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The Reasonable Alternative Design Test: Back to Negligence?

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1. INTRODUCTION

For a long time, people in the Netherlands assumed that their legal system would not endure an American-style "liability crisis" or "litigation explosion". During the last few years, however, Dutch legal scholars have been increasingly concerned about the possibility of a liability insurance crisis developing. Representatives of insurance companies appear more regularly as speakers on this topic at conferences and symposiums devoted to civil litigation. That they are invited provides at least one indication of the concern that many in the Netherlands feel about whether individuals and enterprises will continue to be able to obtain liability insurance. The same concern exists in many other European countries.

2. RECENT DEVELOPMENTS

In this context, some developments are worth mentioning. The DES judgment from the Dutch Supreme Court is more and more often quoted as the example of a bridge too far.[1] Also, the increasing number of cases finding professionals, such as solicitors, accountants, and engineers, legally responsible for malpractice is for many a tell-tale sign of an impending crisis.

As far as liability insurance in the medical realm is concerned, almost all insurance companies have withdrawn from the market during the last few years. At present, only Nationale Nederlanden and two mutual insurers, MediRisk and CentraMed (previously Centraal Beheer), continue to offer this insurance in the Netherlands. Moreover, some Dutch Academic Hospitals have had to seek insurance through Lloyd's of London. One hospital, the Academic Hospital Maastricht, provides its own primary coverage, with a re-insurer standing behind it for excess liability.[2]

During the peak of the liability insurance crisis in the U.S., one also saw the withdrawal of for-profit insurance companies from the market, with some mutual insurers coming in to take their place. Another parallel development is the change from "loss occurrence" insurance policies to "claims made" policies.[3] It is far from clear whether these developments—withdrawal from the insurance market, changing to the claims made instead of the loss occurrence policies—were really necessary in the U.S. or the Netherlands.[4] Among many other reasons, insurers say that they are dealing with reluctant re-insurers.

In one respect at least, it cannot be denied that the number of claims is on the increase in the Netherlands, while from to time completely new types of claims emerge. For example, consider the large number of claims regarding failed sterilisation that have been filed during the last few years,[5] as well as the successful claim for non-pecuniary damages awarded to the parents of a baby that was injured as the result of a doctor's fault; this claim had not been allowed by Dutch law.[6] In addition, there is concern about the possibility of a floodgate of claims in cases of professional illnesses (*e.g.* asbestosis). Some, therefore, believe that the greatest flood of claims is still ahead of us.

Furthermore, the increase in the number of potential causes of action sounding in strict liability concern many. For example, the Dutch Civil Code has recently been enriched with the recognition of a number of new potential causes of action for liability for a variety of dangerous substances.[7] In particular, the environmental liabilities have been the subject of heated discussion. One concern in the Netherlands has been the understanding that Lloyd's of London got into its liquidity difficulties as a result of unexpectedly large environmental claims.

3. PRODUCT LIABILITY

The theory of strict product liability also deserves some

1 HR October 9, 1992, NJ 1994, 535. This ruling is considered to be very pro-plaintiff. On the issue of causation, the Dutch Supreme Court ruled that the pharmaceutical companies named in the lawsuit can be held jointly and severally liable (instead of, e.g. only for their marketshare), even if the plaintiff can not prove which particular company caused the plaintiff's damages. The question whether the drug DES was in fact defective, though, has still not been decided.

2 *De Volkskrant*, November 2, 1995 (in Dutch).

3 See more in detail Stolker's book on the American malpractice crisis, *Van arts naar advocaat*, Kluwer, BSH 1989, pp. 6 *et seq.* (in Dutch).

4 Marc C. Rahdert, *Covering Accident Costs, Insurance, Liability, and Tort Reform* (Temple University Press, Philadelphia, 1995).

5 See P.C.M. Habets, "Schadeclaims naar aanleiding van mislukte sterilisaties: een dossieronderzoek", TvG 1995, pp. 266 *et seq.* (in Dutch).

6 July 5, 1995, TvG 1995, p. 446; NJkort 1995, 35 (in Dutch).

7 For a comprehensive overview see G.E. van Maanen, NTBR 1996, p. 6 (in Dutch).

attention, although the exceptionally small number of such legal proceedings in the Netherlands bears no resemblance to the number of pages written on this subject The fear in Europe that a crisis in the law of liability will occur is almost always put into terms of what is perceived to be the American experience for Europeans, America is the ultimate country of strict liability However, when looking at the Dutch figures, the experience with product liability is not as bad as some had expected, at least as far as legal proceedings are concerned *Published* cases are a rarity, especially when compared with the frequency of cases devoted to medical or traffic claims

The experience in the Netherlands does not seem to be much different than in the U S A 1991 report conducted by the RAND Institute for Civil Justice found that in a large sample of consumers who claimed to have been injured by a product, only 1 per cent hired an attorney for advice on whether to file suit [8] Similarly, a study by the Consumer Product Safety Commission found that fewer than 3 per cent of consumers injured by products ever filed a claim for compensation Among those consumers injured by design defects who do file lawsuits, their likelihood of winning is, on average, only 35-40 per cent [9]

In the U S , it is mainly the case that there have been specific products that have caused the perception that there has been an avalanche of proceedings

cases in State courts in 1992 [10] Over a year-long period ending June 30, 1992, jury verdicts in State general jurisdiction courts in the 75 most populous counties in the U S were studied The following is a summary of the outcome of the study Of all cases that reached a trial by jury, 79 per cent were tort actions, 18 per cent contract, and 2 per cent real property cases If we take a closer look at these tort cases, we find the following data Of all tort cases in the sample heard by juries, 33 per cent were automobile torts, 11 per cent medical malpractice, *5 per cent product liability* and 5 per cent toxic substance

Examining the winners (successful plaintiffs) and losers (unsuccessful plaintiffs) of these suits, the study found the results given in Table 2

Table 2

Jury award	*Winners*	*Losers*
automobile	60%	40%
medical malpractice	30%	70%
product liability	**40%**	**60%**
toxic substance	74%	26%

Finally, what did the winners receive? Table 3 shows the final award amounts for civil jury cases with plaintiff winners

Table 1

Number of proceedings

Year	*Asbestos*	*Dalkon Shield*	*Benedectin*	*Other products*
1974	4	8	—	1504
1975	35	82	—	2532
1976	40	136	—	3234
1977	103	153	1	3475
1978	292	88	0	3599
1979	361	125	0	4252
1980	1137	286	22	4714
1981	1625	388	50	5509
1982	1869	555	73	5600
1983	1926	472	171	5894
1984	2922	805	420	5784
1985	4389	1410	594	6051
1986	5627	444	40	6586

Sources For asbestos Administratative Office of the U S Courts and the Federal Judicial Center for the Dalkon Shield A H Robins Company Inc and for Benedectin Merrell Dow Pharmaceuticals Inc

So, the so-called products liability crisis in the U S is to a great extent an asbestos and a Dalkon Shield crisis (see Table 1)

Other interesting data on product liability claims in the U S confirm these trends One important source of information is a huge survey conducted by the U S Department of Justice of

On the basis of this large-scale study by the U S Justice Department, one can conclude that in comparison to automobile torts and medical malpractice claims, products liability cases make up a significantly smaller number of cases More plaintiffs lose their cases than win, when plaintiffs do win, however, the compensation awarded in products liability cases is relatively high compared to most other tort cases What these

8 Reporters Study I *Enterprise Responsibility for Personal Injury* p 269 (A L I 1991) quoted by Elizabeth C Price Toward a Unified Theory of Products Liability Reviving the Causative Concept of Legal Fault *Tennessee Law Review* 1994 p 1320

9 *idem* p 399

10 U S Department of Justice Bureau of Justice Statistics Special Report July 1995

Table 3

Case type	*Median ($)*	*Mean ($)*	*Over $250,000 (%)*	*$1 million or more (%)*
all tort cases	51,000	408,000	21 2	7 8
toxic substance	101,000	526,000	30 4	13.3
automobile	29,000	220,000	12 7	4.0
product liability	**260,000**	**727,000**	**50.5**	**15.4**
medical malpractice	201,000	1,484,000	47.1	24.8

data do not provide us, however, is the number of *settlements* and the compensation that was given in settlements

4. STALEMATE; RESTATEMENT

In the U.S., product liability finds itself in the limelight. For years now, consumer organisations and trial lawyers on the one side and those aligned with manufacturers on the other side, have opposed each other. As a recent publication from Mark C. Rahdert puts it:

> "The debate over tort reform and the insurance crisis has been a largely partisan affair Advocates on both sides have painted their positions with extremely broad brushes. All too often, they have been content to rest their conclusions on sweeping, undocumented, and often unexamined assertions about the connection between rising insurance costs and the structure of tort doctrine. State legislatures (the chief engines of tort reform), and to some extent the courts, have responded in an equally broad-brush, reactive fashion, with a marked preference for the quick fix over the comprehensive solution. Inevitably pressed for time and strapped for resources, they have seldom investigated much below the surface of this complex topic."[11]

For a very long time now, manufacturers have tried to convince the U.S. Congress to pass legislation which would establish a uniform *federal* standard for product liability, but that effort has never succeeded. This is mainly because the various pressure groups are quite well balanced politically. Manufacturers, for example, have tried for a long time to introduce liability limits or caps, the restriction or the abolition of the possibility of punitive damages and the restriction of strict liability. Other interest groups have tried to maintain as much strict liability as possible. In certain instances, they have even advocated a system of pure strict liability (also known as causative liability). The result has been that there has been no revolutionary change in the U.S. The case law varies, sometimes leaning more towards one, and at other times leaning more towards the other.

There has now been a new development, which might be able to break the stalemate: the American Law Institute is engaged in developing a new Restatement (Third) of Torts, starting with the law of product liability.[12] The ALI's Restatements are a unique type of private, advisory code. Although they are not binding as legislation, unless a court or legislature chooses to follow them, for decades the Restatements have proven to be extremely authoritative pronouncements of the law. Perhaps the most famous has been the Restatement (Second) of Torts, which has been of enormous influence on American tort law for 30 years.

5. THE ALTERNATIVE DESIGN TEST

It is a fact that the discussions in the ALI on the proposal regarding the alternative design test have been heated. In American academic writing, some authors are already speaking of the new proposal as being a giant step backwards from strict liability towards "super negligence".[13] In this article we would like to concentrate on one of the most controversial novelties: the inclusion of the alternative design test where design defects in para. 2(b) are concerned. The section makes the classic distinctions between manufacturing defects, design defects and instances of inadequate warnings or instructions Under the proposed new Restatement, manufacturing defects would be subject to strict liability. If the plaintiff can prove that it is probable that the product failed to comply with reasonable consumer's expectations because of a *manufacturing* defect, he can invoke strict liability

Design defects, on the other hand, would be governed exclusively by a new, and more stringent, liability standard. That part of the proposed new section reads as follows:

> "a product 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 ... and the omission of the alternative design renders the product not reasonably safe".

The burden of proof lies with the victim. He must prove that a reasonable alternative design was feasible and that without the alternative design, it was not reasonable to manufacture and sell the product. That is why some commentators say the new

11 Marc C Rahdert, *Covering Accident Costs, Insurance, Liability, and Tort Reform* (Temple University Press, Philadelphia, 1995), pp. 3–4

12 Restatement (Third) of Torts Products Liability (March 13, 1995), accepted in part by the members of the American Law Institute

13 See for example Elizabeth C. Price, *supra*, 1995, and Philip H Corboy (a famous plaintiff lawyer), "The Not-So-Quiet Revolution· Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts Product Liability", *Tennessee Law Review* 1995, p 1043

design defect test should not be classified as a mere negligence standard· perhaps "super" negligence would be a more appropriate label. If the proposal were to be followed, mere proof that a product's risk outweighs its utility would no longer be sufficient as a basis to impose liability

At first glance there seems to be a difference here with European law. the Directive defined "defect" in terms of consumer expectations.

> "A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including
> (a) the presentation of the product;
> (b) the use to which it could reasonably be expected that the product would be put;
> (c) the time when the product was put into circulation."[14]

On the other hand, we should not forget that the burden of proof in Europe also lies with the victim: "[t]he injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage" (article 4 of the Directive) Even so, it seems to be easier for the plaintiff to prove that he was entitled to expect something else rather than that he has to prove that an alternative design would have been feasible.

6. WHY A DIFFERENCE BETWEEN DIFFERENT TYPES OF DEFECTS?

Why is the proposed new Restatement making a distinction between manufacturing defects and design defects? The official comment gives the following explanation.[15] Whereas a manufacturing defect consists of a product unit's failure to meet the manufacturer's design specifications, a product asserted to have a defective design meets the manufacturer's specifications but raises the question whether the specifications themselves create unreasonable risks.

Answering that question requires reference to a standard outside the specifications. Therefore subsection (b) adopts a reasonableness (*i.e.* a "risk/utility" balancing) test as the standard for judging the defectiveness of product designs. More specifically—according to the Comment—the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design rendered the product not reasonably safe.

In sum, a *double* reasonableness test is at the heart of the proposal! Under prevailing rules concerning allocation of burden of proof, the plaintiff must prove that such a reasonable alternative was, or reasonably could have been, available at the time of sale or distribution In the case of the second reasonableness test, imagine what the most accident-proof and safe car would be like As most people would call this hypothetical vehicle a tank, and not a car, it would not be considered to be a reasonable alternative.[16]

7. SEVERAL NUANCES

Is the proposal before the ALI a giant step backwards in the law of product liability? First, consider some of the nuances that the Restatement itself offers.

Some academic comments on the new Restatement argue that every producer will proclaim that its product design was the safest in use at the time of sale and that a proposed alternative design was not adopted by any manufacturer, or even considered for commercial use at the time of sale. Nevertheless, if a plaintiff introduces expert testimony to establish that a reasonable alternative design could practically have been adopted, a trier of fact may conclude that the design of the product was defective.[17]

While the plaintiff must prove that a reasonable alternative design would have reduced the foreseeable risks of harm, para 2(b) does not require the plaintiff actually to produce a prototype in order to make out a prima facie case. For example, qualified expert testimony on the issue would suffice, if it reasonably supports the conclusion that a reasonable alternative design could have been adopted at the time of sale. Nor is the plaintiff required to establish in detail the costs and benefits associated with adoption of the suggested alternative design [18] Also, the Restatement Comment argues, given the relative limitations on the plaintiff's access to relevant data, the plaintiff is not required to establish in detail the costs and benefits associated with adoption of the suggested alternative design.[19]

Early in the development of product liability law, U.S courts held that a claim based on design defect could not be sustained if the dangers presented by the product were open and obvious. From the early 1970s, however, many courts have accepted the legitimacy of complaints that a product risk, albeit patent, was "unreasonably dangerous" and that the product was defective under section 402A of the Restatement (Second) of Torts.[20] Consequently, the new subsection (b) does not recognise the obviousness of a design-related risk as *precluding* a finding of defectiveness. The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily

14 Art 6 of the Directive

15 Restatement, Comment at p 19

16 For example, *Dreisonstok v Volkswagenwerk, A G*, 489 F (2d) 1066 (4th Cir 1974) (considering whether a Volkswagen van is "defective" because it was not designed with a long hood containing the motor of the van). The case and issue are discussed by Richard L Cupp, "Defining the Boundaries of 'Alternative Design' Under the Restatement (Third) of Torts The Nature and Role of Substitute Products in Design Defect Analysis", 63 Tenn L Rev 329 (1996)

17 Restatement, Comment at 18.

18 *ibid* Comment at 25

19 *ibid*

20 See, e g Jane Stapleton, *Product Liability* (Butterworths, 1994), p 258

preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented harm to the plaintiff [21]

Also, there are products of manifestly unreasonable design Take the example of a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children However, the proposed Restatement Comment notes, if consideration is limited to toy guns that are capable of causing injury, then no reasonable alternative will, by definition, be available In that case, the court can condemn the product design as defective and not reasonably safe, because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible utility that no rational adult, fully aware of the relevant facts, would choose to use or consume the product Thus, manufacturers may be held liable for injuries caused by such products even without proof of a reasonable alternative design [22]

8. SECTION 3 OF THE PROPOSED RESTATEMENT (THIRD)

Furthermore, some protection for plaintiffs who cannot demonstrate a reasonable alternative design is offered by section 3 of the Restatement That section allows courts to infer that the plaintiff's harm was caused by a product defect, without proof of the specific nature of the defect, when circumstantial evidence indicates that it is more likely than not that the harm was caused by a defective product rather than by other possible causes

The Comment[23] gives the following example John purchased a new electric kitchen blender He used it exclusively for making milkshakes Shortly after John purchased the blender, while he was making a milkshake, the blender suddenly shattered A piece of glass struck John s eye, causing harm John s expert, after examining the pieces of glass, concludes that the blender was defective The expert is unable to conclude whether the blender was defectively manufactured or defective in design, because the product was destroyed in the accident The evidence, the Comment argues, would be sufficient to allow the trier of fact to consider whether the product was in fact defective, even though the plaintiff has not established the exact nature of the defect The incident resulting in harm is of a kind that would ordinarily occur only as a result of product defect So, in this case, section 3 offers a (rather narrow) escape from the requirement of proving a reasonable alternative design

9. PROPOSAL BY PROFESSOR SHAPO

An even more serious attack was raised by Professor Shapo of the Northwestern University School of Law during the ALI sessions on the new draft in May 1995 [24] He charged that the new text focuses too much on the risk-utility balance and not enough on consumer expectations He offered an amendment that would demote the reasonable alternative design requirement to one of five considerations courts must take into account in determining whether a product is defective Besides the consumer expectations factor, the other considerations would include whether the risk of the product outweighs its utility, whether the risk of the product outweighs the cost associated with the injury, whether a reasonable seller or distributor would have expected the risk of injury that occurred, and whether the advertising, promotion, and appearance of the product created an impression of safety Shapo s proposal structurally resembles the European approach a number of (more co-ordinated) factors with an important role for consumer expectations

10. RELEVANT FACTORS WITHIN THE RESTATEMENT: CONSUMER EXPECTATIONS

Professor Twerski, one of the two Reporters of the new Restatement, argued however, that the consumer test is not abandoned by the new Restatement, but that it remains an important factor for juries to consider [25] The Comment on section 2(b) also would allow consideration of a broad range of factors in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe The factors in the Comment include the magnitude of the foreseeable risks of harm the accompanying instructions and warnings, the nature and strength of consumer expectations regarding the product, the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed, and the effects of the alternative design on production costs, product longevity, maintenance and repair, esthetics and marketability [26] It is important to note that it is not a relevant factor that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry [27]

We cannot say the ALI s proposal even with its explanatory commentary, is crystal clear If we are correct, the alternative design test will fulfill the function of gatekeeper When the plaintiff can not point to an alternative design, the manufacturer will not be liable unless it has chosen a manifestly unreasonable (very dangerous) design At this stage the balance between risk/utility also plays a part However, if an alternative design was available, and the omission of that alternative renders the product not reasonably safe a broad range of factors

21 Restatement Comment at 20 and 21

22 *ibid* Comment at 21 and 22

23 Comment at 130

24 ALI Approves Product Liability Draft *The United States Law Week* May 20 1995 (63 LW 2734)

25 *idem*

26 Restatement Comment at 24

27 *idem*

legitimately may be considered in determining whether an alternative design is reasonable

All, or some, of these factors may determine whether or not the product is defectively designed The Comment adds however, that the plaintiff is not necessarily required to introduce proof on all of these factors [28] They will vary from case to case

11. CASE LAW ON THE ALTERNATIVE DESIGN

Much of the discussion in the American scholarly literature on the new proposal has focused on whether the proposed treatment of the alternative design test is in accordance with the case law Indeed this very much remains to be seen [29] Concordance with case law is important to the extent commentators believe that the appropriate goal of the Restatements merely should be to accurately track—to restate —the development of the common law or whether it is also appropriate for the ALI to attempt to shape the future direction of the development of the common law

The case law is very varied There are jurisdictions which hold that the plaintiff need not show a reasonable alternative design test in order to hold the manufacturer liable for design defects For example in *Ogg v City of Springfield*,[30] two women were electrocuted when the Hobie Cat catamaran sailboat they were sailing struck an overhanging power line The issue was whether the mast could have been constructed of a material that would not conduct electricity The Illinois Court of Appeals concluded our Supreme Court has never included the existence of a feasible alternative design as one of the elements a plaintiff must prove in order to succeed in a products liability case Thus the existence of an alternative design becomes not an element of proof but instead merely one method of proving one of the elements of proof—that the product was unreasonably dangerous

Other jurisdictions hold that the alternative design test is only one of several factors which may be considered in determining whether a product design is defective In *Montgomery Elevator v McCullough* [31] a products liability suit was brought against an escalator manufacturer to recover for injuries which a 10 year old child sustained His foot was crushed in the space between the treads and the side skirt of the escalator, resulting in amputation of his big toe The Kentucky court considered a reasonable alternative design as merely one factor to be weighed by the jury

There are also jurisdictions which place the burden on the defendant to prove the product was not defective In *Caterpillar Tractor Col v Beck* [32] the plaintiff was killed when his front end loader which he was operating rolled over an embankment The tractor had no roll over protective structure (ROPS) His widow sued the tractor company The Supreme Court of Alaska carefully considered the reasonable alternative design requirement and rejected it, stating we hold the plaintiff need only to show that he was injured and that the injury was proximately caused by the product s design

Profesor Frank J Vandall, in his article carefully surveying the case law under the Restatement (Second) s standard, comes to the conclusion that the alternative design requirement is *not* supported by the majority of the jurisdictions in the U S that have considered the question In addition he contends that the reasonable alternative design requirement violates fundamental policies of products liability [33]

12. A GIANT STEP BACKWARDS?

If it adopts the proposed new Restatement provisions will the American Law Institute be leading American courts into taking the law a giant step backwards? Would U S law, in practice, really start to differ greatly from Europe s, with its consumer expectations test? We wonder for various reasons

(a) the alternative design test of the new Restatement would apply only to design defects not to manufacturing defects,
(b) even if he does not have to produce an alternative prototype the burden of proof on consumer expectations in Europe—as a principle—still rests with the plaintiff,
(c) even under the proposed new Restatement, manufacturers may be liable for harm caused by manifestly dangerous products without proof of a reasonable alternative design,
(d) in the U S the risk/utility balance will still play a role,
(e) in almost all of the European countries, the manufacturer may invoke the development risk defence,
(f) in case of design defects it will often come down to a statement of an external expert or on the simple comparison to a safer product that is already sold in the market

Finally, and this seems to be forgotten by the opponents of the new Restatement, it is not true that the law regarding product liability is strict liability *per se*, although it does sound strict In

28 *Idem*

29 See e g a comprehensive overview by Frank J Vandall The Restatement (Third) of Torts Product Liability Section 2(b) The Reasonable Alternative Design Requirement *Tennessee Law Review* 1995 pp 1407 *et seq*

30 458 N E (2d) 1331 (Ill App Ct 1984)

31 676 S W (2d) 776 (Ky 1984)

32 593 P (2d)734 (Haw 1983)

33 *Supra* at 1428 An exhaustive survey of the law of the American states performed by a practitioner reaches the same conclusion John F Vargo The Emperor s 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 Memphis L Rev 493 (1996)

our view, European products liability law is, apart from the quasi-vicarious liability of other suppliers under the Directive (art 3), only really "strict" in so far as *manufacturing* defects are concerned.[34] That conclusion is also reached by Jane Stapleton:

> "Analysis of the core idea of 'defect' in the E.C product rule shows, first, that contrary to the common description of those rules as imposing 'strict liability' on manufacturers of products, the 'defect' notion in combination with Article 6(2) and the defence in Article 7(e) of the Directive generates a liability on manufacturers rarely, if ever, greater than the liability in negligence and one that is often narrower "[35]

13. WHAT MATTERS IS THE BURDEN OF PROOF

Nevertheless, what really matters—in both Europe and the U.S.—is how the judge will (and should) handle the burden of proof. This is the reason why the Dutch Government, with its flexible division of the burden of proof from the Dutch Code of Civil Procedure (in principle the person who claims carries the burden of proof, yet that burden can shift to the other party when the court considers such is reasonable and appropriate in light of the circumstances of the case), for so long tried to keep the somewhat unsubtle rule on the burden of proof from the European Directive out of the Dutch Civil Code. This has finally, under pressure of the manufacturing lobby, failed, but one works from the presumption that the reasonableness of the situation can bring the judge to change the burden of proof

And is it not already true that in the Netherlands and in the U.S., in cases of design defects, an expert will need to be called in for help? It is our opinion that, as a practical matter, in many of the American design cases it does not really matter all that much *which* system one chooses: the alternative design test as gatekeeper with a consumer expectations test afterwards, or applying a consumer expectations test directly. The reason it may not matter very much which test is utilised is that the trier of fact's conclusion about the "expectation of the consumer" will be heavily influenced by the answer to the question whether an alternative design would have been feasible. Under either analysis, it will almost always be of importance whether an alternative design was available and whether the consumer was entitled to expect that alternative.

14. CONCLUSIONS

We conclude that both regimes—the third Restatement and the Directive—do not differ that much from one another with respect to design defects. Almost always it comes down to whether an *alternative design* is possible and whether this is also a *reasonable* alternative, and what the consumer could *reasonably expect*. The only doubtful situation is what results when it cannot be proven that there was a reasonable alternative but the trier of fact could fairly conclude that the reasonable consumer was entitled to expect better safety from the product. If the proposed new Restatement test is adopted and followed in the U.S. courts, some future injured plaintiffs in America might very well be worse off than a similar plaintiff in Europe because the U.S. trial judge will not let the jury decide the case. The trial judge will be obligated to enter judgment for the defendant if, as a matter of law, the plaintiff's case is legally inadequate due to the failure to prove that a reasonable alternative design actually existed. What we don't know is how many injured persons will fall into this category. In any event, one can expect that in some of these cases, the judge could very well reach a just solution with the help of the risk/benefit test. In other cases, the plaintiff may prevail because the defect is not one of design, but is a manufacturing flaw or can be considered a failure to warn.

Where design defects are concerned, negligence is consequently very important and may well become even more important in the future in U.S. law. However, product liability never has been exclusively a regime of strict liability. It seems that American tort law may be about to engage in an experiment where the mix will include a little more negligence and a little less strict liability. As there is little evidence demonstrating that U.S. law is labouring under a crisis which demands a revision of the law of product liability, and even less evidence that Europe is suffering one, we recommend that the Old World let their American cousins in the New World embark on this experiment alone.

34 At least one important U S commenator contends that U S law is the same "the concept of 'strict liability' applies properly only to manufacturing flaw cases, and .. negligence principles and negligence doctrine govern liability in design and warnings cases" David G Owen, "Defectiveness Restated Exploding the 'Strict' Products Liability Myth", 1996 U Illinois L Rev 743, 786 (1996) Professor Owen believes that the proposed Restatement (Third) should proclaim this distinction "forthrightly"

35 Stapleton at pp 271–272