacturing area. In deciding what is wrong with the product, the fact-finder has nothing with which to compare it. Therefore, determining whether a product is

16. Wade, *supra* note 5, at 826.

17. 259 La. 599, 250 So. 2d 754 (1971).

18. *Id.* at 602-03, 250 So. 2d at 755 (emphasis added).

19. *Guilyot v. Del-Gulf Supply, Inc.*, 362 So. 2d 816, 819 (La. App. 4th Cir. 1978).

20. The pertinent part of § 402A states:

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. . . . (2) although (a) the seller has exercised all possible care in the preparation and sale of his product. See also *Bell v. Jet Wheel Blast* 462 So. 2d 166 (La. 1985).

21. See Prosser, *supra* note 10, at 695-97.

22. *Id.* at 698-99; see also Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 *Syracuse L. Rev.* 559 (1969).

defectively designed entails closely scrutinizing basic social policies to decide what standards and safety precautions society should require of a manufacturer before he is allowed to market a product to the public.

Relying on *DeBattista v. Argonaut-Southwest Insurance Co.*²³ and *Hebert v. Brazzel*,²⁴ the *LeRay* court declined to use the risk-utility balancing approach to decide a design defect case. The court defined a "defective or unreasonably dangerous product as one that is dangerous to an extent beyond that which would be contemplated by an ordinary consumer."²⁵ The court went on to say, "This shift to a consumer expectation approach for determining defectiveness impliedly rejects the prior balancing test of *Hunt v. City Stores*."²⁶ However, a closer look at *DeBattista* and *Hebert* will disclose that these two cases not only are distinguishable from *LeRay* but also are inconsistent with other Louisiana cases that have adhered to the balancing approach.²⁷ Just as in other states,²⁸ the balancing approach is still the proper method for analyzing design defect cases in Louisiana.

In *DeBattista* a blood bank was held strictly liable when the plaintiff contracted serum hepatitis from a blood transfusion that he received while undergoing surgery. The court found the blood defective, *i.e.*, unreasonably dangerous in normal use. The court stated, "The risks involved in receiving a transfusion of blood in this condition are certainly greater than a reasonable consumer would expect."²⁹ The court refused the defendant's request that the jury be instructed to use the risk-utility balancing test to determine whether the blood was defective. The court discounted the risk-utility test as a misconstruction of the unreasonably-dangerous standard, stating that "'[u]nreasonably dangerous' means simply that the article which injured the plaintiff was dangerous to an extent beyond that which would be contemplated by an ordinary consumer."³⁰ If *DeBattista* is regarded as having discarded the balancing test in design defect cases altogether, then lower courts will have been given nothing but ambiguous reasoning to assist them in deciding the

23. 403 So. 2d 26 (La. 1981).

24. 403 So. 2d 1242 (La. 1981).

25. 444 So. 2d at 1255.

26. *Id.* In *DeBattista*, Justice Dennis explains that Louisiana retains the motion of unreasonable risk in a strict liability action. If this is so, it is necessary to conclude that the only way to determine "unreasonableness" is by using the balancing process just as in negligence cases except that the defendant is imputed with knowledge of the defect. 403 So. 2d at 31.

27. See *Hunt v. City Stores*, 387 So. 2d 585 (La. 1980); *Juneau v. Interstate Blood Bank, Inc.*, 333 So. 2d 354 (La. App. 3rd Cir.), cert. denied, 337 So. 2d 220 (La. 1976); *Martin v. Southern Baptist Hosp.*, 352 So. 2d 351 (La. App. 4th Cir. 1977), cert. denied, 354 So. 2d 210 (La. 1978).

28. See *infra* note 51 and accompanying text.

29. 403 So. 2d at 31.

30. *Id.* at 30.

meaning of "unreasonably dangerous."³¹ The important considerations involved are simply too complex to justify a single all-purpose definition of "defect" in the design context. The consumer-expectation test is inadequate by itself to give courts or juries any guidelines to follow in determining whether a product's design is safe enough to meet the requirements which society imposes on manufacturers before they market a product. Jurors have been conditioned by advertising and governmental regulatory agencies to expect perfection in the market place. Such expectations have been raised to an unreasonably high level. If the expectations of a consumer (even the mythical prudent consumer) are the sole criteria used by the fact-finder in deciding design cases, many useful products may never reach the market. Practicality demands that the fact-finder be allowed to weigh the risks of a product against its utility before deciding the issue of liability. Otherwise, because of high consumer expectations, strict products liability will become absolute liability, making a manufacturer virtually an insurer of his product. Using the consumer-expectation test alone, it is easy to look back on the injury on the one hand and say that a reasonable consumer who is ill may expect that he could be infected with hepatitis from a transfusion if medical technology has no foolproof way to discover hepatitis in blood. A reasonable consumer in such a position would most probably be willing to take the risk and accept the transfusion, since the blood may be vital to the cure. It seems logical that if one wants to decide what a reasonable consumer might expect from a certain product, one must weigh the risks of the product against its utility in society. For example, the jury could conclude that a reasonable consumer might expect that a product such as blood has such a high utility that the risk of contracting hepatitis, absent any negligence, does not make the product unreasonably dangerous. Therefore, what the ordinary consumer expects may be important in deciding whether or not a product is unreasonably dangerous, but this does not mean that the balancing approach should be discarded.³²

31. See Note, *DeBattista v. Argonaut-Southwest Insurance Co.: The Meaning of Unreasonably Dangerous in Louisiana Products Liability*, 42 La. L. Rev. 1453 (1982). The author of this Note criticizes *DeBattista* by examining the problems California courts experienced when they refused to adhere to the balancing test in design cases. The ambiguity that the lower courts had to deal with when trying to decide whether a product was defective eventually caused California to return to the balancing test. See also Justice Blanch's dissent in *DeBattista* where he indicated that the test used by the majority makes the blood bank an insurer of its product even though there are no ways for science to detect hepatitis in blood units at all times. 403 So. 2d at 34.

32. The landmark case of *Barker v. Lull Eng'g Co.*, 20 Cal. 3d. 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), advocates the use of the consumer expectations test in the alternative with the risk-utility balancing approach. In any case, the Louisiana Legislature has eliminated strict liability for blood transfusions. See 1981 La. Acts, No. 331, adding La. R.S. 9:2797; 1981 La. Acts, No. 611, adding La. Civ. Code art. 2322.

In *Hebert*, the plaintiff sued the manufacturer of a valve in strict liability for injuries when the valve blew off of a pressurized water tank and struck him in the chest. The handwheel used to release the pressure to the valve was broken off, so the plaintiff used a wrench to turn the valve stem, the stem broke off, and pressure was released too rapidly, causing the accident. Whether the valve stem was broken by its being forced with the wrench or in some other manner was not clear, but using the consumer-expectation test, the jury found that the valve was not defectively designed or manufactured.³³ The Louisiana Supreme Court decided that the jury's factual determinations were not erroneous. The jury also found that the plaintiff's decedent had assumed the risk and misused the product with the wrench. Misuse is a defense in a design defect case as well as in a manufacturing defect case.³⁴ Nowhere in the opinion did Justice Dennis expressly reject the balancing approach for design cases. Therefore, it is submitted that the *Hebert* court simply did not want to disturb the jury's factual finding that plaintiff's decedent misused the product. This use of the consumer-expectation test does not mean that Louisiana courts reject the balancing process in design cases.

Strict liability under Civil Code article 2317³⁵ is similar to strict liability for a design defect in products liability cases.³⁶ Under article 2317, the custodian of a thing is strictly liable if the thing poses an unreasonable risk of harm to others in light of all relevant social, economic, and moral considerations.³⁷ The relevant principle was espoused in the case of *Loescher v. Parr*:

When harm results from the conduct or defect of a person or thing which creates *an unreasonable risk of harm* to others, a person legally responsible under these code articles for the supervision, care, or guardianship of the person or thing may be held liable for the damage thus caused, despite the fact that no personal negligent act or inattention on the former's part is proved. The liability arises from his legal relationship to the person or thing whose conduct or defect creates an unreasonable risk of injuries to others.³⁸

Similarly, the manufacturer of a product is strictly liable for the defective design if the product is unreasonably dangerous in normal use.³⁹ The

33. 403 So. 2d at 1245.

34. *Id.*

35. Civil Code article 2317 provides: "[W]e are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

36. See *Kent v. Gulf States*, 418 So. 2d at 49 n.6; see also *DeBattista*, 403 So. 2d at 30.

37. *Entrevia v. Hood*, 427 So. 2d 1146, 1147 (La. 1983).

38. 324 So. 2d 441, 446 (La. 1976).

39. 259 La. at 599, 250 So. 2d at 754.

unreasonable-risk-of-harm criterion of article 2317 cannot be distinguished from the unreasonably-dangerous-in-normal-use standard used in products liability cases. Hence a product that is unreasonably dangerous in normal use would pose an unreasonable risk of harm to others. Reasonable care is not a defense in strict liability under article 2317⁴⁰ or in a design case, yet both theories of liability involve a value judgment as to what society considers "unreasonable" for the manufacturer or custodian of a thing to release upon the public. Therefore, the standard for determining liability under 2317 and in design cases should be the same.

It can be seen from *Entrevia v. Hood* that the risk-utility balancing process is still used in article 2317 actions. The issue in *Entrevia* was whether the owner of a remote, unoccupied farmhouse, which was surrounded by a fence and posted with "no trespassing" signs is strictly liable for damages to a trespasser injured by the collapse of the building's steps. The trial court determined that there was no unreasonable risk of harm to Entrevia posed "by the steps of a remote farmhouse that had "no trespassing" signs posted" ⁴² The court of appeal reversed, awarding the plaintiff damages, holding that the defendant was liable since the plaintiff had proved that the defendant's defective steps had caused plaintiff's injuries and that the defendant had proved no affirmative defense. The supreme court reversed the court of appeal and reinstated the decision of the trial court, stating that the mere fact that plaintiff was hurt by the collapse of the steps was not enough for recovery under article 2317 or article 2322. The plaintiff must prove that her injuries were caused by a quality of the building that posed an unreasonable risk of harm to others.⁴³ The court decided correctly that it is not the fact of the injury that gives rise to strict liability but that the injury was caused by an unreasonable risk created by a thing in the defendant's custody. The unreasonable risk is determined without looking at the conduct of the manufacturer but by focusing strictly on the product and using the risk-utility balancing approach:

As this court has noted in relation to other forms of strict liability under the civil code, the activities of a man for which he may be liable without acting negligently are to be determined after a study of the laws and customs, a balancing of claims and interests, a weighing of the risk and the gravity of the

40. Once the plaintiff proves the product poses an "unreasonable risk of harm," the defendant has only three defenses to a 2317 action: "fault of the victim, fault of a third person, or an irresistible force." See *Entrevia*, 427 So. 2d at 1148.

41. 427 So. 2d 1146 (1983).

42. *Id.* at 1147.

43. *Id.* at 1149.

harm, and a consideration of individual and societal rights and obligations.⁴⁴

The court agreed with the trial court that to force all owners to repair broken steps in remote farmhouses would be too costly since the steps posed a minimal risk. This type of balancing test is constantly used by judges in negligence cases.⁴⁵ The policy considerations are the same under article 2317, the only difference being that the defendant is presumed to possess knowledge of the defect. The court analyzes a 2317 liability situation by first assuming the defendant knew of the defect, then deciding whether the defendant was acting as a reasonable man by maintaining the thing.⁴⁶ Therefore, since the liability of the custodian of a thing under article 2317 is similar to the liability of the manufacturer of a defectively designed product, the risk-utility balancing approach used to determine an unreasonable risk of harm under article 2317 is relevant to the treatment of strict liability for a conscious design case. Logic dictates that if *Entrevia* retains the balancing approach in the article 2317 area, the balancing approach must also be retained in design cases.

Louisiana products liability law has been influenced by the common law of other states,⁴⁷ many of which use section 402A of the Restatement (Second) of Torts as the basis for a strict liability action.⁴⁸ The unreasonably dangerous standard set out by section 402A⁴⁹ to determine design defects is very similar to the *Weber* standard of unreasonably dangerous in normal use employed in Louisiana. Both standards require that the product be defective, *i.e.*, unreasonably dangerous to the user or consumer. Despite the fact that section 402A defines unreasonably dangerous as "dangerous 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,"⁵⁰ many states which use section 402A as a premise for strict liability in conscious design cases still use the risk-utility balancing approach.⁵¹ The leading case in the common law jurisdictions in this area is *Barker v. Lull Engineering Co., Inc.*⁵² in which the Supreme Court of California reversed a lower court decision that held the jury was not to be permitted to consider the risk-utility

44. *Id.*

45. *Id.* at 1150.

46. *Id.*

47. See *Guilyot*, 362 So. 2d at 819; see also *Kent*, 418 So. 2d at 501.

48. *Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985).

49. See *supra* note 20.

50. See Restatement (Second) of Torts § 402A, comment (i).

51. See *Davis v. Fox River Tractor Co.*, 518 F.2d 481 (10th Cir. 1975); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973); *Bowman v. General Motors*, 427 F. Supp. 234 (E.D. Pa. 1977); *Byrns v. Riddell, Inc.*, 550 P.2d 1065 (Ariz. 1976); *Garst v. General Motors*, 207 Kan. 2, 484 P.2d 47 (1971).

52. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

factor in reaching its determination. The court decided that the consumer-expectation test can be used in a design case, but not alone. The jury must also be instructed as to the risk-utility balancing test before they decide the issue of defectiveness.⁵³

The instruction given to the jury in the *LeRay* case to guide them in determining whether the umbrella filter was defectively designed was: "A product is defective or unreasonably dangerous when a reasonable seller would not sell the product if he knew the risks involved or if the risks are greater than a reasonable buyer would expect."⁵⁴ This instruction is nothing more than a mixture of the knowledgeable-seller test⁵⁵ and the consumer-expectation test, and it provides absolutely no guidance for the jury's decision-making process. The consumer-expectation test presents much difficulty for the fact-finder attempting to decide if a product is defective because in application, it is not clear whether the ordinary consumer possessing ordinary knowledge common to the community is a hypothetically reasonable man or the individual plaintiff in the action at bar. The problem can best be illustrated by the case of *Young v. Tide Craft, Inc.*⁵⁶ in which an experienced boater was thrown overboard and drowned. Plaintiff, decedent's wife, alleged that the boat was defective because the boat failed to have a kill switch which would have cut the motor off when the decedent was ejected. The court, purporting to use an objective consumer-expectation test by declaring that for the product to be defective it must be dangerous beyond the contemplation of the ordinary consumer,⁵⁷ based its decision on the special knowledge of plaintiff's decedent as an experienced boater: "It is common knowledge that a normal risk of boating is that of being thrown overboard. While the test set out . . . is an objective one and knowledge to the community must be attributed to [plaintiff's decedent], there can nevertheless be no question of his awareness of this risk."⁵⁸ The court purported to use an objective standard, but it then imputed

53. Many eminent scholars have also advocated the use of the risk-utility balancing approach in conscious design cases. See Wade, *supra* note 5, at 837; Prosser, *supra* note 10, at 669; see also Keeton, *Products Liability and The Meaning of Defect*, 8 St. Mary's L.J. 30 (1973).

54. 444 So. 2d at 1254.

55. *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974), defines the knowledgeable seller test as follows: "A dangerously defective article would be one which a reasonable person would not put into the stream of commerce, if he had knowledge of its harmful character." The knowledge of the dangerous condition is imputed to the seller. Because the Louisiana courts have not applied this test and because it produces results similar to those resulting from the consumer-expectations test, this article will not analyze the knowledgeable seller test. The court in *Phillips* stated that "the two standards are the same because a seller acting reasonably would be selling the same product which a reasonable consumer believes he is buying." 269 Or. at 493, 525 P.2d at 1037.

56. 270 S.C. 453, 242 S.E.2d 671 (1978).

57. *Id.* at 470, 242 S.E.2d at 680.

58. *Id.* at 471-72, 242 S.E.2d at 681-82.

the decedent's specialized knowledge of boating to the ordinary consumer in order to relieve the defendant of liability. Arguably, under this subjective analysis the design may have been unreasonably dangerous and the defendant may have been found liable had the decedent been a less-experienced boater.⁵⁹ This would create an unjust result in that the design would be unreasonably dangerous to one plaintiff yet not another.

It has also been argued that, even with a completely objective analysis of the ordinary consumer, the consumer-expectation test is nothing more than an updated version of the patent-danger rule.⁶⁰ Many courts have criticized the patent-danger rule as unjustly denying recovery to injured plaintiffs and relieving manufacturers of their duty to design safe products.⁶¹ Arguably, a reasonable consumer would expect that a product with an apparent and obviously dangerous characteristic may be harmful. Thus, under the consumer-expectation test, an injured plaintiff could never recover from a defendant manufacturer for harm suffered as a result of an apparent or obvious danger even if the product could have been designed in a safer fashion, without great expense and decrease in utility. In this instance the consumer-expectation test fails to provide the manufacturer with any incentive to design safer products because the manufacturer knows he can escape liability for defective design if the danger is obvious.

Another problem is the opposite of that presented by the patent-danger rule. A product considered unreasonably dangerous under the consumer-expectation test would not necessarily be considered unreasonably dangerous under the risk-utility balancing approach. Some products may be deemed unreasonably dangerous because few people are victimized by unknowable or undiscoverable side effects.⁶² From the consumer's viewpoint the product is expected to be perfect. If something goes wrong and someone is injured, it is easy to argue that the product was dangerous beyond the expectations of an ordinary consumer despite the high utility of the product. This problem is analogous to the situation in *DeBattista* in that a transfusion of blood has a high utility because it is a lifesaver even though the undiscoverable risk of hepatitis is present. Using the consumer-expectation test, it may be said that the consumer does not expect to contract hepatitis, and therefore, that the blood is

59. See Birnbaum, *Unmasking the Test for Design Defect: From Negligence (to Warranty) to Strict Liability to Negligence*, 33 Vand. L. Rev. 593, 612-13 (1980).

60. See Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 Tex. L. Rev. 1303, 1304 (1974).

61. See Keeton, *Products Liability—Inadequacy of Information*, 48 Tex. L. Rev. 398 (1970); Marshall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U. L. Rev. 1065 (1973); see also *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976); *Pike v. Frank G. Hough Co.*, 2 Cal. 2d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

62. Prosser, *supra* note 10, at 698-99.

unreasonably dangerous, but if the utility of the blood is weighed against the risk of becoming infected with hepatitis, the blood may not be unreasonably dangerous or defective.

The consumer-expectation test presents another problem that limits its feasibility in deciding defective design cases. How does a jury know what a reasonable consumer expects in a certain product?⁶³ How does a jury know what the expectations of a reasonable consumer would be toward a product with a complicated technical design? The question can be raised whether expert testimony can be introduced to prove a reasonable consumer's expectations. If this evidence is not allowed, then is the jury limited to considering the views of a hypothetical reasonable man?⁶⁴ In all probability, the jurors will make a visceral decision. The jury will probably use some vague common-sense notion of what a reasonable consumer would expect in the way of safety.⁶⁵ This increases the chance of verdicts based on emotion rather than on reason and evidence. Jurors may tend to vote with their emotions out of sympathy to a badly injured plaintiff and against products they do not favor. It should be remembered that the term "defect" used in the design-defect context does not have the same meaning as in its ordinary context. Webster's defines "defect" as "a fault or flaw, and irregularity."⁶⁶ A jury instruction requiring jurors to decide whether a product has a defect without defining "defect" in a particular context is useless. In a design defect case, the fact-finder is trying to find an irregularity in the product with no example of a regular product. Jurors in a design case, unlike a manufacturing defect case, have nothing with which to compare the injuring product. The balancing factors give the fact-finders some neutral guidelines to aid them in determining what constitutes a defect in the design context. However, it is difficult for a juror, who is himself a consumer, to know what a reasonable person should expect from a technologically complex product.

The determination of a defective or unreasonably dangerous design is much more complicated than the determination of whether or not a product is defectively manufactured. Without proper guidance as to what "defect" or "unreasonably dangerous" means in this special context, the fact-finder cannot be expected to pass judgement on the design safety of a product. Although it is not error-free, the risk-utility balancing approach is the best way to provide the fact-finder with this guidance. In this context the product is defective if the magnitude of the risks

63. *Id.* at 699; Wade, *supra* note 5, at 829; Rheingold, *What are the Consumer's "Reasonable Expectations?"*, 22 *Bus. Law.* 589 (1967).

64. See O'Donnell & Thomas, *Design Litigation and Strict Liability: The Problem of Jury Instructions Which Do Not Instruct*, *J. Prods. Liab.* 185, 199 (1982).

65. See Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 *S.C. L. Rev.* 803, 823 (1976).

66. Webster's Third New International Dictionary 591 (1976).

outweighs the utility of the product.⁶⁷ Reasonable care is not a defense since the manufacturer is presumed to know the dangerous condition of the product.⁶⁸ This balancing process guides the fact-finder by helping him to understand the conflicting interests which the product's designers were required to "trade off" in deciding on things such as "safety, cost, durability, weight, comfort, aesthetics and function." Emphasis on the balancing factors also helps to insure that the fact-finder will base his decision on neutral factors and on the evidence rather than on emotional grounds.⁶⁹

The role of the fact-finder in a design case is similar to that of a legislator who is called upon to decide whether to vote for proposed legislation. The legislator must balance the desires of his constituents on both sides and decide which vote to cast, based upon what he thinks would be in the best interest of those he represents. Similarly, the juror in a design case must decide the level of safety society will accept in a technically designed product. This must be determined in part by the cost of this safety to society in general. Sometimes a poll can tell the legislator what society demands and he can thereby ascertain what his constituents expect. A jury does not have this advantage. A jury has no way of knowing what other consumers would expect from product. Therefore, by weighing the risks of a product against its utility in society, the fact-finder can get a better idea of what safety level society should demand in certain products.

The *LeRay* court should not have rejected the risk-utility balancing approach in design defect cases. Not only does the court cite weak authority for the proposition that Louisiana no longer uses the balancing approach, it is clear that other Louisiana courts still use the balancing approach in design cases.⁷⁰ Further support for its use can be found in the *Entrevia* court's use of this approach in an article 2317 case, since such a case is similar to a design case.

In light of the complex designs of today's products and the inadequacies of the consumer expectation test in the design area, it is hoped that other courts in Louisiana will not follow *LeRay* and will continue to realize that the risk-utility balancing process is the proper method to determine a defective design.

Jeff Tillery

67. Prosser, *supra* note 10, at 699.

68. Wade, *supra* note 5, at 830.

69. See *Entrevia*, 427 So. 2d at 1146.

70. *Hunt v. City Stores*, 387 So. 2d at 585.