1-1-1998

THE LIABILITY OF THE AUTOMOBILE AND MOTORCYCLE MANUFACTURERS AND THEIR SUPPLIERS FOR DEFECTIVE PRODUCTS IN THE UNITED STATES COMPARED TO GERMANY

DANIEL KARL ROBYN
The University of Georgia School of Law
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Daniel Karl Robyn
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by

DANIEL KARL ROBYN

Erstes Juristisches Staatsexamen, Universität zu Köln, Germany 1997

A Thesis Submitted to the Graduate Faculty
of The University of Georgia in Partial Fulfillment
of the
Requirements for the Degree

MASTER OF LAWS

ATHENS, GEORGIA
1998
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by

DANIEL KARL ROBYN

Approved:

[Signature]
Major Professor
6/24/1998
Date

[Signature]
Reading Chair
June 24, 1998
Date

Approved:

[Signature]
Dean of the Graduate School
June 26, 1998
Date
DEDICATED
TO MY PARENTS,
MARC & ROSWITHA ROBYN,
AND TO
CHERYL "KLEINES"
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INTRODUCTION

This thesis deals with the liability of automobile and motorcycle manufacturers, as well as their suppliers, in situations where a defective product causes a harmful event. Specifically, it compares the product liability laws of the Federal Republic of Germany\(^1\) to those of the United States of America\(^2\).

Before entering into the details of legal doctrine, the introductory note provides background information on the social and economic aspects of automobile use in those two countries. Next, Chapter I describes the liability regime governing claims against German motor vehicle manufacturers and their suppliers. Chapter II focuses on the comparable law in the United States and contains the conclusion that both laws are very similar, in part even identical, and only differ in a few aspects. It recommends that the German legislature should introduce capped punitive damages to its product liability law, and, with regard to American product liability law, it argues for the adoption of a clearer determination of the preemption doctrine by the United States Supreme Court. It further pleads against federalization of United States product liability law which, as a part of tort law, traditionally belongs to the states.

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\(^1\) [hereinafter Germany].

\(^2\) [hereinafter United States or U.S.].
Social aspects demonstrating the practical relevance of the topic

Motor vehicle travel is the primary means of transportation in the United States and Germany. It provides a high degree of personal mobility for each individual, making it possible to establish social and business contacts and organize one’s leisure time. Due to the geographical dimensions and underdeveloped public transportation systems, most importantly in the United States, the automobile has become a practical necessity of everyday life. This observation is reflected in statistics pertaining to the degree of motorization in the two countries. In 1996 the population in the United States was approximately 265.28 million, in Germany 82.01 million people. The number of registered vehicles in the United States was 201.63 million, in Germany 49 million, so that the degree of motorization in the United States is 76 %, whereas in Germany it is only about 57 %. However, it must be kept in mind that children under the age of 16 in the United States and under the age of 18 in Germany are generally not legally entitled to drive automobiles. Moreover, elderly people will often not be able to drive cars due to their physical condition. Thus, because these groups of people may not be taken into account when measuring the degree of motorization, the factual degree of motorization is even higher than the one mentioned above. In addition, the number of new registrations for motor vehicles, especially for passenger cars, increases every year. In

5 Statistisches Bundesamt Deutschland (Federal Statistical Office of Germany) [hereinafter Statistisches Bundesamt], <http://www.statistik-bund.de/basis/e/be02_t02.htm>.
6 See supra, note 4.
8 See, § 7 sec. I, Nr. 3 Strassenverkehrs-Zulassungs-Ordnung (StVZO) in der Fassung der Bekanntmachung vom 28.09.1988, Bundesgesetzblatt, Teil I [hereinafter BGBI. I], S. 1793 [hereinafter StVZO].
1996 about 4.8 million motor vehicles were newly registered in the United States,\(^9\) compared to 3.8 million in 1995\(^{10}\), while in Germany the number of registrations for passenger cars amounted to almost 3.5 million\(^{11}\) in 1996 compared to 3.2 million in 1995.\(^{12}\) Thus, the degree of motorization increases continuously in both nations.

Although motorization brings numerous advantages, its biggest disadvantage is that the use of motor vehicles can lead to accidents in which a large number of people are killed every year. In 1996, there were an estimated 6,842,000 police-reported traffic crashes, in which 41,907 people were killed and 3,511,000 people were injured.\(^{13}\) Thus, an average of 115 persons died each day in motor vehicle crashes, one every 13 minutes.\(^{14}\) In the same year 8,758 people were killed in motor vehicle accidents in Germany, an average of 24 people per day, one every hour.\(^{15}\) In the majority of these accidents alcohol and/or speeding was at least a contributing factor.\(^{16}\) However, in a small number of accidents, the malfunction of a part of the motor vehicle, its design or

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\(^{10}\) In 1994, the total number of registered vehicles was 188.43 million. In 1995, this number increased to 192.21 million, thus an increase of about 3.8 million compared to 1994 can be noticed. This number increased again in 1996, where 197.1 million vehicles were registered, thus a total of approximately 4.8 million new registrations compared to 1995 can be noticed, see, U.S. Department of Transportation, National Highway Traffic Safety Administration, Overview Traffic Safety Facts 1996, Summary, Table 2, p. 3, <http://www.nhtsa.dot.gov/people/ncsa/overvu96.html#Motorcy>.

\(^{11}\) Statistisches Bundesamt, Verkehr (Traffic), <http://www.statistik-bund.de/basis/d/bdl9_t01.htm>.

\(^{12}\) Id.


\(^{14}\) Id.

\(^{15}\) Statistisches Bundesamt Verkehr (Traffic), <http://www.statistik-bund.de/basis/d/bd19_t03.htm>.

\(^{16}\) In 1996, 17,126 fatalities were alcohol-related (40.9% of total traffic fatalities for the year) and 12,998 lives were lost in speeding-related crashes (speeding was a contributing factor in 30% of all fatal crashes), see, U.S. Department of Transportation, National Highway Traffic Safety Administration, Overview Traffic Safety Facts 1996, Summary, p. 4-5, <http://www.nhtsa.dot.gov/people/ncsa/overvu96.html #Motorcy>.
the lack of necessary information will have played a role in the occurrence of the accident.\textsuperscript{17}

-\textbf{ECONOMIC ASPECT SHOWING THE PRACTICAL IMPORTANCE OF THE TOPIC}

The mentioned statistical data already gives a hint to the economic importance of the motor vehicle industry the United States and Germany. In fact, it is one of the top industries in the respective national economies, providing many jobs and constituting a significant percentage of the gross national product. In 1996, Germany, for example, was the third largest producer and the second largest exporter of motorcars in the world.\textsuperscript{18} Thus, it is not surprising that one often hears the term "automobile-lobby" which might, from case to case, be connected with the exertion of influence on political, economic and legal decisions.

-\textbf{EFFECTS OF PRODUCT LIABILITY ON AUTOMOBILE AND MOTORCYCLE MANUFACTURERS (AND THEIR SUPPLIERS)}

Product liability laws can affect the business and business-related decisions of motor vehicle manufacturers and their suppliers. First, the liability for defective products often is one factor which is taken into consideration before determining the location of a production center,\textsuperscript{19} because the strictness of product liability laws may vary from country to country and in the United States from state to state. However,

\textsuperscript{17} E.g., see, BGHZ 99,167 ff. - Honda: Here, a steering gear cover led to the death of the driver of a motorcycle; in this case, the defect consisted of the manufacturer's (Honda's) failure to observe accessories (steering gear cover) that could be used for its products (motorcycles).


\textsuperscript{19}HENRY J. STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS 50 (4\textsuperscript{th} ed. 1994); as an example one can refer to BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996): The Alabama Supreme Court held that the Trial Court erred in its decision to allow an action against the German manufacturer (BMW) as long-arm-jurisdiction did not exist because of a lack of contacts to the forum in the United States; see, Joachim Zekoll, \textit{Umkehr im U.S.-amerikanischen Produkthaftpflichtrecht und internationaler Schadensersatzprozess}, Praxis des Internationalen Privat- und Verfahrensrechts [hereinafter IPRax] 1997,198 (201).
economic factors like the market, wages, social security contributions, taxes, antitrust and labor legislation,\textsuperscript{20} will often be more important and even decisive for the determination in question. For example, the production center of the Mercedes-Benz cross-country vehicle (M-Class, ML-320) is in Tuscaloosa, Alabama,\textsuperscript{21} despite Alabama’s strict product liability laws.

Secondly, the involvement of a manufacturer or supplier in a product liability suit and the related potential risk of economic loss can have severe consequences for its business. Due to higher medical costs, the existence of a jury, and the availability of punitive damages in the United States, which is unknown to German law, this risk is even higher for U.S. manufacturers, or those who can be sued in the United States, compared to others who are not subject to U.S. jurisdiction. This can be illustrated by a recent case in which a South Carolina jury returned a $262.5 million verdict against Chrysler in a product liability suit brought by a family whose 6-year-old child was killed in an automobile accident. The award consisted of $12.5 million in compensatory and $250 million in punitive damages.\textsuperscript{22}

Thirdly, in addition to the potential monetary liability a motor vehicle manufacturer has to face, the loss of reputation caused by the involvement in a product liability action can lead to a sales crisis. The same is true for a manufacturer or supplier who has to start a recall campaign for a product that is defective. Here, the manufacturer has to remedy the defect which may cost a lot of money and damage its image. In Germany, Mercedes Benz recently had to face this situation. Beginning in October 1997, Mercedes-Benz recalled its A-Class, the so-called “Baby-Benz,” because it tended

\textsuperscript{20} Id.

\textsuperscript{21} Deutsche Autos in den USA begehrt (German cars desired in the U.S.), Koelner Stadt-Anzeiger, Wirtschaft, October 6, 1997, <http://ksta.de/text/wirtschaft/wirtschaft01.html>.

\textsuperscript{22} The Atlanta Journal-Constitution, October 9, 1997, at section G 1.
to roll over in extreme driving situations simulated in road tests. About 100,000 cars of this type were affected. Delivery to customers was delayed for 12 weeks, and the 2,600 cars which had already been delivered were recalled. The whole A-Class-series got a new chassis-tuning with different stabilizers, broader tires, a lowered body-work and was equipped with an Electronic Stability Program (ESP) guaranteeing a computerized stabilization of the car in a split second. All these improvements were added without additional charge to the customer, and those customers who had already ordered an A-Class model for a delivery date prior to February 1998 received a substitute car from Mercedes-Benz. It is estimated that the profit of the company in the years 1997 and 1998 will be diminished by 300 million Deutsche Mark [hereinafter DM], and combine boss Juergen Schrempp admitted that the prestige of the combine, known as a model in traffic safety until that date, has been scratched. Other examples of recall campaigns carried out by automobile manufacturers can be gathered from the table in the appendix.

Rapidly developing technology contributes to the manufacturer’s increased exposure to product liability suits or being forced to recall products. In former times a car consisted of only a few mechanical parts. Today it consists of thousands of mechanical and electronic elements some of which are highly sophisticated, like driver and passenger airbags, side-bags, Anti-Slip-Regulation (ASR), Anti-lock Braking System (ABS), brake assistant, Electronic Stability Program (ESP), power windows etc. Although most of these innovations contribute to safety and comfort, they may also

25 Id.
27 Koelner Stadt-Anzeiger, November 12, 1997, at 33.
28 See infra, at 186.
malfunction in a way that can cause an accident for which the manufacturer or supplier could be held liable.29

On the subject of liability, we now have to consider the liability situation for defective products in both countries. The potential defendant in Germany has to be aware of the increasing shaping of the idea of consumer protection,30 which is noticeable not only in legislation and jurisprudence but also in the attitude of the consumers who become more and more demanding. In the field of legislation, the EC-Directive31 on product liability must first be mentioned. It was enacted on July 25, 1985, and Germany, in performing its duty to transform this directive in accordance with art. 189 of the European Treaty, enacted on January 1, 1990 the national statute concerning the liability for defective products (Produkthaftungsgesetz, ProdHaftG)32 which is obligatory for all states. The most important innovation that has been brought by this law is the introduction of strict liability for all three kinds of product liability claims (manufacturing, design, and instructions or warnings-defects). Thus, since 1990 a product liability claim can either be based on traditional tort law (§§ 823 - 853 BGB)33 requiring fault, or on strict liability.

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29 For example, since 1990, 89 people have been killed in the Unites States by airbags inflating in low severity crashes, see, Airbag Statistics, <http://www.hwysafety.org/airbags/airstat.htm>. From October 1993 to September 1994 it is estimated that 499 persons have been injured in connection with motor vehicle power windows; 9 % of them (43 persons) were injured as a result of a “faulty” power window, see, U.S. Department of Transportation, National Highway Traffic Safety Administration, Research Note, May 1997, Injuries associated with Hazards involving Motor Vehicle Power Windows, <http://www.nhtsa.dot.gov/people/ncsa>.

30 FRIEDRICH GRAF VON WESTPHALEN-LITTBARSKI, PRODUKthaftungshandbuch, Band 1, Vertragliche und deliktische Haftung, Strafrecht und Produkthaftpflichtversicherung § 48, Rn. 1 [hereinafter von Westphalen-editor, Band 1]; Littbarski is talking about a “[T]riumphal march of the idea of consumer protection…”.


33 Buerglerliches Gesetzbuch (Civil Code) v. 18.08.1896, Reichsgesetzblatt [hereinafter RGL]. S. 195, entered into force 01.01.1900.
Another law which has recently been enacted on the basis of an EC-Directive\textsuperscript{34} is the statute concerning the regulation of safety requirements for products and the protection of CE-labeling (Produktsicherheitsgesetz, ProdSG)\textsuperscript{35}. This statute was enacted on August 1, 1997 and requires manufacturers to put safe products on the market. In case of violation of this requirement, administrative agencies, like the Federal Office for Motor Traffic (Kraftfahrtbundesamt,) have the power either to forbid the marketing of the product or to issue orders to the manufacturer requiring it to provide a warning about the product or recall it. Secondly, these agencies can issue warnings or recalls themselves; and, finally, they can impose an administrative fine up to 50,000, DM to the disobeying manufacturer. With this law, the power of administrative agencies to intervene in situations involving defective products was expressly established for the first time.

In addition, an EC-Directive establishing a higher standard for crash tests is in preparation. New cars will have to meet the requirements of this directive from October 1, 1998 on, whereas it becomes mandatory for all cars, including those introduced before 1998, on October 1, 2003.\textsuperscript{36}

With regard to the German courts, it can be said that since the leading case, the so called “Fowl pest case,”\textsuperscript{37} decided by the Federal Supreme Court of Germany, a continuous tightening of the defendant’s duties under product liability law can be noticed.\textsuperscript{38}

\textsuperscript{34} EG-Richtlinie 92/59 EWG des Rates v. 29.06.1992 ueber die allgemeine Produktsicherheit “Produktsicherheitsrichtlinie”, ABIEG Nr. L 228 v. 11.08.1992, S. 24.


\textsuperscript{37} BGHZ 51,91 - Huhnerpest (Fowl pest).

\textsuperscript{38} See, in particular: BGHZ 80,186 - Apfelschorf I (Derosal) (Apple scab I); BGHZ 80,199 - Apfelschorf II (Benomyl) (Apple scab II); BGHZ 99,167 - Honda; BGHZ 104,323 - Mehrwegflasche I (Returnable bottle I); BGHZ 116,60 - Kindertee I (Child tea I); BGHZ 116,104 - Salmonellen (Salmonellae).
In the United States, however, product liability law and the role of consumer protection are more complex. Of course, this is to a high extent due to the fact that, in contrast to Germany, a federal law on products liability is non-existent. As in most areas of substantive law (e.g. criminal law, family law), product liability law is not subject to federal but to state regulation, either with regard to legislation or with respect to common law. As a result of this division of competence one can notice fragmentation and a lack of clarity in the field of product liability. Although several attempts have been made to introduce a federal law on products liability, each has failed. In 1996, the latest legislative initiative to enact such a federal law, through which restrictions of liability would have been introduced, failed. The draft law passed both the House of Representatives and the Senate and was the most successful initiative that has ever been introduced. However, President Clinton considered it to be too detrimental to the consumer and vetoed the proposal. Thus, the liability for defective products is still subject to a different treatment in each of the 50 states. In the majority of these states, however, efforts for reform of product liability law have taken place

39 Tort law, including product liability law, belongs to the historic province of the states and it is estimated that 95% of tort litigation is decided by state courts, see, Thomas A. Eaton & Susette M. Talarico, A Profile of Tort Litigation in Georgia and Reflections on Tort Reform, 30 Ga. L. Rev. 627,632 and note 9 (1996).

40 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938): “[T]here is no federal common law...”.


42 The 1996 legislation focused on capping punitive damage awards and intended to establish uniform state laws regarding punitive damages, see, The Common Sense Product Liability Legal Reform Act of 1996, H.R. 956,1049 Cong. § 102 (a) (1) (1996), see, Mabry, supra note 41, at 251. For criticism on this bill, see, Eaton & Talarico, supra note 39, at 685,686 (arguing that the proposed 1996 legislation did address secondary issues (e.g. punitive damages, joint and several liability) instead of imposing a uniform standard to determine design or warning defects).

since the 1980s, pursuing the common goal of reducing the number of claims brought against enterprises.44 45 In particular, this “quiet revolution” comprises the introduction of caps on damages, the modification or abolition of the collateral source rule, joint and several liability, and a change in awarding punitive damages50.51

44 James A. Henderson, Jr. & Theodore Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 U.C.L.A. L. Rev. 479 (1990); Pace, supra note 41, at 1613 (stating that the recently proposed national tort reform legislation intends to protect manufacturers from excessive punitive damage awards; see also, S. Rep. No. 104-69, at 1-1 (1995)); Product liability actions have increased from 2% of all federal cases in 1975 to 5.74% in 1989, see, Goodman, supra note 41, at 307.


48 According to the collateral source rule a damage claim against the defendant remains entirely although the plaintiff has other claims resulting out of the same harmful event against a third party - typically an insurance company - the same is true even if the plaintiff has already received the payment of damages from the third party. Usually, these claims or payments had to be disregarded in a products liability action; meanwhile, in most of the jurisdictions either the jury or the judge can decide whether they have to be subtracted from the amount of damages that is going to be awarded to the plaintiff, see, Kathleen E. Pyne, Linking Tort Reform to Fairness and Moral Values, 1995 Det. C.L. Mich St. U. L. Rev. 1207, note 70 (1995) (stating that the only states retaining the collateral source rule are Colorado, Florida, Iowa, Missouri, New Jersey, North Dakota, Ohio, and Oregon).

49 Under the common law rule of joint and several liability each of several defendants is responsible for the entire loss, see, Eaton & Talarico, supra note 39, at 682-683. This rule is comparable to the rules applicable in German tort law (§§ 840, 421 ff., 426 BGB).

50 One restriction concerning the granting of punitive damages is the introduction of an upper limit (“caps”) for punitive damages. In Connecticut, for example, the amount of punitive damages may not be higher than the double of the actual damage claim, see, CONN. GEN. STAT. ANN. § 52-240B (West 1991). Another kind of restriction is that the plaintiff can only recover a certain percentage of the amount of granted punitive damages; the other part - which can be up to 75%, see, GA. CODE ANN., § 51-12-5.1(e)(2) - will flow towards the state; e.g., in Oregon the plaintiff gets 40% of the awarded amount of punitive damages, see, OR. REV. STAT. § 18.540 (1) (a). Some of the reasons for the introduction of statutory capped punitive damages is that they increase predictability of punitive damage awards and avoid the effect of over-deterrence, see, Amelia J. Toy, Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective, 40 Emory L.J. 303,323-328 (1991). In addition, the requirement concerning the provision of evidence for circumstances justifying the granting of punitive damages is higher than the one for other facts: Whereas usually facts have to be proven by the “preponderance of
Furthermore, an important source of tort law in the United States to which courts often refer to as an authority, the Restatement, has been subject to change and high criticism. In reflecting current common law, the Restatement (Second) of Torts from 1965 established in its § 402A a strict liability standard for all kinds of product defects. From 1965 until today, however, courts have interpreted § 402A in various ways. Today's common law majority upholds a strict liability standard solely for manufacturing defects. For design and instruction or warning defects, on the other hand, a "kind of negligence" standard is applied under which the plaintiff has to prove the availability of an alternative design or information. These changes are reflected in the rules set forth in the Third Restatement. However, critics argue that the new Restatement incorrectly restates the common law and that it is, to the detriment of the consumer, too manufacturer-friendly. This controversy further enhances the difficulty and complexity of U.S. product liability law.

The above mentioned aspects give an impression of the close linking of social, economic, and legal issues and demonstrate the practical importance of product liability in the motor vehicle area. The purpose of this thesis is to present the product liability law in this field in Germany and the United States by taking a comparative view, to discover and debate the legal issues, and to attempt to provide solutions for them.

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51 PROSSER, supra note 45, at 808.


CHAPTER I

PRODUCT LIABILITY IN THE MOTOR VEHICLE AREA IN GERMANY

A. SOURCES OF LAW AND SYSTEM OF PRODUCT LIABILITY LAW

1. THREE STATUTORY SOURCES BASED ON TORT LAW - GENERALLY EXCLUDING CONTRACT LAW

In German law three statutory sources of product liability law are found. The first source is the German Civil Code (Bürgerliches Gesetzbuch, BGB)\textsuperscript{54} from 1900, which contains in its §§ 823 - 853 BGB the traditional tort law. The second source is the Product Liability Act (Produkthaftungsgesetz)\textsuperscript{55} from 1990. The third and most recent source, the Product Safety Act (Produktsicherheitsgesetz),\textsuperscript{56} was enacted on August 1\textsuperscript{st}, 1997.

As we can see, contract law does not appear as a source of product liability. The reason for this is that, with regard to an action brought against the manufacturer or supplier of a defective product, a contract does generally not exist because the consumer usually buys a product (\textit{e.g.} car) from a dealer, trader, or marketing company, not directly from the manufacturer. Due to the lack of contractual links between the consumer and the latter, the consumer's claim can, according to the German Supreme Civil Court [Bundesgerichtshof in Zivilsachen], generally not arise out of contract law

\textsuperscript{54} See supra, note 33.
\textsuperscript{55} See supra, note 32.
\textsuperscript{56} See supra, note 35.
but can only be based on tort law. Even if, in exceptional cases, contractual relations between the consumer and the manufacturer exist, a contract-based claim for harm caused by a defective product would be subject to more, or at least more severe, potential defenses than a products liability claim based on tort law. Although in an action for breach of warranty of a sales contract (§§ 433, 459 ff. BGB) the defendant is liable without fault, such a claim is barred by the statute of limitations six months after the item has been handed over (§ 477 sec. 1 BGB.) The same statute of limitations is applicable to an action for breach of a sales contract [positive Vertragsverletzung, p.V.V.], where, to compound matters, the defendant is only liable for culpable behavior for which the plaintiff bears the burden of proof. Moreover, a contractual claim could be contracted away either by individual agreement between the parties or by the use of general terms and conditions of trade [Allgemeine Geschäftsbedingungen], limited only by the statute concerning the regulation of general terms and conditions of trade (AGB-Gesetz). From the plaintiff’s point of view, these disadvantages are further enhanced by the fact that, according to § 253 BGB, the plaintiff cannot get damages for pain and suffering under contract law.

57 BGHZ 51,91(93 ff.) - Huehnerpest (Fowl pest).
58 In this context, a parallel can be drawn to United States product liability law: Since MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) the privity requirement for actions against a manufacturer has been abolished, see infra, Chapter II, at 96-97.
60 HELMUT HEINRICH, in PALANDT BUERGERLICHES GESETZBUCH § 276 BGB, Rn. 110 (57th ed. 1998).
61 Id. at Vorbem v § 249 BGB, Rn. 162.
62 HANS PUTZO, in PALANDT BUERGERLICHES GESETZBUCH Vorbem v § 459 BGB, Rn. 1; § 463 BGB, Rn. 3 (57th ed. 1998).
65 § 253 BGB provides: “For damage which is not pecuniary damage, compensation in money can only be requested in cases determined by the law.”
because a provision allowing him to recover for this kind of damage does not exist in this area of law.

A claim based on tort law, on the other hand, is subject to a three-year limitation period that begins from the time the plaintiff discovered or reasonably should have discovered the act or omission of the tortfeasor (§ 852 sec. I BGB - traditional tort law) (§ 12 sec. I ProdhaftG). The liability of the defendant for defective products under tort law can generally be contracted away neither through individual agreement nor through the use of general terms and conditions of trade. Furthermore, the plaintiff is not excluded from recovery for pain and suffering as the result of a provision allowing him to recover for this kind of damage § 847 BGB. Thus, tort law has been and still is the fundamental pillar of product liability law.


Although the legislature of the Civil Code from 1900 included a section dealing with tort law, it did not specifically take care of the manufacturer’s liability for defective products. Thus, it was the task of the courts to interpret traditional tort law under this aspect of liability so that product liability was, in fact, not subject to statutory but to judicial regulation. Today, this kind of liability is partly regulated in special statutes (e.g., Produkthaftungsgesetz and Produktsicherheitsgesetz). However, compared to other fields of law, courts still play a very important role in interpretation,

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66 Heinz Thomas, in Palandt Bürgerliches Gesetzbuch § 823 BGB, Rn. 218 (57th ed. 1998); the reason for that in tort law the liability (for defective products) can generally not be "contracted" away is that in contrast to contracts which create obligations based on agreements [vertragliche Schuldverhältnisse], tort law consists of obligations which are created by law [gesetzliche Schuldverhältnisse].


68 See, e.g., BGHZ 51,91 ff. - Huehnerpest (Fowl pest): In this landmark decision the Supreme Court introduced the shift of burden of proof to the defendant with regard to breach of duty and fault.
determination, and updating of this law, as legislators are not able to regulate every single issue that might arise. One may conclude that in this area German judicial decisions almost have the same importance as common law in the United States.

3. DIFFERENCES BETWEEN THE THREE SOURCES AND THE IMPACT ON CRIMINAL LAW

Liability for a claim under traditional torts (§§ 823 - 853 BGB) is based on fault. In order for a plaintiff's claim to be successful, he must generally prove that the act or omission of the defendant was negligent or intentional. From the plaintiff's point of view this is a relatively high standard compared to the statute concerning the liability for defective products (Produkthaftungsgesetz), but the traditional tort law does generally not place any limitations on the plaintiff's potential recovery.

On the other hand, the statute concerning the liability for defective products (Produkthaftungsgesetz) does establish a strict liability standard so that the defendant can be held liable for damages caused by his defective product regardless of fault. Thus, the plaintiff who bases his claim on this statute does not have to prove any form of culpable behavior on the part of the defendant. However, the Produkthaftungsgesetz provides several limitations with respect to the damages that the plaintiff can recover. Most importantly, it does not contain a provision according to which the plaintiff could recover for pain and suffering. This kind of recovery is exclusively reserved to

\[\text{69 MERTENS, supra note 67, § 823 BGB, Rn. 271.}\]
\[\text{70 See, e.g., BGHZ 104,323 ff. - Mehrwegflasche I (Returnable bottle I): The Supreme Court introduced the manufacturer's duty to secure the status of products that have a specific risk of danger; consequence of a violation of this duty is the presumption that a (manufacturing) defect already existed before the product has been marketed.}\]
\[\text{71 THOMAS, supra note 66, § 823 BGB, Rn. 54 - 57.}\]
\[\text{72 Id. at § 823 BGB, Rn. 159.}\]
\[\text{73 Id. at Vorbem v § 1 ProdHaftG, Rn. 5.}\]
\[\text{74 See, § 1 sec. IV ProdHaftG.}\]
traditional tort law (§ 847 BGB). In case of property damage, the plaintiff has to pay a deductible of 1.125,- DM (§ 11 ProdHaftG), and in case of personal harm the amount of money the plaintiff can recover is limited to 160 million DM (§ 10 sec. 1 ProdHaftG) (capped damages).75

Thus, under traditional tort law we have a liability standard based on negligence without any limitations, whereas under the statute concerning the liability for defective products, the liability standard is strict liability with several limitations. Therefore, it can be concluded that a disadvantage for the plaintiff in the burden of proof is compensated by allowing him non-limited recovery and vice versa.

In contrast to traditional tort law, which basically76 attempts to provide compensation for harm that has already occurred, and the Produkthaftungsgesetz, which fully77 follows the same purpose, the statute concerning the regulation of safety requirements for products (Produktsicherheitsgesetz, ProdSG) takes a different approach. By empowering the Federal Office for Motor Traffic of Germany [Kraftfahrtbundesamt] to prohibit a product from being put on the market (§ 7 ProdSG), to warn of dangerous products (§ 8 ProdSG) and / or to recall unsafe products (§ 9

75 Further important limitations which are foreseen in the Produkthaftungsgesetz are:
- In case of property damage the plaintiff cannot recover for the defective product itself but only for damage caused to other things, see § 1 sec. 1, cl. 2 ProdHaftG;
- In case of property damage the plaintiff can only recover if the other thing was meant to be and was in fact used by the plaintiff for private purposes (in contrast to commercial activities), see § 1 sec. 1, cl. 2 ProdHaftG;
- The Produkthaftungsgesetz contains a provision of repose according to which the plaintiff's claim is excluded ten years after the defective product that caused the harm has been put on the market by the manufacturer, see § 13 sec. 1 ProdHaftG.

76 The term “basically” is used because of the following reason: Although traditional tort law provides in the majority of cases compensation only, it also comprises the aspect of preventing the occurrence of harm in the area of products liability since the manufacturer's post-salt duties to warn, instruct and recall defective products is recognized under § 823 sec. 1 BGB, see, THOMAS, supra note 66, § 823 BGB, Rn. 208-209.

77 The term “fully” is used because the Produkthaftungsgesetz exclusively serves the purpose of providing compensation but does not comprise any aspect of prevention of harm.
ProdSG), the legislature’s purpose is not to compensate for harmful events but to prevent their occurrence (prevention instead of compensation). Moreover, by vesting a governmental agency with power concerning the regulation of private business matters, it belongs to the field of public law, in particular administrative law, with influence on private law (tort law), whereas traditional tort law and the Produkthaftungsgesetz belong to the area of private law only. This means that under the Produktsicherheitsgesetz the manufacturer, trader or a third person can be subject to administrative regulation (e.g. administrative fines, substitute performance). However, a violation of traditional tort law, the Produkthaftungsgesetz or even the Produktsicherheitsgesetz by a car manufacturer or its supplier might also be sanctioned by the German Criminal Code (Strafgesetzbuch, StGB). One might, for example, think of a case in which personal injury occurred as a result of the negligent, or even intentional behavior, of an automobile manufacturer who knew or could have known that the gas tanks of a certain car he produces are likely to explode when filling the tank under warm weather conditions. Then, the manufacturer or its responsible organs (e.g.

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79 German law makes the general difference between three different fields of law: Private Law - which comprises, among others, tort law and in particular products liability law - , involving private parties only, Public Law and Criminal Law (which is in fact only a special area of public law), both generally involving a governmental party on the one hand and a private party on the other hand; this distinction is reflected in the existence of three general jurisdictions and has effect on the distribution of competences: For private law matters, Civil Courts (Zivilgerichte) have jurisdiction, for Public Law either the administrative Courts or the Constitutional Courts of the Laender (states) or the Bund have competence and for Criminal Law only Criminal Courts can be called on.

80 See, § 7 sec. III ProdSG.

81 Strafgesetzbuch (StGB), v. 15.05.1871 RGBI. S. 127 [hereinafter StGB].


83 In fact, several accidents caused by fire and explosions occurred in 1995 due to gases escaping out of the filler pipes of OPEL Astra models when refueled; because of that the German car manufacturer OPEL had to recall worldwide 2.3 million affected cars of this model, see, Report: Rueckrufe am laufenden Band, Autobild Nr. 49 v. 05.12.1997, at 76.
board)\textsuperscript{84} or employees (e.g. product designer, product manager)\textsuperscript{85} will not only be subject to a product liability action brought by the plaintiff, but he will also be subject to criminal prosecution, which could be based on § 230 StGB (negligent physical injury), § 222 StGB (negligent homicide), § 223 StGB (intentional physical injury), § 226 StGB (intentional physical injury which negligently caused death) or § 303 StGB (intentional damage to property). In such a situation, the responsible organs or persons who acted or omitted necessary measures could be convicted to pay a criminal fine, or they could even be imprisoned.

Thus, although German product liability law has its roots in private law (tort law), it also affects administrative law as part of the public law and can even raise issues under criminal law. As a resulting consequence, the motor vehicle manufacturer or its supplier will be well advised to examine product liability issues not only under the aspects of tort law but also with regard to effects on the other two fields of law. Therefore he should make use of lawyers who are specialized in these areas.

**B. PRODUCT LIABILITY UNDER TRADITIONAL TORT LAW (§§ 823 - 853 BGB)**

**1. STRUCTURE AND MOST IMPORTANT SECTIONS OF TRADITIONAL TORT LAW**

Before entering in detail into the exposition of product liability issues under traditional tort law, it is necessary to explain briefly its structure and to present its most important provisions. German traditional tort law is regulated in the last title of the last section of the second of five\textsuperscript{86} books of the Civil Code from 1900, the law of

\textsuperscript{84} Kremer, supra note 82 at 139.

\textsuperscript{85} Id.

\textsuperscript{86} The German Civil Code (Buergerliches Gesetzbuch, BGB) comprises five books: 1\textsuperscript{st} book, General Part (§§ 1 - 240); 2\textsuperscript{nd} book, Law of obligations (§§ 241 - 853); 3\textsuperscript{rd} book, Law of things (§§ 854 - 1296); 4\textsuperscript{th} book, Family law (§§ 1297 - 1921); 5\textsuperscript{th} book, Law of succession (§§ 1922 - 2385).
obligations. It comprises §§ 823 - 853 BGB which are not only still applicable\(^{87}\) beside the modern statute concerning the liability for defective products (Produkthaftungsgesetz) from 1990, but which still provide the foundation for product liability law. This is due to the fact that the Produkthaftungsgesetz and the Produktsicherheitsgesetz from 1997 are disadvantageous for the plaintiff and / or leave gaps in the regulation of issues such as the duty to warn or to recall defective products or accessories. Thus a recourse to traditional tort law is often necessary in order to sustain the plaintiff’s claim in its entire extent.

Although under the heading of “Tortious acts” the Civil Code only lists §§ 823 - 853 BGB, traditional tort law comprises in fact more provisions. This is due to the system of the Civil Code which contains general rules at the beginning of the Code, or at the beginning of its books, that are usually applicable to the sections which follow, as long as they do not modify the general rules. Like this, the latter only had to be cited once instead of being cited in every section to which they also apply. The first book of the Civil Code is named “General Part” and provides with its §§ 1 - 240 BGB general rules which are in principle applicable to each of the four following books. With respect to tort law, the regulation of limitation in §§ 194 - 225 BGB and the provisions of grounds of justification for an unlawful behavior in §§ 226 - 231 BGB are of particular importance. The second book, the law of obligations, contains in its §§ 241 - 432 BGB general rules most of which can be applied to traditional tort law. Of high importance are §§ 249 - 253 BGB\(^{88}\) which regulate the kind and the extent of damages the plaintiff can recover, § 254 BGB which contains the rule on contributory negligence and §§ 421 - 432 BGB which are designed for situations in which more than one debtor or creditor exists (joint-debtors, joint-creditors).\(^{89}\)

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\(^{87}\) See, § 15 sec. II ProdHaftG.

\(^{88}\) §§ 249 - 253 BGB are modified or specified by §§ 842 - 845, 847 BGB.

\(^{89}\) §§ 412 - 426 BGB are specified or modified by § 840 sec. 1 - III BGB.
Traditional tort law itself provides the main provisions in the area of product liability with § 823 sec. I BGB\(^{90}\) and § 823 sec. II BGB\(^{91}\). These sections represent the basis of the claim, containing its prerequisites and the compensation for damages as legal consequence. Still less important is § 831 sec. I BGB\(^{92}\) which establishes the liability of the principal for a vicarious agent who causes harm. In such a situation it is not the vicarious agent but the principal who will have to pay damages to the third person, if he is unable to provide exculpatory evidence.

Concerning the determination of the kind and extent of damages for which the plaintiff can recover under §§ 823 sec. I, § 823 sec. II and § 831 sec. I BGB, the general rules of §§ 249 - 253 BGB are completed by §§ 842 - 845 BGB and § 847 BGB. Of particular importance in this context is § 253 BGB,\(^{93}\) which states that compensation for non-material damage can only be requested in cases determined by the law. Such a determination is contained in § 847 sec. I BGB,\(^{94}\) which establishes that a plaintiff can get compensation for pain and suffering when harm has occurred to his body, his health, or his personal liberty.\(^{95}\)

\(^{90}\) § 823 sec. I BGB provides: “A person who, intentionally or negligently, causes unlawfully harm to life, body, health, freedom, property, or other rights of another person is obliged to compensate the resulting damage to this person.”

\(^{91}\) § 823 sec. II BGB provides: “Subject to the same obligation is the one who violates a law which intends to provide protection for another person. If, according to this law, its violation is possible without fault, the duty to provide compensation for damages only exists in case of fault.”

\(^{92}\) § 831 sec. I BGB states: “The one who nominates another person to performing is obliged to provide compensation for the damage which the other person causes unlawfully to a third person in execution of the performing. The duty to provide compensation for damages does not exist if the principal followed the necessary standard of care in trade and business with regard to the choice...and the supervision of the nominated person or if the damage had also occurred would the principal have followed this standard of care.”

\(^{93}\) See supra, note 65.

\(^{94}\) § 847 sec. I BGB provides: “In case of injury to body or health as well as in case of deprivation of freedom, the injured person can also get a just compensation in money for damage that is not pecuniary damage.”

\(^{95}\) The assessment of the amount of money which the plaintiff can recover as pain and suffering lies in the discretion of the court (judge(s)), see, § 287 ZPO (Code of Civil Procedure), Zivilprozessordnung v. 30.01.1877 (RGBl. S. 83), [hereinafter ZPO].
§ 840 BGB contains a rule on the liability of joint tortfeasors that are, according to § 840 sec. 1 BGB, generally liable as joint-debtors under §§ 421 - 426 BGB. Finally, § 852 BGB completes the general regulations of limitation of §§ 194 - 225 BGB in establishing a period of limitation of three years for a claim based on traditional tort law, beginning from the time in which the plaintiff obtained knowledge of the tortious act or omission of the tortfeasor.

2. LIABILITY UNDER § 823 SEC. 1 BGB

A) LINK AND CONSTITUENT FACTS

In order to bring a successful claim under § 823 sec. 1 BGB, the following seven requirements must be met. The defendant must have (i.) violated a duty of care by an act or omission\(^{96}\) which (ii.) must have caused a (iii.) violation of a right protected under § 823 sec. 1 BGB. The latter violation must have been (iv.) unlawful, and the defendant must have acted with (v.) fault (negligent or intentional), and a (vi.) harm must have occurred to the plaintiff, and finally (vii.) a causal connection between the violation of the protected right and the occurrence of the harm must exist.\(^{97}\)

(1.) VIOLATION OF A DUTY OF CARE BY AN ACT OR OMISSION

For a violation of a duty of care in the area of product liability, the decisive fact is not whether a product is defective, but rather whether the manufacturer or supplier observed the necessary standard of care in trade and business (reasonable manufacturer standard) with respect to the manufacture and design of his product, and whether he furnished appropriate warnings and instructions for the product.\(^{98}\)

\(^{96}\) See, THOMAS, supra note 66, § 823 BGB, Rn. 2.

\(^{97}\) Id. at § 823 BGB, Rn. 1.

(II.) CAUSAL CONNECTION BETWEEN VIOLATION OF DUTY OF CARE AND VIOLATION OF RIGHT

This violation must have led to a violation of a right that is protected under § 823 sec. I BGB. Such a causal connection exists when three elements are completed. First, according to the theory of equivalence,\(^9^9\) also called the “but for” test,\(^1^0^0\) which treats every circumstance equal,\(^1^0^1\) a causal link exists when a circumstance cannot be disregarded without the success (harm) being dropped. In other words, if one can give a negative answer to the question, “if one disregards the circumstance would the harm then still have occurred?”, then a causal connection exists. Although this theory is a necessary factor in determining whether a causal link exists, it extends liability beyond all bounds, because almost every fact would have to be considered as causal.\(^1^0^2\)

Therefore, the so-called theory of adequate causation has to be considered as second element. Its goal is to eliminate completely unlikely causal developments by raising the question of whether these developments can still be attributed to the tortfeasor.\(^1^0^3\) The third element that must be checked with regard to the issue of causal connection is whether it is the purpose of the violated statute or section to protect from the kind of harm which occurred.\(^1^0^4\)

(iii.) VIOLATION OF A RIGHT PROTECTED UNDER § 823 SEC. I BGB

If a causal connection can be established as mentioned above, one must see if a right that is protected under § 823 sec. I BGB has been violated. This section expressly

\(^9^9\) HEINRICHS, supra note 60, Vorbem v § 249 BGB, Rn. 57.

\(^1^0^0\) Id.

\(^1^0^1\) Id.

\(^1^0^2\) HEINRICHS, supra note 60, Vorbem v § 249 BGB, Rn. 58; even the fact that the parents gave birth to the tortfeasor would be a causal factor because without his birth the harm would not have occurred.

\(^1^0^3\) HEINRICHS, supra note 60, Vorbem v § 249 BGB, Rn. 58.

\(^1^0^4\) Id. at Vorbem v § 249 BGB, Rn. 62.
enumerates life, body, health and personal liberty as protected rights. Moreover, § 823 sec. I BGB speaks of "...other rights..." that are subject to its protection. This other right is the undisputed right of possession of something, which comes into play in cases where damage occurred to property only, and where the plaintiff is not the owner of the vehicle. Then, he cannot assert a violation of his property right, but he can base his claim on violation of his right of possession of the automobile. Thus, he will still be able to get compensation, if he is unable to use the vehicle involved in the accident.

In any case, however, in order to file a product liability suit, a right protected under § 823 sec. I BGB must have been violated by putting a defective product on the market. The situations in which a product is considered as "defective" will be discussed in connection with the different categories of product defects.

(iv.) Unjustified Violation

The violation of a right protected under § 823 sec. I BGB must not be legally justified by a ground of justification which can either be written (§§ 227 - 231, 904 BGB) or unwritten (approval or consent). However, in the area of product liability neither written nor unwritten grounds of justification will be pertinent, because, obviously, a manufacturer will not have acted in self-defense (§ 227 BGB) or self-help (§ 229 BGB), nor will the consumer have consented to the violation of the right.

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105 THOMAS, supra note 66, § 823 BGB, Rn. 13.
106 One might for example think of a situation in which the plaintiff leased a car or in which he bought a car under reservation of title.
107 MERTENS, supra note 67, § 823 sec. I BGB, Rn. 276.
108 See infra, at 43.
109 THOMAS, supra note 66, § 823 BGB, Rn. 36-44.
(V.) Fault

Moreover, the defendant is only liable if he acted with intent or at least with negligence with regard to the violation of the right protected under § 823 sec. I BGB.\(^{110}\) Intent is thereby defined as knowledge and will to violate the right,\(^{111}\) and negligence is defined as disregard of the diligence that is necessary in trade.\(^{112}\) Regarding the field of products liability, a manufacturer or supplier will most often have acted negligently when a product defect occurred. On the other hand, with respect to design and warnings or instructions defects, intentional behavior is conceivable, because here a company might initiate a cost-benefit-analysis in cases where the financial expenditure of additional safety features might affect the practical use of the product\(^{113}\) or where costs for additional warnings or recalls of the product might exceed the amount of damages that could be awarded to the plaintiff in a potential law suit.\(^{114}\)

(Vi. / vii.) Harm and Its Causal Connection to the Violation of Protected Right

Through the intentional or negligent violation of a right protected under § 823 sec. I BGB a harm must have occurred. Harm is naturally defined as every loss that one suffers to his goods like life, health, property, honor, etc. and comprises pecuniary loss as well as non-material damage.\(^{115}\) For our topic especially relevant are the

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\(^{110}\) THOMAS, supra note 66, § 823 BGB, Rn. 54, 55-57; HEINRICHS, supra note 60, § 276 BGB, Rn. 10-12.

\(^{111}\) HEINRICHS, supra note 60, § 276 BGB, Rn. 10.

\(^{112}\) Id. at § 276 BGB, Rn. 12.

\(^{113}\) An automobile manufacturer could for example produce a car that is designed as safe as a tank; however, this would affect the practical usefulness of the vehicle due to its weight, size, use of fuel etc.

\(^{114}\) Andreas Birkmann, Produktbeobachtungspflicht bei Kraftfahrzeugen - Entwicklung und Weiterentwicklung der Produktbeobachtungspflicht durch die Rechtsprechung des Bundesgerichtshofs, DAR 4/90, 124 (127) (1990); see also, Wolf Wegener, Produktbeobachtungspflicht bei Kraftfahrzeugen, DAR 4/90, 130 (131) (1990).

\(^{115}\) HEINRICHS, supra note 60, Vorbem v § 249 BGB, Rn. 7.
compensation for medical expenses, pain and suffering, loss of earnings, inability to use the product (vehicle) and property damage.

If each of the above mentioned requirements is fulfilled, the plaintiff has the right to get compensation under § 823 sec. I BGB for the loss he suffered.

b) Potential plaintiffs and potential defendants

After having presented the general prerequisites of § 823 sec. I BGB, we now turn to the question of who can sue and who can be sued under this section.

(i.) Potential plaintiffs

§ 823 sec. I BGB\textsuperscript{116} provides that everyone who is subject to a violation of a right protected by this section has a right to request compensation. Thus, in a product liability case not only the consumer of the product (buyer, lessee, user), but also any third person that suffers injury because of the defectiveness of the product (automobile or motorcycle) has a claim against the liable person or company.

(ii.) Potential defendants

The wording of § 823 sec. I BGB also provides the starting point for determining who can be a potential defendant in a product liability action. It states that "[t]he one who...causes unlawfully harm...is obliged to compensate...".\textsuperscript{117} Accordingly, "everybody" who is responsible for the occurrence of the harm can be held liable.\textsuperscript{118} In cases where the harm has been partially caused by a defective product, however, only those who were in fact involved or who seemed to be involved in its production or its placement on the market could be held responsible, if they had violated

\footnotesize{\textsuperscript{116} See supra, note 90.}
\footnotesize{\textsuperscript{117} See supra, note 90.}
\footnotesize{\textsuperscript{118} See, Kremer, supra note 82, at 136.}
a legal duty to maintain safety.\textsuperscript{119} Thus, in a product liability action the circle of potential defendants can be reduced to three basic categories: (a) the manufacturer and its supplier, (b) the quasi-manufacturer and (c) others.

\textbf{(A) Motor vehicle manufacturers and their suppliers as potential defendants}

When discussing product manufacturers, we must differentiate between three types of manufacturers. First, there is the manufacturer who produces the product entirely in his own enterprise ("entire manufacturer.") Next, we have the manufacturer of individual supply parts ("supplier," ) and finally, there is the manufacturer who puts the parts produced by himself together with the supplied ones so that the final product is created ("assembler").\textsuperscript{120} In the motor vehicle industry, however, neither cars nor motorcycles are entirely produced by one manufacturer. Rather, motor vehicle companies such as Mercedes-Benz, Bayerische Motorenwerke (BMW), Audi, Porsche, etc. work together with suppliers that furnish electronic parts, brakes or tires. Therefore, they have to be considered as assemblers.

With regard to liability, the supplier is first of all generally responsible for the defectiveness of the individual supply parts.\textsuperscript{121} In addition, he is also liable for defects of the final product that are the result of a violation of his duty to instruct the assembler with respect to the use and assimilation of the supply parts.\textsuperscript{122} Moreover, the supplier has a duty to notify the assembler if he recognizes that the construction of a spare part is defective in the way it is intended by the assembler, and when he has a reason to assume

\textsuperscript{119} MERTENS, \textit{supra} note 67, § 823 BGB, Rn. 276.

\textsuperscript{120} \textit{Id.} at §823 BGB, Rn. 278.

\textsuperscript{121} BGH Versicherungsrecht [hereinafter VersR] 1959,104 (105); BGH Neue Juristische Wochenschrift [hereinafter NJW] 1968,247 (248); MERTENS, \textit{supra} note 67, § 823 BGB, Rn. 278 and note 724.

\textsuperscript{122} BGH NJW 1996,2224 (2225); MERTENS, \textit{supra} note 67, § 823 BGB, Rn. 278 and note 726.
that the danger has not been recognized by the latter.\(^{123}\) In case of violation of this duty the supplier will be held liable if harm occurs because of the omission of the notification.

The assembler, on the other hand, is responsible for defects resulting out of the assembly of the motor vehicle.\(^{124}\) Furthermore, he can also be held liable for defective supply parts, although in the majority of cases the supplier itself will have to assume this responsibility. One could for example think of a case in which the defect finds its origin in the defective design-plan or design-instruction of the assembler according to which the supplier has produced the part.\(^{125}\) Then, the assembler will be held solely liable. The same responsibility hits the assembler in situations where he violated his own duties, like his duty to carefully choose and observe the supplier,\(^{126}\) his duty to carry out quality checks\(^{127}\) concerning the supply parts, and his duty to observe their faultless working\(^{128}\).

Another important area in which car and motorcycle manufacturers might be subject to liability is the one of motor-vehicle accessories. In 1986, the Supreme Court held in its famous “Honda-decision”\(^{129}\) that a worldwide operating motorcycle-manufacturer has the duty to observe the world-market of accessories that are compatible to its own products in order to discover and prevent dangers resulting from the combination of its motorcycle, here, a “Honda GL 1000 Goldwing”, with accessories, here, a cover for the steering gear. Facts, issues, and the potential impact of

\[^{123}\text{BGH NJW 1996,2224 (2225 f.); BGH Zeitschrift fuer Wirtschaftsrecht [hereinafter ZIP] 1990,514 (515); MERTENS, supra note 67, \$ 823 BGB, Rn. 278.}\]

\[^{124}\text{BGH VersR 1956,259 (259); MERTENS, supra note 67, \$ 823 BGB, Rn. 278.}\]

\[^{125}\text{BGHZ 67,359 (362); MERTENS, supra note 67, \$ 823 BGB, Rn. 278.}\]

\[^{126}\text{BGH VersR 1972,559 (560); MERTENS, supra note 67, \$ 823 BGB, Rn. 278; Kremer, supra note 82 at 137.}\]

\[^{127}\text{BGH NJW 1968,247 (248); MERTENS, supra note 67, \$ 823 BGB, Rn. 278.}\]

\[^{128}\text{BGHZ 104,323 (327); BGHZ 67,359 (362).}\]

\[^{129}\text{BGHZ 99,167 ff.}\]
this case on the motor vehicle manufacturing world will be discussed in connection with the duty to observe products once they have been put on the market.\textsuperscript{130}

\textbf{(iii.) The quasi-manufacturer as potential defendant under § 823 sec. 1 BGB}

Another category of potential defendants is the so called quasi-manufacturers. In contrast to the real manufacturer, they are not involved in the production process of the product but label someone else’s product either with their names or trademarks.\textsuperscript{131} Such a quasi-manufacturer is subject to liability when two prerequisites are fulfilled. First, through the mentioned behavior he must have at least impliedly indicated that he took a personal duty to check the product safety so that it appears as if he were the real manufacturer.\textsuperscript{132} Second, in contrast to § 4 ProdHaftG,\textsuperscript{133} the consumer must have evinced a special confidence to the quasi-manufacturer with the result that the first-mentioned omitted precautionary measures which he otherwise would have taken.\textsuperscript{134} This requirement is based on the finding of the Supreme Court that consumers generally evince their confidence to the professionalism of the real manufacturer, while only

\begin{footnotesize}
\textsuperscript{130} See infra, at 54.

\textsuperscript{131} One could, for example, think of a car manufacturer which receives engine filters (oil, air-filter) from another manufacturer specialized in the manufacture of these filters. In order to make it seem that each single part of the car was produced by the car-manufacturer he puts his label on the filters before integrating them into the engine. If a harmful event occurs due to a defect in these products, the car manufacturer will be liable as quasi-manufacturer since he did not manufacture the filters himself but put his label on them.

\textsuperscript{132} BGH NJW Rechtsprechungs-Report [hereinafter NJW-RR] 1995,342 (343) (concerning the duty to observe products); MERTENS, supra note 67, § 823 BGB, Rn. 279.

\textsuperscript{133} See infra, at 83, and note 362; under § 4 ProdHaftG the only requirement to establish liability for a quasi-manufacturer is that he sells a product under his name, trademark or other distinctive sign.

\textsuperscript{134} BGH NJW 1980,1219 (1219); BGH VersR 1977,839 (839); HEIN KOETZ, DELIKTSRECHT, Rn. 468 (6th ed. 1994).
\end{footnotesize}
under particular circumstances\textsuperscript{135} do they give their confidence to the one that provided the name.\textsuperscript{136}

Although in recent cases dealing with defective food products for babies\textsuperscript{137} the Supreme Court has established a duty for the quasi-manufacturer to observe its "products," in the motor vehicle area, however, the existence of quasi-manufacturers as potential defendants is not as likely as it might be in other fields. This can be concluded by taking a look at the occurrences within the chain of distribution from the manufacturer of the supply parts (supplier), to the manufacturer of the motor vehicle (assembler), to the retailer (dealer), and finally to the consumer. The assembler who gets individual parts from the supplier will integrate them into the car or motorcycle he produces. With respect to the appearance of his name (e.g. "BMW"), the assembler will only be interested in selling the motor vehicle as a whole under his name; he will not have an interest in labeling any single part of it, because it would make additional negotiations with the supplier necessary dealing with the permission of changing names or trademarks in order not to get in conflict with law. Secondly, it would increase the purchase price of the supply part as the supplier will not "sell" his name free of charge. Thirdly, it would lead to an increase of the assembler's production costs, as he would have to build up a special department for the labeling. Finally, it would not necessarily cause an increase of its profit or reputation. Thus, concerning the relationship between the supplier and the assembler, the latter will almost never be a quasi-manufacturer. The same is true for the retailer (authorized dealer) who buys the motor vehicle from the assembler. Although he might put his business name on the frame of the license plates

\textsuperscript{135} Particular circumstances can be: Unusual knowledge / fame of the quasi-manufacturer or unusual influence of the latter on the real manufacturer, see, G. Schiemann, \textit{in Erman Handkommentar zum Buergerlichen Gesetzbuch}, [hereinafter Erman] § 823 BGB, Rn. 123 (9\textsuperscript{th} ed. 1994).

\textsuperscript{136} BGH NJW 1980, 1219 (1219); BGH VersR 1977,839 (839); \textit{see also}, Schiemann, \textit{supra} note 135, § 823 BGB, Rn. 123.

\textsuperscript{137} BGHZ 116,60 - Kindertee I (Child tea I); BGH NJW 1995,1286 - Kindertee III (Child tea III).
of the cars he sells for advertisement purposes, he will not label these automobiles with his name or trademark

(iv.) Other Potential Defendants

- Liability of Marketing Company and Importer

The liability of the marketing company and that of the importer of motor vehicles is basically identical, because the importer is the marketing company of a foreign manufacturer.¹³⁸ Thus, both groups of potential defendants can be discussed together.

As neither the marketing company nor the importer of motor vehicles is a manufacturer, neither is generally liable under traditional tort law for harm caused by defective products.¹³⁹ Nevertheless, either can, under particular circumstances, have a duty to examine, instruct or observe the products it sells, and liability can be established under § 823 sec. 1 BGB in case of its violation. For example, both the marketer and the importer are obliged to examine the products purchased from the assembler, if they had knowledge of the occurrence of harmful events in which these products were involved, or if other circumstances make such an examination necessary.¹⁴⁰ If then no measures to avert the danger coming from the product were taken, a violation of the marketing company’s and / or the importer’s legal duty would exist and liability could be established.

Although the standard of liability for both potential defendants is basically the same, one could think about imposing stricter duties on the importer of motor vehicles

¹³⁸ MERTENS, supra note 67, § 823 BGB, Rn. 280.
¹⁴⁰ BGHZ 99,167 (170 f.); MERTENS, supra note 67, § 823 BGB, Rn. 280; THOMAS, supra note 66, § 823 BGB, Rn. 216.
than on domestic marketing companies. This consideration could at least be justified in situations where a manufacturer abroad has to follow lower safety standards than the one in Germany and / or where a suit and its enforcement against a foreign manufacturer would be considerably aggravated. However, the Supreme Court held in 1980 that the introduction of stricter duties was not necessary for those who import technical goods from the six original European Union Countries. Behind this decision was the reasoning that these countries have basically the same safety standards for products. Furthermore, it emphasized that the enforcement of judgments among member-states of the European Union is sufficiently guaranteed by the “Agreement of the European Communities concerning the judicial competence and enforcement of judicial decisions in civil and commercial affairs.” Due to EC-Directives leading to a progressive Europeanwide unification of product liability laws and safety standards, this holding might generally be extended to all member states of the European Union. Regarding the duties of importers of U.S. or Japanese automobiles and motorcycles, one can hazard the assumption that the Supreme Court would decide in a similar way, because safety standards for motor vehicles in the United States and Japan are at least as high as in the member states of the European Union. Thus, the one who imports motor vehicles out of the mentioned countries will generally not be subject to stricter duties than a domestic marketing company.

141 MERTENS, supra note 67, § 823 BGB, Rn. 280.

142 BGH NJW 1980,1219 (1219 f.) - Fahrradgabel (Bicycle-handle-bars).

143 The six original member states of the European Coal and Steel Community, founded in Paris April 18, 1951, are: Germany, France, Italy, Belgium, Netherlands, Luxemburg.

144 Uebereinkommen der Europaeischen Gemeinschaften ueber die gerichtliche Zustaendigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen v. 27.09.1968, BGBl. 72 II 774, entered into force on 01.02.1973 between the six original member-states.

145 See, EC-Directives leading to the enactment of product liability laws, product safety laws and crash-test-standards, see, Introduction, supra at 7-8.
LIABILITY OF THE COMBINE (GROUP)

Motor vehicle manufacturers are often structured, or could at least often be structured, in the form of a combine, which means that there is a controlling company, mostly a corporation and several subsidiaries, frequently private limited companies. In order to escape product liability, the combine could transfer the production of goods that is the most likely to cause severe harm (e.g. airbags, brakes, tires, gas tanks) to a combine-subsidiary. The most important reason for such an externalization of liability is that the controlling company of the combine, which is usually the financially strongest defendant, could through this behavior evacuate its assets from the plaintiff's access. As a result, the number of defendants the plaintiff could potentially sue successfully would be decreased, and its restriction to the combine-subsidiary as defendant would be fatal for his claim in cases where the latter is insolvent or where the claim is barred by the statute of limitation (§ 852 BGB). In consideration of these facts, one has to raise the question of whether the combine’s controlling company can and should get off without being held liable when a harmful event has been caused by a defective product manufactured by the combine-subsidiary. Legal scholars agree that a company executing control over its dependent subsidiary should also be held legally responsible in the above mentioned situations. They persuasively argue that a controlling company has the legal duty resulting out of § 823 sec. 1 BGB to intervene.

146 Kremer, supra note 82, at 138.
147 Id.
148 Id. at 135.
149 This question has been raised in 1969 by Ekkehard Rehbinder and has been taken up again by Oehler, Hommelhoff and Westermann in the beginning of the 1990s, see, id. at 138 and notes 41, 43.
when its subsidiary puts products with a high risk of danger on the market. In cases where an intervention was possible and necessary to prevent the sales of the harm-causing product, but where it has been omitted, the controlling company is liable for the consequences.\textsuperscript{151} This result corresponds to the holding of the Supreme Court that any enterprise that uses a third company for its purposes is to be held liable if it violates either its duty to carefully observe it or its duty to intervene where an intervention is necessary.\textsuperscript{152}

In my opinion, the key factor is whether the controlling company intends to take a profit out of the combine-subsidiary, and whether the latter is dependant on the former. The externalization of liability for highly dangerous productions to a subsidiary is acceptable without consequences for the controlling company as long as the latter does not get any profit out of the marketing of these products. In other words, the one who takes the entire risk should get the entire profit. However, a company that does not want to take any risk, but wants the profit to be shared, enters a one-way-street in the wrong direction and should not get off scot-free. The question is now how to determine whether a controlling company intends to profit, or in fact does profit, from its subsidiary. A profit can either be gained as direct financial benefit (e.g. in cases where an agreement concerning the profit-sharing exists) or indirectly by somehow controlling the subsidiary.\textsuperscript{153}

Thus, even if a motor vehicle manufacturer transfers the production of goods with a high risk of danger to its depending subsidiary, he will still potentially be subject to liability.

\textsuperscript{151} THEISEN, supra note 150, at 443; Oehler, supra note 150, at 1451.
\textsuperscript{152} BGH NJW 1976,46 (46) - Oelabfall (Oil-waste).
\textsuperscript{153} Kremer, supra note 82, at 138.
- LIABILITY OF THE MANUFACTURER’S / SUPPLIER’S EMPLOYEES

Until now we have spoken of the liability of the “manufacturer” or “supplier”, thus, of the liability of a company involved in the manufacture of motor vehicles or their parts. However, the question arises whether the employees of these companies can be held personally liable for harm caused by defective products. On the one hand, this question is of particular importance in the field of criminal law, where not the company itself, but its acting individuals can be subject to prosecution for an intentional or negligent violation of their duties which leads to physical injury or to harm to property.\textsuperscript{154} On the other hand, its weight is qualified with regard to civil cases by the fact that an individual employee will generally not be as financially strong as a business enterprise. However, it will still be important in cases where the manufacturing company (\textit{e.g.} a small supply enterprise) is bankrupt, or where plaintiff’s claim is barred by the statute of limitation (§ 852 BGB).\textsuperscript{155} If then the plaintiff has a valid claim against an employee, especially against executives of the company, he might at least be able to get some compensation.

When discussing employees, we must distinguish between the members of the board of directors or employees on similar level,\textsuperscript{156} the members of the supervisory board, the lab-managers responsible for design and manufacture of the motor vehicle, and other employees below the management level.\textsuperscript{157} Additionally, it must be kept in

\begin{itemize}
\item \textsuperscript{154} \textit{See, e.g.,} BGH NJW 1990,2560 (2564 ff.) - Lederspray (Leather-spray); BGH NStE § 223 StGB Nr. 5 - Mandelbienenstich.
\item \textsuperscript{155} Kremer, \textit{supra} note 82, at 135. One might ask how plaintiff can sue an individual if his claim against the company is barred by the statute of limitation. The answer to this is that the three year time period set forth in § 852 BGB begins to run at the time where the plaintiff got actual knowledge of the tortious act and the tortfeasor. Thus, although the plaintiff might know who the defendant company was, he might not know who individually committed a wrongful act. Accordingly, the limitation period with regard to plaintiff’s claim against the company begins earlier than the one for the claim against the individual.
\item \textsuperscript{156} \textit{E.g.,} in a private limited company which does not have a board of directors, the managers have to be considered as “employees on similar level”.
\item \textsuperscript{157} Kremer, \textit{supra} note 82, at 136-137.
\end{itemize}
mind for the following that liability under § 823 sec. 1 BGB an “everybody” liability, which means that everyone, regardless of his position, who unlawfully causes harm by violating his duty of care, could be held liable.\footnote{158}{Id. at 136.}

\textbf{- LIABILITY OF MEMBERS OF THE BOARD OF DIRECTORS AND OF MANAGERS}

In the area of product recalls, each person within a group of executives has a duty to initiate the recall of the harm-causing product after the first serious hints of health risks caused by the product come in.\footnote{159}{\textit{See}, BGH NJW 1990,2560 (2564 ff.) - Lederspray (Leather-spray); BGH NStE § 223 StGB Nr. 5 - Mandelbienenstich; Kremer, \textit{supra} note 82, at 136.} In cases where the recall or similar counter-measures have been omitted, although they would have been the adequate way of eliminating the product’s danger, liability will be established.\footnote{160}{\textit{Id.}}

With respect to responsibility for manufacturing, design, and warnings defects, the general holding of the Supreme Court can be applied. This is that liability will fall on each member of the board of directors or managers in situations where their duty to carefully and entirely organize the enterprise has been violated. This is true even if none of these persons has been actively involved in the actual harmful event, because, according to the Supreme Court, it is sufficient that it has been facilitated by faulty organization.\footnote{161}{BGHZ 109,297 (303); according to the legal literature, the Supreme Court is on the way to hold members of the board of directors (in a corporation) and managers (in a private limited company) personally liable for every tortuous act, \textit{see}, S. Reuse, \textit{Die Haftung von Managern im Aussenverhaeltnis}, DStR 1995,688 (689) m.w.N.; Kremer, \textit{supra} note 82, at 136.} Thus, in cases where one of the above mentioned duties has been flouted, the executive, director, or manager of the motor vehicle manufacturer or its supplier can be subject to liability.
- LIABILITY OF MEMBERS OF THE SUPERVISING BOARD

Next, one must examine the development of judicial decisions issued by the Supreme Court for the liability of directors and managers and the establishment of personal legal responsibility for members of the supervisory board.\(^\text{162}\) This board has the duty to supervise the activities of the board of directors\(^\text{163}\) or of the management\(^\text{164}\). If it remains passive in situations where it has knowledge or could have had knowledge that the executive organs of the company act or acted unlawfully, it violates its duty to supervise. Thus, its members should be held personally liable in the same way as directors or managers would when disregarding their duties.

- LIABILITY OF LAB MANAGERS RESPONSIBLE FOR DESIGN AND MANUFACTURE

According to the Supreme Court the lab manager as well as the production manager of a product are subject to liability for design and manufacturing defects.\(^\text{165}\) The court’s reasoning focuses on the fact that these individuals hold a highly responsible position which not only allows them to organize, supervise and control their departments but which also imposes on them the corresponding duties to do so.\(^\text{166}\)

In my opinion it is reasonable to hold this group of employees liable for design and manufacturing defects. After all it is they who have superior qualification, knowledge, and power, which enables them to discover product defects and to initiate product modifications if necessary. It is they who get detailed information concerning the product so that they have the general overview about the functioning of the product.

\(^{162}\) Kremer, supra note 82, at 137.

\(^{163}\) See, § 111 sec. I Aktiengesetz v. 06.09.1965 (BGBl. I S. 1089) [hereinafter AtkG].

\(^{164}\) See, § 52 sec. I Gesetz betreffend die Gesellschaften mit beschränkter Haftung v. 20.04.1892 (RGBl. S. 477) [hereinafter GmbHG] in connection with § 111 sec. I AktG.

\(^{165}\) BGH NJW 1987,372 (372) - Verzinkungsspray (Galvanizing spray); BGH NJW 1975,1827 (1828) - Spannkupplung.

\(^{166}\) Id.
Finally, possible objections alleging that it would be unfair to impose liability on these individuals, because a successful product liability suit could ruin them financially, should be rejected. First, everyone takes a risk when he causes harm to a person or property. Secondly, knowing that a risk of being financially ruined exists, lab and production managers should be even more careful in the daily execution of their jobs or, if they do not want to take this risk, they should quit this position. As a third argument, it should be noted that, particularly in the motor vehicle branch, a series of product tests (crash-tests, driving tests etc.) is carried out for several years before the final product is put on the market. Therefore, the responsible managers have enough time and opportunity to discover and eliminate product defects. Ultimately, the plaintiff bears the burden of proving the defendant’s faulty behavior, because the presumption of fault that the Supreme Court\textsuperscript{167} generally uses in product liability cases\textsuperscript{168} is applied only when the company’s employee can be considered as its representative.\textsuperscript{169} Lab and product managers, although holding powerful positions within the company, can hardly be seen as representatives. Consequently, the plaintiff bears the full burden of proof in a suit against these persons, a burden that significantly reduces his chances of success. Therefore, the personal liability of this group of defendants is entirely justified.

- EMPLOYEES UNDERNEATH THE MANAGEMENT LEVEL

In contrast to the company’s executives, the “blue-collar-worker” does not bear as much responsibility in his job but is to a higher extent dependent on directives. Moreover, he does not usually have the specialized technological knowledge, and his salary is usually lower than that of the executive organs. Accordingly, this group of employees is subject to a higher risk of being financially bankrupt if involved as

\textsuperscript{167} BGHZ 51,91 ff. -Huehnerpest (Fowl pest).
\textsuperscript{168} See infra, at pp. 41.
\textsuperscript{169} Kremer, supra note 82, at 136-137.
defendant in a product liability suit without having the power of influencing the design and manufacturing process. Therefore, and because of constitutional objections based on a possible violation of art. 2 sec. I Grundgesetz170 as well as a violation of the principle of social justice and the welfare state171, some courts and legal authors protest against the liability of these employees.172 However, in 1991 the Supreme Court held a cook in a family enterprise personally liable for defective food products served during a wedding.173 This decision, however, must neither be regarded as the opposite of the preceding line of arguments, nor must it automatically be applicable to the employee working on the assembly line of an automobile or motorcycle manufacturer, because the fact patterns of the “wedding-case” and the hypothetical “mess-up on the assembly-line-case” can be clearly distinguished. In the decided case, the cook worked in a small family business which consisted of a few “employees” only. In contrast, motor vehicle manufacturers or suppliers are big enterprises with thousands of workers. Furthermore, the number of potentially injured persons, and accordingly the number of potential plaintiffs, in the “wedding decision” is reduced to only a few individuals. This can generally not be grasped in our hypothetical case. This also means that the financial loss the employee has to face is in general much higher in the latter situation.

For these reasons, the worker in a big motor vehicle manufacturing enterprise should generally not be held individually liable for harm caused by a defective part of the motor vehicle.

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170 Grundgesetz (Constitution) fuer die Bundesrepublik Deutschland v. 23.05.1949 (BGBI. S. 1) [hereinafter GG].
171 This principle is guaranteed and finds its roots in art. 20 sec. I GG.
Nevertheless, an exception of this general consideration may be made if the employee wrongfully manufactured the part of the vehicle for which he is responsible. For example, one might think of a situation in which he forgot to install a gasket in the gas tank of a car, leading to an explosion when fueled. Here, the defect would affect one car only, and there would only be a few potential plaintiffs (the driver, passengers and people injured by the explosion). In this case the risk of suffering financial loss would not be higher for the defendant than in the “wedding case”. Thus, one might argue that in such a situation liability should be established against the employee. However, it must not be disregarded that there is still a difference between the job of a cook and that of a worker on an assembly line of a car manufacturer. Only the latter can be considered as hazardous employment, because in case of a mistake the occurrence of severe injuries is very likely, while a mistake in cooking a meal will usually only lead to a loss of taste. Accordingly, in this kind of situation the worker should not be held liable for normal negligence but only for gross negligence and intent.

- **JOINT TORTFEASORS**

If the plaintiff is able to successfully sue more than one defendant in a product liability action, each defendant is, according to § 840 sec. I BGB in connection with §§ 421 ff. BGB, liable as a joint-debtor. This means that the plaintiff can request full payment of the amount of damages awarded from one defendant. The defendant who completely satisfies the plaintiff then has a legal claim under § 426 sec. II BGB to get proportional compensation from the other debtors.

**C) DISTRIBUTION OF BURDEN OF PROOF - BACKGROUND INFORMATION**

The distribution of the burden of proof is a very important factor that can and will often be decisive in a torts action in which one party cannot provide evidence for its
claim, or where the party is not able to give sufficient evidence. Then, the party that bears the burden of proof for this particular prerequisite will at least partly lose its case. Although the details of the distribution of burden of proof in products liability cases will be discussed in connection with the different categories of product defects, there are some general aspects to be mentioned in order to provide important background information.

In a non-products liability claim based on § 823 sec. 1 BGB the plaintiff usually bears the burden of proof for all seven prerequisites of this section. The same was true for products liability claims before 1968. However, since that time the Supreme Court has developed an important reduction with regard to plaintiff’s burden in the area of product liability.

(I.) THE SITUATION BEFORE THE FOWL-PEST DECISION: PLAINTIFF BEARS FULL BURDEN OF PROOF

Since about 1916 the liability of the manufacturer for defective products was recognized by the Supreme Court of the German Reich. From this time until 1968 the rules of traditional tort law were applied for such cases without modification concerning the distribution of burden of proof. This means that, at that time, the plaintiff had to prove every single prerequisite of § 823 sec. 1 BGB, including in particular the violation of a duty of care as well as fault on the side of the defendant. As the plaintiff normally

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175 See infra, at 43.
176 THOMAS, supra note 66, § 823 BGB, Rn. 167; THOMAS-PUTZO, supra note 174, § 284 ZPO, Rn. 17-40.
177 BGHZ 51,91 ff. - Huehnerpest (Fowl pest).
had knowledge neither about the internal organization of the manufacturer's enterprise nor about the production process, his claim was rarely successful because of his inability to provide evidence for the two last-mentioned elements. In addition, the manufacturer was often able to provide decentralized\(^\text{179}\) exculpatory evidence in order to escape liability for vicarious agents under § 831 BGB\(^\text{180}\).

(II.) THE SITUATION SINCE THE FOWL-PEST DECISION (1968): REDUCING THE PLAINTIFF'S BURDEN OF PROOF IN MANUFACTURING DEFECT CASES

In its fowl-pest decision from November 26, 1968,\(^\text{181}\) which dealt with a manufacturing defect of a medication for chicken against fowl pest, the Supreme Court set up the principles forming the foundation of product liability law for the future. First, it held that a privity between the plaintiff (consumer) and the defendant (manufacturer) is not necessary in order to bring a successful product liability action. Instead, only tort law (§§ 823 sec. I and sec. II BGB) provides the basis for such actions. Second, the court modified the rules concerning the burden of proof in favor of the plaintiff in cases involving a manufacturing defect. It decided that in such cases the plaintiff neither has the burden of proving the breach of a duty of care, nor the fault of the defendant.\(^\text{182}\) Instead, the prerequisites of § 823 sec. I BGB are to be presumed in this kind of case so that the defendant bears the burden of providing exculpatory evidence in order to refute this presumption. In its reasoning the court argued that on the one hand the plaintiff generally neither has an insight into the details of the manufacturing process, nor, on the other hand, can he control it. Thus, it would be nearly impossible for the plaintiff to get information necessary to gather the facts of the case so that he could file a successful

\(^{179}\) With regard to the application of decentralized exculpatory evidence also for big enterprises, see, BGHZ 4,1 (2); BGH VersR 1964,297 (297); THOMAS, supra note 66, § 831 BGB, Rn. 15.

\(^{180}\) See, § 831 BGB, supra note 92.

\(^{181}\) BGHZ 51,91 ff. - Huehnerpest (Fowl-pest).

\(^{182}\) BGHZ 51,91 ff.
suit. The manufacturer, on the other hand, initiates, controls, and supervises the manufacturing process, which enables him not only to easily discover the source of the defect but also to gather the entire facts of the case.

Both the holding and the reasoning of the court should be agreed upon for three reasons. First, because of the closeness of the manufacturer to his internal manufacturing process, secondly, because the large majority of product liability cases would otherwise be doomed to failure, and finally, as a matter of fairness to the unknowing consumer, who has to face the knowledgeable manufacturer who is still able to provide exculpatory evidence concerning his lack of fault and his compliance with a duty of care.

(III.) EXTENSION OF THE SHIFT OF BURDEN OF PROOF TO DESIGN DEFECT CASES

As the fowl-pest decision dealt with a manufacturing defect, the principles established by the Supreme Court in this case are limited to this particular type of defect. However, the court extended the scope of application of these principles to design defects in another landmark decision. The court argued that, with regard to the lack of evidence, the plaintiff faces the same difficulties in design defect cases as he does in manufacturing defect cases. Thus, in both kinds of situations the breach of a duty of care by the defendant and his fault are presumed.

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183 BGHZ 51,91 ff.; in addition it has to be said that, in contrast to the United States, a pre-trial discovery - which enables the parties to gather information about the adversary - is not recognized in German Civil Procedure so that the plaintiff in Germany is more likely to be lacking evidence than the one in the U.S.
184 BGHZ 67,359 ff. Schwimmschalter (Swim-switch).
185 Id. at 361.
(d) Three Different Categories of Product Defects

Under § 823 sec. 1 BGB the defendant is liable for a violation of his legal duty to maintain safety. The scope of this duty is to be determined according to the phases in the course of the production process. Within this process, one can distinguish between three different phases: the development of the product (design), its manufacture, and its equipping the consumer with information in order to not only instruct him about the product’s use but also to warn him about the product’s dangers. According to this structure, the different kinds of violations of the defendant’s duty to maintain safety can be divided into three categories: design defects, manufacturing defects, and instructions or warning defects.

(1.) Design Defects

A product is defective in design when the defect occurred within the planning, development, or choice of the production method. Contrary to manufacturing defects, this kind of error typically affects the whole product series, and therefore it is the most feared by the manufacturer. Although we now know in which phase of the production process the product error must have happened, in order to constitute a design defect the question remains how such a defect should be determined. In general, one can say that the key element of that question is whether the product is safe or safe enough for its use in trade and business. Courts and legal literature make use of several factors in order

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186 MERTENS, supra note 67, § 823 BGB, Rn. 282; SCHIEMANN, supra note 135, § 823 BGB, Rn. 115.
187 SCHIEMANN, supra note 135, § 823 BGB, Rn. 115.
188 BGHZ 86,256 - Gaszug; BGHZ 51,91 ff. - Huehnerpest (Fowl pest); BGH NJW 1968,247 ff. - Schubstrebe; MERTENS, supra note 52, § 823 BGB, Rn. 283-289.
190 WESCH, supra note 189, at 104.
191 This question is actually subject to a controversy in the product liability laws in the United States, see infra, Chapter II, at pp. 107.
to provide a satisfactory reply to this question. The courts hold that a product is
defective in design if it is, under safety aspects, not suitable for its intended purpose.\textsuperscript{192}
In addition, it must provide both, operational safety\textsuperscript{193} and compliance with existing
minimum safety requirements\textsuperscript{194}. Nevertheless, these expositions are not yet complete
but bring up two new issues: first, what standard is used to decide whether a product is
suitable for its intended purpose, and second, which role the manufacturer’s compliance
with cogent safety regulations plays.

\textbf{(A) Issue: Standard to determine whether a motor vehicle is safe enough}

As to the first issue, the Supreme Court focuses on the expectations of the consumer\textsuperscript{195} and on a kind of cost-benefit-analysis\textsuperscript{196}. The product (motor vehicle) will
not be considered defective in design if its safety features are in accord with the
consumer’s expectations. The level of expectations will of course vary depending on the
kind of consumer group for which the product is designed. Motor vehicles, especially
automobiles, are generally intended to be used by the majority of the people, because
automobiles are the most important means of individual transportation.\textsuperscript{197} Thus, in this
area the “reasonable” consumer must be the standard to measure whether the individual
motor vehicle is safe enough. However, some vehicles, like racing cars or cross-country
motorcycles, are not to be used by “everybody” but only by experts. In these situations
the reasonable expectations of the latter provide the applicable standard. In addition, the

\begin{itemize}
\item \textsuperscript{192} BGHZ 104,323 (327); BGH VersR 1967,498 (500); OLG Koeln VerR 1993,110 (111).
\item \textsuperscript{193} BGH VersR 1959,523 (524); OLG Karlsruhe NJW-RR 1995,594 (596 ff.); OLG Saarbruecken NJW-
RR 1993,990 (991).
\item \textsuperscript{194} BGH NJW 1990,908 (909); OLG Koeln NJW-RR 1991, 285 (286).
\item \textsuperscript{195} BGH NJW 1990,906 (906 f.); BGH VersR 1985,1093 (1094).
\item \textsuperscript{196} BGH NJW 1990,906 (907); BGH NJW 1990,908 (909).
\item \textsuperscript{197} See, Introduction, \textit{supra} at 2-3.
\end{itemize}
courts recognize the financial factor involved in the equipping of products with safety features and require that their costs have to be in accord with their benefits. Moreover, several other factors that are equally recognized in the legal literature are taken into consideration. Those factors are: the comparison of the actual product to that which a reasonable manufacturer would have chosen in order to reduce or avoid an unreasonable danger, the state of science and technology at the time the product was put on the market, the likelihood of a realization of the danger, its resulting type of damages (bodily injury or property damage), and the consequences. Accordingly, the outcome of a claim alleging the failure of an automobile manufacturer to provide a safety element in a passenger car, for example the lack of side-airbags, is not easily foreseeable and will depend on the complex interaction of the mentioned factors.

This situation is comparable to the one in the United States where, depending on the jurisdiction, a variety of tests to determine design defectiveness can be found. Among those tests are a form of risk-utility or risk-benefit analysis, the consumer expectations test, the comparison to what a reasonable manufacturer would have done and, the reasonable alternative design requirement.

198 BGH NJW 1990,906 (907); BGH NJW 1990,908 (909).
201 Id. at Rn. 447, 449.
202 See, Chapter II, infra at pp. 107.
(B) **Issue: The role of compliance with existing safety regulations**

The non-compliance of the manufacturer or supplier with existing obligatory minimum safety regulations (e.g. crash-test standards) will generally constitute a design defect and be considered as negligent conduct.209

(c) **Issue: No liability for development risks**

In section (a) it was mentioned that one of the factors for the determination of product defectiveness is the manufacturer’s compliance with the state of science and technology at the time was introduced in the market. In this context the question arises whether a product should also be considered defective if it does not comply with scientific and technological standards that have been developed after its introduction on the market. In other words, should the manufacturer be liable for development risks? Courts210 and legal scholars211 generally deny this kind of liability, and the legislature has recognized it only for a few products, such as medical drugs.212 In the motor vehicle area, though, liability for development risks does not exist under § 823 sec. I BGB.213

This view should be entirely agreed upon considering that under the fault standard of § 823 sec. I BGB a defendant can only be held liable for intent or

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208 This topic is even a bigger issue in the United States raising two questions: Whether the manufacturer’s compliance with federal safety regulations preempts state tort law, and, if not, whether compliance serves as a defense in a state tort action, see, Chapter II, infra at pp. 128.

209 BGH VersR 1959,523 (524); BGH VersR 1960,1095 (1096).

210 BGHZ 51,91 (105); OLG Muenchen VersR 1990,791 (792); OLG Duesseldorf NJW-RR 1992,284 (284).

211 MERTENS, supra note 67, § 823 BGB, Rn. 288; HEIN KOETZ, DELIKTSRECHT, Rn. 448 (6th ed. 1994).

212 Gesetz zur Neuordnung des Arzneimittelrechts (Arzneimittelgesetz) v. 24.08.1976, BGBl. I S. 2245, §§ 84 ff. [hereinafter AMG], (Law governing the manufacture and prescription of drugs).

213 Neither does liability for development risks exist under the strict liability standard of the Produkthaftungsgesetz, see, § 1 sec. II Nr. 5 ProdHaftG.
negligence. This requires that he at least could have known that the actual product design would lead to a violation of one of the plaintiff’s rights protected under this section. However, this prerequisite is not fulfilled with regard to new technologies through the application of which actual product damages could have been avoided, because they would not have been discernable during the time the product was designed and finally marketed. This means that a plaintiff who alleges the defectiveness of his automobile built in the 1960s because of the lack of a driver-airbag will not be successful, as this safety feature was developed in the 1980s.

(d) DISTRIBUTION OF BURDEN OF PROOF

As the defendant’s breach of duty of care and his fault are presumed in design defect cases, the plaintiff only has to prove that one of his rights protected under § 823 sec. 1 BGB was violated due to the design defectiveness of the motor vehicle and that, as a result, he suffered damages. In order to escape liability the manufacturer or supplier has to provide evidence showing that he neither breached his duty of care nor acted with fault.214

To provide the necessary evidence both parties can make use of five different means of proof: expert witnesses,215 inspection (judicial view),216 interrogation of a party,217 instruments,218 and witnesses219. The plaintiff’s proof of violation of a protected right and the resulting damages can generally be presented easily by interrogating the party and by the provision of witnesses or instruments, such as medical documents. More difficult, however, is the provision of evidence for the product defect

214 BGHZ 67,359 (361 f.); BGH VersR 1971,80 (82).
215 See, §§ 402-414 ZPO.
216 See, §§ 371-372a ZPO.
217 See, §§ 445-455 ZPO.
218 See, §§ 415-444 ZPO.
219 See, §§ 373-401 ZPO.
and its causality for the damage, because, in the motor vehicle area in particular, this determination requires scientific knowledge. Accordingly, the plaintiff will generally have to rely on expert witnesses (e.g. engineers). In two situations, though, his burden of proof with regard to product defect and its causality for the damage is reduced, and he does not have to provide full evidence. First, when the damage is to be considered as a typical result of this kind of defect, he is allowed to provide prima facie evidence. Second, if different circumstances point to the defectiveness of the product as a cause of the damage it is sufficient for him to present circumstantial evidence.

The defendant, on the other hand, will make use of expert witnesses to show that the product was not defective. In addition, with respect to the provision of exculpatory evidence for his non-breach of a duty of care and his non-fault, he has to show the two elements. First, that the production process was organized and supervised in a manner that excluded the genesis of sources of product defects and, second, that it was not subject to any disruptions caused by mistakes of his employees. If the last-mentioned element cannot be proven, the defendant first has to name every single employee who was involved in the production process and then has to provide exculpatory evidence.

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220 BGHZ 51, 91, (104); MERTENS, supra note 67, § 823 BGB, Rn. 298. As an example one could assume of the following fact pattern: Plaintiff is inattentively driving in his car and collides with another vehicle. He suffers serious injuries, among others, he broke the third neck vertebra. Plaintiff alleges that this kind of damage occurred before the collision because the airbag in his car was defective and happened to explode seconds before impact. It is known that fractures of the second and third vertebra are usually caused by defective airbags exploding too early. In so far, plaintiff's harm is a typical result of the airbag defect. He may introduce circumstantial evidence.

221 BGH NJW 1987, 1694 (1694 f.); MERTENS, supra note 67, § 823 BGB, Rn. 298. As an example one could think of the following situation: Plaintiff is driving within the speed limit on a straight road, in dry weather condition, it is daylight, and there is no other traffic. Suddenly, the car gets out of control and plaintiff hits a tree. Under these circumstances nothing points to plaintiff's own misconduct. Also misconduct of other traffic participants is excluded. Thus, there must have been a defect in the car. Plaintiff is allowed to present circumstantial evidence.

222 BGHZ 51, 91 (105, 107 f.); BGHZ 59, 303 (309).

223 MERTENS, supra note 67, § 823 BGB, Rn. 299.
that each of them was selected and supervised appropriately. For this kind of evidence instruments, witnesses, and the interrogation of the party will come into play as means of proof.

**(II.) Manufacturing defects**

As already disclosed by its name, manufacturing defects originate during the manufacturing process of the product and are in most cases either caused by a failure of a human being (e.g. mistake of a worker automobile assembly-line) or by the breakdown of a machine. In contrast to design defects, the fault in the manufacture of the product will typically not affect the whole product series but only a single product. Thus, the latter kind of defect will have a much less severe financial consequence for the manufacturer, because only one potential harmful event can occur, and he will not have to recall a whole product series. In order to avoid or reduce the risk of being held liable for this kind of defect, the motor vehicle manufacturer has to be advised to completely organize and supervise the manufacturing process and to introduce a reasonable number of quality checks for the incomplete as well as for the complete vehicle.

**(A) Distribution of burden of proof**

With regard to the provision of evidence, generally the same principles for design defects apply. Therefore, the plaintiff must prove the defectiveness of the product before it has been put on the market and its causal link to the damage. The manufacturer has to provide the pursuant exculpatory evidence.

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224 BGH NJW 1968,247 (248); BGH NJW 1973,1602 (1603); MERTENS, supra note 67, § 823 BGB, Rn. 292, 299.

225 WESCH, supra note 189, at 105.

226 Id.

227 MERTENS, supra note 67, § 823 BGB, Rn. 287.
(B) PRESUMPTION OF EXISTENCE OF DEFECT BEFORE MARKETING OF PRODUCT

However, the Supreme Court introduced, in cases dealing with manufacturing defects of mineral water bottles,\(^{228}\) the so called “duty to secure the results” (Befundsicherungspflicht) or “duty to secure the status of the product” (Statussicherungspflicht). This duty obliges the manufacturer of products that show a “specific tendency to cause damage”\(^{229}\) to examine the condition (“status”) of each of them through a specific quality check that is even more thorough than the usual quality controls. The reason for the introduction of this duty is to guarantee the faultlessness of those products when put on the market, because they contain a particularly high risk of danger for the consumer. A violation of this duty leads to the presumption that the manufacturing defect already existed before the product was marketed, and that this defect would have been noticed if the status had been appropriately secured.\(^{230}\) Through this presumption the Supreme Court has again shifted the burden of proof to the manufacturer, who now has to offer additional exculpatory evidence showing that the defect did not exist until the product was put on the market.

As a result of this legal development, the question arises whether this holding not only applies to mineral water bottles but also to the entire motor vehicle or at least to parts of it. The Supreme Court emphasized that the duty to secure the status exists in situations in which the product shows a “specific tendency to cause damage”\(^{231}\) This tendency can be shown if the product in question contains considerable risks for the consumer which are deeply rooted in its manufacture so that a normal quality check is

\(^{228}\) BGHZ 104,323 - Mehrwegflasche I (Returnable bottle I) with comment Ekkehart Reinelt, Comment, NJW 1988,2614 (2614); BGH NJW 1993,528 - Mehrwegflasche II (Returnable bottle II); BGH NJW 1995,2162 - Mehrwegflasche III (Returnable bottle III).

\(^{229}\) See, BGHZ 104,323 (334); BGH NJW 1993,528 (529).

\(^{230}\) BGHZ 104,323 (336) - Mehrwegflasche I (Returnable bottle I); BGH NJW 1993,528 (529) - Mehrwegflasche II (Returnable bottle II).

\(^{231}\) See supra, note 230.
insufficient, and a particular status inquiry is necessary. A motor vehicle consists of several parts which could meet these requirements. For example, brakes, tires and steering gears\textsuperscript{232} create a very high risk of danger to automobile passengers and third persons if they are faulty.

\textbf{(C) No liability for “run-away-products”}

Although courts are generally reluctant in recognizing gaps of liability for the defendant, an exception is made for so called “run-away-products”.\textsuperscript{233} These are manufacturing defects that occur in spite of all precautions.\textsuperscript{234} Because the manufacturer did everything reasonably possible to prevent the occurrence of this kind of defect, he did not act with fault.\textsuperscript{235} Accordingly, one of the main prerequisites of § 823 BGB is missing in those cases, and liability cannot be established.

\textbf{(II.) Instructions and warnings defects}

In contrast to design and manufacturing defects, an instructions or warnings defect does not affect the constitution of the product itself but describes a lack of information which the defendant should have reasonably included either at the time of sale (pre-sale failure to instruct or warn) or after the marketing of the product (post-sale failure to instruct or warn).\textsuperscript{236} Whether a duty to inform exists, and what the content of the information should be, should be determined on a case-by-case basis. Within this determination, the following factors have to be taken into consideration: the state of science and technology at the time which the product was put on the market, the

\textsuperscript{232} Birkmann, \textit{supra} note 114, at 129.
\textsuperscript{233} WESCH, \textit{supra} note 189, at 105.
\textsuperscript{234} THOMAS, \textit{supra} note 66, § 823 BGB, Rn. 205.
\textsuperscript{235} Id.; see also, WESCH, \textit{supra} note 189, at 105.
\textsuperscript{236} HEIN KOETZ, DELIKTSRECHT, Rn. 454 (6th ed. 1994).
likelihood of realization of the danger, the kind and extent of potential damages, and, in particular, the knowledge of the expected consumer group.\footnote{BGHZ 80,186 (192) - Apfelschorf I (Derosal); HEIN KOETZ, DELIKTSRECHT, Rn. 455 (6th ed. 1994).}

Before entering into detailed discussion, a notice serving semantic clarification has to be given. Some authors\footnote{E.g., MERTENS, supra note 67, § 823 BGB, Rn. 284; SCHIEMANN, supra note 135, § 823 BGB, Rn. 122.} do not differentiate between instructions defects and warnings defects but use the term “instruction defect” as generic term. However, if using a generic term, the words “information defect” should be chosen instead, because this term comprises more appropriately the two other terms. When talking about “instructions” or “warnings” semantic differences should be kept in mind. To “instruct” indicates how one is to do something, in particular, \textit{how} the product has to be used. To “warn”, on the other hand, indicates that something is dangerous, in particular, it points at the \textit{dangers} involved in the use of the product.\footnote{This semantic distinction is borrowed from U.S. product liability law which, in my opinion, defines the terms “instruction” and “warning” in an adequate way, see, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, Proposed Final Draft, § 2, cmt I, at 31.} In the following these terms are used with this meaning.

\textbf{(a) Contents and form of pre-sale information}

The manner in which the manufacturer or supplier in the motor vehicle branch has to create its pre-sale information for his products not to be subject to liability was determined in a line of cases decided by the Supreme Court.\footnote{BGHZ 116,60 (64 ff.; 68 ff.) - Kindertee I (Child tea I); BGH NJW 1994,932 (933) - Kindertee II (Child tea II); BGH NJW 1995,1286 (1287 f.) - Kindertee III (Child tea III).} Although some of these do involve other manufacturers than those of motor vehicles, this does not affect their adoption for our topic, as the holdings and the reasoning in these decisions have a general scope of application.
First, the automobile or motorcycle manufacturer has to inform the consumers how to operate the vehicle and to point out the risks involved in its operation.\textsuperscript{241} This requirement will generally be fulfilled, as motor vehicle manufacturers usually provide extensive operating instructions manuals. However, the information provided has to be as clear, detailed, and as understandable as reasonably possible, and, if necessary, visually emphasis may be used to reach the average user.\textsuperscript{242} Of course, when not dealing with people who have inferior or superior knowledge (e.g. experts), the manufacturer has to adjust its information to this group of consumer.\textsuperscript{243} In addition, the potential defendant also has to provide warnings concerning a foreseeable misuse\textsuperscript{244} of the vehicle by its user.\textsuperscript{245} In this context it has to be mentioned that the compliance with a statutory regulated duty to warn is “not always” sufficient.\textsuperscript{246, 247} However, the manufacturer’s duty to warn ends where the product misuse is absolutely unusual\textsuperscript{248} or obvious\textsuperscript{249} to the consumer.

\textsuperscript{241} BGH NJW 1975,1827 (1829); MERTENS, \textit{supra} note 67, § 823 BGB, Rn. 284.

\textsuperscript{242} BGHZ 116,60 (64 ff.; 68 ff.) - Kindertee I (Child tea I); BGH NJW 1994,932 (933) - Kindertee II (Child tea II); BGH NJW 1995,1286 (1287 f.) - Kindertee III (Child tea III); OLG Koeln VersR 1987,573 (573 f.); MERTENS, \textit{supra} note 67, § 823 BGB, Rn. 286.


\textsuperscript{244} BGHZ 129,353 (353); BGH z 106,273 (283); MERTENS, \textit{supra} note 67, § 823 BGB, Rn. 285.

\textsuperscript{245} As an example one might think of a manufacturer’s duty to warn of the dangers arising when starting a car with stick shift while in gear.

\textsuperscript{246} BGHZ 106,273 (280 ff.); BGH NJW 1987,372 (373).

\textsuperscript{247} The role of compliance with federal regulations is equally an important issue in the product liability laws in the United States, see, Chapter II, \textit{infra} at pp. 128.

\textsuperscript{248} BGH NJW 1981,2514 (2514). For example: Plaintiff wants to commit suicide and locks himself into the trunk of his car. Then he changes his mind and suffers harm because he is captured in the trunk for several days. He sues manufacturer for defectively designed trunk lock. Plaintiff’s misuse was unusual and manufacturer did not have a duty to warn of this danger.

\textsuperscript{249} OLG Koblenz VersR 1981,740 (740). For example: Plaintiff uses 1971 VW-van as cross country vehicle and suffers harm because the car rolled over. Plaintiff’s misuse was obvious and manufacturer did not have a duty to warn of this danger.
(b) Duty to Observe Products and Post-sale Duty to Warn

Aside from cases dealing with a pre-sale failure to inform, one can also think of cases in which the product information was appropriate at the time of marketing but, due to new dangers discovered in the course of technological development, became inappropriate in the future. Already the Supreme Court of the German Reich\(^{250}\) has basically recognized the manufacturer’s duty not only to control the product until its marketing but also to constantly observe\(^{251}\) it in the future. Connected to this duty is the obligation of the manufacturer to collect all new scientific findings and empirical data\(^{252}\)\(^{253}\) as well as to observe the product development of his most important competitors\(^{254}\).

Out of this information he has to take appropriate counter-measures, which can either be the provision of additional warnings (post-sale warnings), the elimination of the source of danger by repair, or the recall of the product.\(^{255}\) The determination of the appropriateness of the measure depends not only on the concrete situation but also, in any case, the factors “extent of risk of danger” and the “kind of potential damages” have to be considered.\(^{256}\) In order to guarantee the flow of information from scientific institutions, and especially from the consumer to the manufacturer, the latter has to take

\(^{250}\) RGZ 163,21 (26); RG DR 1940,1293; see, Birkmann, supra note 114, at 126.


\(^{252}\) BGHZ 99,167 ff. - Honda; BGHZ 80,186 ff. - Apfelschorf I (Derosal); BGHZ 80,199 ff. Apfelschorf II (Benomyl).

\(^{253}\) E.g., these data could and should be gathered by analyzing test reports, specialist journals (scientific and technological journals) etc., see, Hans Josef Kullmann, \textit{Die Produktbeobachtungspflicht des Kraftfahrzeugherstellers im Hinblick auf Zubehoer}, BB 1987,1957 (1958).

\(^{254}\) BGH NJW 1990,906 (907); MERTENS, supra note 67, § 823 BGB, Rn. 289; Birkmann, supra note 114, at 127.

\(^{255}\) BGHZ 80,186 (190) - Apfelschorf I (Derosal); BGHZ 64,46 (49 ff.) - Haartonicum.

\(^{256}\) Birkmann, supra note 114, at 127.
adequate organizational precautions.\textsuperscript{257} For example, a motor vehicle could set up of an Auto-Safety-Hotline to which vehicle malfunctions could be reported.\textsuperscript{258}

If the manufacturer violates any of these duties he can be held liable under § 823 sec. I BGB.

\textbf{(c) Duty to observe product accessories}

In addition to the potential defendant’s potential duty to observe his own products, he also has a duty to observe other company’s accessories that could be used in combination with his products in order to discover potential dangers resulting out of this combination (combination danger).\textsuperscript{259} \textsuperscript{260} In the motor vehicle area, this duty was established by the Supreme Court in 1986 in the famous “Honda-decision”\textsuperscript{261} where the driver of a Honda GL 1000 “Goldwing” motorcycle was killed when he crashed against a crash-barrier while riding at a speed of 140 to 150 km/h (approx. 87 to 94 mph).\textsuperscript{262} The cause of the accident was the reduction of the driving stability of the motorcycle due to the fact that its former owner had equipped it with a steering gear cover manufactured and marketed by a German accessories-marketing company.\textsuperscript{263} The Supreme Court held that, in addition to the company which produces the accessories, the motor vehicle manufacturer also could be held liable. The reasoning focused on the

\textsuperscript{257} Id.

\textsuperscript{258} In the United States a nationwide Auto-Safety-Hotline exists; however, this hotline has not been set up by motor vehicle manufacturers but by a federal agency, the National Highway Traffic Safety Administration which is part of the Department of Transportation, see, <http:www.nhtsa.dot.gov./hotline/>.

\textsuperscript{259} BGHZ 99,167 (172 ff.) - Honda.

\textsuperscript{260} With regard to the manufacturer of pharmaceuticals the duty to instruct and warn of combination dangers is regulated by statute, see, § 11 sec. 1 Nr. 7 AMG and § 11a sec. 1 Nr. 7 AMG; see, Kullmann, supra note 253, at 1959.

\textsuperscript{261} BGHZ 99,167 ff. - Honda.

\textsuperscript{262} For further facts, see, Kullmann, supra note 253, at 1958.

\textsuperscript{263} Kullmann, supra note 253, at 1958.
circumstance that the latter is better able to test the accessories’ influence on the entire motor vehicle than the former. In addition, he saves costs for the development and manufacture of accessories, the existence of which might increase the sale of his vehicles. 264 However, the question has to be raised whether this decision establishes excessive demands on the motor vehicle manufacturers, as the world-market of automobile and motorcycle accessories is large and almost impossible to keep in general overview. 265 A reply to this question has been given by the Supreme Court in the Honda case, which distinguished between four different categories of accessories. The four categories are commonly used accessories, necessary accessories, accessories the use of which has been facilitated by the manufacturer and, finally, accessories that require the addition of special mountings.

- COMMONLY USED ACCESSORIES

Commonly used accessories are the ones frequently used by consumers. With regard to these accessories, a strict duty to observe exists and is at the same time sufficient. This means that the manufacturer does not generally have the additional duty to inspect these items. 266 Nevertheless, the latter duty can originate if an immediate cause exists (e.g. car accident probably caused by commonly used accessories). For items not commonly used, on the other hand, the Supreme Court did not expressly establish any duty. Therefore, it can be concluded that for those no strict duty to actively observe exists.

264 E.g., one can think of accessories provided by tuning companies that enhance both, the outward appearance of the automobile, and its interior elements (e.g., more luxury or more powerful engine).

265 Kullmann, supra note 253, at 1958.

266 BGHZ 99,167,174.
- NECESSARY ACCESSORIES AND ACCESSORIES FACILITATED BY THE MANUFACTURER

Necessary accessories are ones that are urgently needed for the functioning of the motor vehicle (e.g. tires).\textsuperscript{267} Accessories are facilitated if the manufacturer pre-installed holes, hooks, bore holes or similar things so that they can easily be added to the motor vehicle (e.g. a roof rack). For both kinds, the manufacturer not only has the duty to observe but also to test in his own test roads.\textsuperscript{268} In case he has doubts concerning their safety, he either has to recommend the ones which he successfully tested, and which he estimates to be safe, or to warn of their use.\textsuperscript{269}

- ACCESSORIES REQUIRING SPECIAL MOUNTINGS

For this group of accessories, mounting facilities do not already exist but have yet to be installed. Here, generally, only a duty to observe is placed the motor vehicle manufacturer, unless concrete circumstances advise him to take further measures.

- EXISTENCE OF ADMINISTRATIVE OPERATING PERMISSIONS: NO INFLUENCE ON THE MANUFACTURER’S LIABILITY

A last issue that comes up in connection with accessories is whether the potential defendant can be held responsible if the registration office issued a general operating permission for them in accordance with §§ 22, 22a StVZO\textsuperscript{270}. In the Honda case the Supreme Court answered this question in the affirmative and held that the existence of operating permissions for accessories neither reduces the manufacturer’s duty to observe or test them nor his obligation to warn of their dangers.\textsuperscript{271} It based its

\textsuperscript{267} Kullmann, supra note 253, at 1958.
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} See supra, note 8.
\textsuperscript{271} BGHZ 99,167 (172 ff.) - Honda.
holding on the reason that a manufacturer is not allowed to conclude from the existence of such permissions that the accessories companies developed and tested their products carefully; neither shall he be allowed to presume that every potential defect of the accessories has been already discovered.\textsuperscript{272}

This is a proper consideration of the meaning and purpose of operating instructions because, according to § 18 sec. I StVZO, their issue shows their admission for traffic but does not constitute a guarantee for their faultless functioning.

\textbf{(D) DUTY TO RECALL DEFECTIVE MOTOR VEHICLES}

Aside from his post-sale duties to provide additional instructions or warnings, the motor vehicle manufacturer can be obliged to recall defective vehicles under § 823 sec. I BGB. A recall is the request of the manufacturer to the consumer to turn in the product in order to repair or exchange it or to take it back.\textsuperscript{273} Today, a manufacturer can be subject to a duty to recall under two different aspects. First, this duty can originate out of traditional tort law.\textsuperscript{274} Second, since the enactment of the Produktsicherheitsgesetz in August 1997, the same duty can be imposed by the Federal Office for Motor Traffic, thus by an administrative agency.

\textit{- DUTY TO RECALL UNDER § 823 SEC. I BGB}

Recalls of motor vehicles took place for the first time in the United States and are provable for the years 1903, 1916 and 1924.\textsuperscript{275} As a recall in the automobile

\textsuperscript{272} BGHZ 99,167 (172 ff.) - Honda.


\textsuperscript{274} Although the existence of a duty to recall is commonly recognized its dogmatic foundation is controversial; it is discussed to base it on either § 823 sec. I BGB, § 1004 sec. I, cl. 1 BGB, or § 1004 sec. I, cl. 2 BGB; see, Bodewig, supra note 273, at 344; see also, Ingeborg Schwenzer, \textit{Rueckruf- und Warnpflichten des Warenherstellers}, Juristenzeitung [hereinafter JZ] 1987,1059 (1060).

\textsuperscript{275} Levenson, \textit{Recalls: Tracing them back to the Turn of the Century}, 113 Dun's Review 117 (1979); see also, Bodewig, supra note 273, at 341.
industry normally affects thousands of vehicles, it is connected with a high financial expenditure. Thus, manufacturers will consider this measure as “ultima ratio” only and, if reasonably possible, will try to solve any problem, first by providing additional instructions or warnings, which generally involve a smaller amount of money. Considering this as background, the question arises, when is the manufacturer forced to recall his products? Although no universal reply to the question can be given, the answer to this question has to be determined by using the following factors:\(^\text{276}\) which object of legal protection is in danger (e.g. life or property), the likelihood of the realization of the danger, the number of potentially affected persons, the magnitude of the violation of the object of legal protection, the amount of expected damages, the costs of the recall, the consequences of the recall on the reputation and goodwill of the manufacturer, the existence of alternative counter-measures, the relation of his individual advantage to the social benefit of the product, the kind of product and the way of its marketing and the need of protection for the affected group of persons.

According to these factors a recall of motor vehicles will be inevitable for the manufacturer in cases involving defects of safety-relevant parts (such as brakes, tires, airbags, steering gear, gas tanks) that affect a large number of products. On the other hand, a recall will not be necessary in cases where the defect only deteriorates the outward appearance of the automobile or motorcycle. However, if a recall is necessary and executed, the manufacturer will have to bear its costs as well as its related expenditures like repair, exchange\(^\text{277}\) and putting a substitute car at the consumer’s disposal for the duration of the recall procedure. If the latter is not possible, the manufacturer has to provide compensation for the consumer’s inability to use the

\(^{276}\) See, Bodewig, supra note 273, at 342.

\(^{277}\) MERTENS, supra note 67, § 823 BGB, Rn. 289; Bodewig, supra note 273, at 344; Schwenzer, supra note 274, at 1063.
On the other hand, the manufacturer is not obliged to refit motor vehicles with safety features that have been developed or become the technical standard after the marketing of the vehicle at no cost, because this would favor the consumer too much. Therefore, a duty to refit a vehicle with airbags or side-bags, which did not exist at the time of its marketing, does not exist, even if newly manufactured vehicles would be considered defective without these safety features.

-DUTY TO RECALL UNDER THE PRODUKTSICHERHEITSGESETZ

The Produktsicherheitsgesetz from August 1997 obliges the manufacturer to put only “safe” products on the market (§ 4 sec. I ProdSG). If a product is not safe according to the definition contained in § 6 ProdSG, the Federal Office for Motor Traffic can intervene before or after the product has been marketed. Before its marketing the Office has the power to forbid or to temporarily forbid the product’s placement on the market (§ 7 sec. II ProdSG). After its marketing the agency can either force the manufacturer to give warnings, or it can give the warnings itself in case of near danger (§ 8 ProdSG). In the same way it can force the manufacturer to recall its products (§ 9 ProdSG). In cases where the manufacturer does not comply with the agency’s orders, an administrative fine up to 50,000,- DM can be imposed (§ 15 ProdSG).

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278 In order to determine the amount of compensation the consumer is allowed to recover in such a case a special catalogue can be used. It contains specific information with regard to how much the daily use of different kinds of cars from different manufacturers is worth. However, the maximum amount that can be awarded per day is 150,- DM. As an example, the use of a “BMW 318IS” is worth DM 98,- per day, the use of a “Chevrolet Corvette Coupe” DM 134,- per day and the use of a Mercedes-Benz 500 SL 150,- DM; see, Tabelle von Sanden/Danner/Kueppersbusch Stand 01.01.1995, in Palandt Kommentar zum Bürgerlichen Gesetzbuch, Anhang zu §§ 249, 250 BGB, Pkw-Nutzungsausfallentschädigung.

279 Bodewig, supra note 273, at 344.

280 Id.
The existence of the Produktsicherheitsgesetz serves the prevention of accidents, and thus extends281 the protection of the consumer provided by traditional tort law and the Produkthaftungsgesetz282, which both focus on a compensatory function. Moreover, it creates new incentives for product manufacturers to create safer products. Therefore, its enactment should be approved.

(E) Peculiarities in the distribution of burden of proof

With regard to the distribution of the burden of proof in instructions or warnings cases, the Supreme Court283 distinguishes between two situations. The situation in which an instruction or warning defect existed before the product was marketed (pre-marketing situation), and one in which it became defective after it was put on the market (post-marketing situation).

- The pre-marketing situation

In the first mentioned case, the same rules of distribution of burden of proof apply for design and manufacturing defects.284 Eventually, all three kinds of defects put the consumer in the same position, as he does not have any knowledge about the internal structure of the manufacturer’s enterprise and thus has to face a lack of evidence.

- The post-marketing situation

In contrast, such a lack of evidence does not exits when the instructions or warnings defect occurs after the product’s marketing. Now, the plaintiff, as well as the

281 Before the enactment of the Produktsicherheitsgesetz the Federal Office for Motor Traffic only had the power to revoke the operating permission for a vehicle (§ 20 sec. V StVZO) so that its further marketing could be prevented; see, Wegener, supra note 114, at 133.

282 See infra, at 82.

283 BGHZ 116,60 ff. - Kindertee I (Child tea I).

284 BGHZ 116,60 (73) - Kindertee I (Child tea I).
defendant, has the same sources of information (news, test reports etc.) concerning the practical proving of the product so that they are equally "strong". Accordingly, a reduction of the plaintiff's burden of proof is not necessary. Although this view has been criticized\(^{285}\), it appropriately considers that the difficulties of providing evidence were the starting point for the Supreme Court's invention of the shift of the burden of proof. Where, like in post-marketing situations, this difficulty does not exist, there is no need for a shift of this burden to the manufacturer.

- Presumption that the consumer would have followed adequate instructions and warnings

Another peculiarity within this third category of defect exists with regard to the proof of causality of omission of adequate information and occurrence of the damage. Usually, it is the plaintiff's responsibility to provide this evidence, which means that he will be required to prove that the damage would not have occurred had the manufacturer provided adequate institutions or warnings.\(^{286}\) In practice, the plaintiff would argue that he would have followed the information if it had been appropriate. However, in this area the courts reduce the plaintiff's burden of proof by presuming that the consumer would have complied with clear and understandable instructions or warnings.\(^{287}\)

(IV.) Comment

As can be concluded from the preceding, legislation and judicial decisions have constantly increased the duty of motor vehicle manufacturers and suppliers in the course of the last decade, either by intensifying already existing duties (e.g. duty to

\(^{285}\) Some authors consider the distinction between the pre-marketing and the post-marketing situation and their consequences as "artificial", see, e.g., SCHIEMANN, supra note 135, § 823 BGB, Rn. 122, HEIN KOETZ, DELIKTSRECHT, Rn. 448.

\(^{286}\) BGHZ 106,273 (284) - Asthma-Spray.

\(^{287}\) BGHZ 116,60 (73) - Kindertee I (Child tea I).
observe product) or by introducing new duties (e.g. duty to secure product status) with severe practical consequences. One explanation for this pro-consumer development could be the influence of European law on German national law, because in the field of legislation the Product Liability Act and the Product Safety Act found their origin in E.C. directives. Another explanation is the belief that a risk-utility assessment must, as a practical matter, be made by the product manufacturer rather than by the consumer. In this context, it must also be kept in mind that the former generally has a better chance to insure against this risk. However, in the end it will at least partly be the totality of the consumers who will bear the product risk, as the manufacturer will shift its loss suffered by taking insurance to his customers by increasing his product prices.

E) DEFENSES

In a products liability action the manufacturer could plead for dismissal of the complaint based on five main arguments: (i.) compliance with cogent safety standards or operating permissions, (ii.) a run-away-product defense, (iii.) contributory negligence of the plaintiff, (iv.) product misuse, and finally (v.) that the time set forth in the statute of limitation elapsed.

(I.) COMPLIANCE WITH COGENT SAFETY STANDARDS / OPERATING PERMISSIONS

This kind of defense could be brought by the manufacturer in design or information defect cases in which he complied with mandatory safety standards or operating permissions (§§ 22, 22a StVZO). However, since safety standards constitute only minimum standards, evidence of compliance may be introduced but is not decisive on the question whether a manufacturer acted negligently.

288 MERTENS, supra note 67, § 823 BGB, Rn. 269.
289 Id.
(II.) Run-away-product defense

This type of defense can be presented in manufacturing defect cases only as it deals with a manufacturing defect that occurred in spite of all precautions. Due to a lack of fault the defendant cannot be held liable in this situation.

(III.) Contributory negligence (§ 254 sec. I and II BGB)

If the plaintiff has contributed to the occurrence of the damage (e.g. driving while intoxicated, speeding), the defendant's duty to compensate and the extent to which the defendant will be required to provide compensation depend on the circumstances, particularly, to what extent the damages have been caused by one party or the other (§ 254 sec. I BGB). Thus, when successfully presenting this defense the amount of damages for which the manufacturer will have to compensate the consumer will either be reduced to a smaller amount or, more rarely, to zero.

The same is true under § 254 sec. II BGB, which provides a defense in situations where not the occurrence of the damages but their extent has been partly caused by the plaintiff because of the violation of his duty to minimize the damages (e.g. plaintiff refuses medical treatment although he knows that he is seriously injured).

(iv.) Misuse of product

Eventually, the manufacturer can claim no responsibility for the harmful event, because the plaintiff misused his product. However, it has been mentioned already that the manufacturer can still be held liable for such a misuse in situations where it was foreseeable and where he did not fulfill his duty to warn of the dangers resulting out of the misuse. On the other hand, the defendant will not be subject to legal responsibility in cases where the misuse was absolutely unusual or obvious to the plaintiff.290

290 For examples, see supra, at 54, notes 248,249.
(v.) Statute of Limitation: § 852 BGB

Finally, the manufacturer can allege that plaintiff's claim is barred by the statute of limitation. According to § 852 sec. I BGB this is the case if plaintiff did not file a lawsuit within three years after he gained knowledge of the tortious act of the tortfeasor.

F) Damages

If the plaintiff succeeds in the product liability suit, he will be entitled to compensation from the defendant for his loss under § 823 sec. I BGB. This includes compensation for all damages that have to be considered as a result of a violation of a right protected under this section, like compensation for medical expenses, loss of earnings, property damage, etc. In addition, in cases where the plaintiff's motor vehicle has been recalled, he does not have to bear the costs of the repair / exchange measures. Furthermore, he has the right to a substitute vehicle or adequate compensation.

(I.) Compensation for Pain and Suffering (§§ 823 sec. I, 847 BGB)

Moreover, under § 823 sec. I BGB, in connection with § 847 BGB, the plaintiff is also allowed to get compensation for pain and suffering when bodily injured. This is one of the most important differences between traditional tort law and the Produkthaftungsgesetz, under which compensation for pain and suffering does not exist.

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291 MERTENS, supra note 67, § 823 BGB, Rn. 293.
292 With regard to compensation for property damage the peculiarities developed by the Supreme Court in BGHZ 67,359 ff. have to be considered, see, SCHIEMANN, supra note 135, § 623 BGB, Rn. 124, headword: "Weiterfressender Mangelschaden".
293 See infra, at pp. 82.
(II.) NO COMPENSATION FOR PURE ECONOMIC LOSS

§ 823 sec. 1 BGB requires either the violation of life, body, health, personal liberty, property or other rights. Because a violation of a pure pecuniary right is neither expressively mentioned nor comprised in the field of “other rights”\(^\text{294}\), a compensation for pure economic loss, a loss which did not occur as a result of a violation of a right protected under § 823 sec. 1 BGB, is not given.\(^\text{295}\)

(III.) NO PUNITIVE DAMAGES

In contrast to U.S. product liability laws, an award of punitive damages for the plaintiff and / or the state\(^\text{296}\) does not exist in German tort law. In 1992, in a case dealing with the recognition and enforceability of of U.S. judgment awarding $400,000 in punitive damages, the German Supreme Court held that, in general, these kind of damages are incompatible with basic principles of German constitutional and tort law.\(^\text{297}\) However, important arguments (e.g. increase of traffic consumer safety, in particular, traffic safety) can be provided against this holding and lead to the conclusion that capped punitive damages should be introduced by the German legislature. In order to understand the rationale for this proposal, it is necessary to analyze the legal, economic, and social background governing the institution of punitive damages in the United States.

\(^{294}\) THOMAS, supra note 66, § 823 BGB, Rn. 217.

\(^{295}\) MERTENS, supra note 67, § 823 BGB, Rn. 293.

\(^{296}\) To which extent punitive damages are awarded to the plaintiff depends on the jurisdiction. In most states the plaintiff receives the entire amount of punitive damages awarded. Some states, however, have enacted statutes that apportion punitive damages between the plaintiff and the state, see, e.g., FLA. STAT. ANN. § 768.73(2)-(4) (West Supp. 1992) (35 % of punitive damage awards must be paid into state funds); GA. CODE ANN. § 51-12-5.1(e)(2) (75 % of the uncapped punitive damage award must be paid into state treasury); MO. ANN. STAT. § 537.675.2 (West Supp. 1992) (50 % of punitive damage award must be paid to the Tort Victims Compensation Fund); N.Y. C.P.L.R. § 8701 (McKinney Supp. 1995) (20 % of punitive damage award must be paid to state).

\(^{297}\) BGHZ 118,312,337-345.
(A) **PUNITIVE DAMAGES IN THE UNITED STATES**

Since tort law traditionally belongs to the province of the states, the award of punitive damages is governed by state common and statutory law. As a result, punitive damages are treated differently from state to state. Some states have introduced caps on punitive damage awards, raised the burden of proof from preponderance of evidence to clear and convincing evidence, or passed legislation to apportion punitive damages between the state and the plaintiff. These differences and the fact that vagueness governs the state court’s determination of liability and assessments of amounts leading to excessive punitive damages awards, have kindled a controversy on whether punitive damages should be subject to uniform federal legislation. While the critics of such a reform fear an encroachment of federal law upon a domain which historically belongs to the states, the proponents favor it because it would provide more certainty, and predictability, while protecting the defendant against excessive awards, leading to a reduction of lawsuits. However, it is important to notice that this controversy does not question the existence of punitive damages. Rather, it focuses on how to award punitive damages. Moreover, with regard to the issue of introducing punitive damages into German law, this controversy is irrelevant. According to art. 72, 74 sec. I, Nr. 1 GG (Grundgesetz, Constitution) tort law, as a domain of private law, is solely regulated by the federal government. Thus, punitive damages would be introduced uniformly. Therefore, the question of whether to favor state or federal tort reform in the United States does not need to be answered. The same is true for issues arising out of the

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299 See supra, notes 50 and 296.

300 See, e.g., Eaton & Talarico, *supra* note 298, at 670 - 691; Pace, *supra* note 41, at 1615 - 1632.

301 Pace, *supra* note 41, at 1615 - 1616.
existence of a jury because this institution does not exist in German law. Instead, we can focus on the objectives, prerequisites, and the constitutionality of punitive damages.

- **OBJECTIVES OF PUNITIVE DAMAGES: DETERRENCE AND PUNISHMENT**

Punitive damages seek to achieve three basic goals. First, they are awarded to deter the individual defendant (e.g. manufacturer) from repeating his misconduct (specific or individual deterrence), second, to deter other potential defendants from engaging in similar kind of behavior in the future (general deterrence), and third, they serve to punish the defendant for outrageous conduct.

- **PREREQUISITE TO AWARD PUNITIVE DAMAGES: REPREHENSIBLE CONDUCT**

The key factor on which courts and juries focus in order to decide whether to award punitive damages, and if so, to what extent, is the reprehensibility of defendant’s conduct. According to the definitions provided by the courts, reprehensibility can be found if the defendant acted maliciously, willfully, egregiously, or with reckless disregard for the rights of others. A significant example in which this prerequisite was met is *Grimshaw v. Ford Motor Co.* The facts of this case provided that numerous Ford Pinto vehicles were equipped with a defective fuel system which caused fire in the vehicle’s interior in 20 to 30 mile-per-hour collisions. The cost of recalling and retrofitting the automobiles would have been $137 million. Ford estimated that the costs resulting from liability for injuries caused by the defective fuel system (180 burn
deaths, 180 serious burn injuries, and 2,100 destroyed vehicles) were only $49.5 million.\textsuperscript{306} Consequently, Ford decided not to recall its vehicles, although the management was aware of the crash tests showing the vulnerability of the Pinto’s fuel tank to rupture at low speed rear impacts.\textsuperscript{307} The court held that Ford’s decision to expose consumers to a high risk of injury and death constituted an unethical cost-benefit analysis that egregiously undervalued “[h]uman lives and limbs against corporate profit.”\textsuperscript{308} The jury awarded $127.5 million for the plaintiff, including $125 million in punitive damages.\textsuperscript{309}

- ASSESSMENT OF PUNITIVE DAMAGES AWARDS

In most states, the jury determines the amount of punitive damages.\textsuperscript{310} However, the judge retains the power to review the jury award on punitive damages and can reverse it if he believes that it is excessive, or the result of a prejudice or passion on the part of the jury.\textsuperscript{311} In order to determine whether and to what amount punitive damages should be awarded, courts and juries should take several factors into consideration.

In BMW of North America, Inc. v. Gore,\textsuperscript{312} the Supreme Court recently examined the constitutionality of a punitive damage award in light of the Due Process


\textsuperscript{308} Id. at 384. (Grimshaw, Ford)

\textsuperscript{309} The punitive damage award was reduced by the trial judge to $3.5 million, see, id, at 358.

\textsuperscript{310} In some states, however, the judge determines the amount of punitive damages to be awarded, see, e.g., CONN. GEN. STAT. ANN. § 52-240b (West 1991) (stating that the judge determines the amount of punitive damages in products liability cases); OHIO REV. CODE ANN. § 2307.80 (Anderson 1995); Lisa M. Sharkey, Judge or Jury: Who should assess Punitive Damages ?, 64 U. Cin. L. Rev. 1089 (1996).

\textsuperscript{311} See, e.g., Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (the court upheld the trial court’s remittitur to $3.5 million of a jury award of $125 million in punitive damages).

\textsuperscript{312} 517 U.S. 559 (1996). In 1990, plaintiff, Dr. Ira Gore, purchased a new black BMW sports sedan for $40,750.88 from an Alabama BMW dealer. After nine months plaintiff noticed that the car had been repainted (presumably because it had been exposed to acid rain during transit between the manufacturing plant and BMW’s preparation center in Brunswick, Georgia) and he sued BMW of North America, the American distributor of BMW automobiles. At trial, BMW acknowledged that since 1983 it had adopted
Clause of the Fourteenth Amendment and provided three guideposts to determine this question. First, and most importantly, the defendant’s degree of reprehensibility has to be considered in order to decide on the excessiveness of punitive damages since “[s]ome wrongs are more blameworthy than others.” Factors which should be considered in this determination are the harm that has been caused (e.g. in Gore pure economic loss without impact on the vehicle’s safety or performance), the harm that could have occurred (potential harm), whether the defendant is a recidivist, whether he acted in bad faith, the defendant’s wealth, and whether the defendant gained a profit from his misconduct. Second, the relationship between the plaintiff’s compensatory damages and the amount of punitive damages awarded must be a “reasonable one”. In Gore, the

the nationwide policy to sell previously damaged cars as new without advising the dealer if the repair cost did not exceed 3% of the suggested retail price. Furthermore, plaintiff introduced evidence that since 1983 BMW had sold nationwide 983 refinished cars as new, including 14 in Alabama, without disclosing that they had been repainted prior to sale. The jury returned a verdict awarding to the plaintiff $4,000 in compensatory damages and $4 million in punitive damages, finding that the nondisclosure policy constituted gross, oppressive or malicious fraud. BMW filed a post-trial motion to set aside the punitive damages, arguing that the award exceeded the constitutionally permissible amount. The trial judge denied this motion and held that the award did not violate the due process clause of the Fourteenth Amendment because it was not “grossly excessive”. The Alabama Supreme Court agreed on the ground that BMW’s conduct was reprehensible. However, it reduced the punitive damages award to $2 million because the jury had improperly multiplied plaintiff’s compensatory damages by the number of similar sales nationwide, not only those in Alabama. The United States Supreme Court, however, held that the $2 million punitive damage award is grossly excessive and violates the due process clause of the Fourteenth Amendment and reversed the judgment.

313 U.S. Const. amend. XIV. The Due Process Clause provides: “[N]or shall any State deprive any person of life, liberty, or property, without the due process of law...”. Also before Gore, the Supreme Court has examined punitive damage awards in light of the due process clause, see, e.g. Pacific Mutual Life Ins., Co. v. Haslip, 499 U.S. 1,21 (1991) (holding that a jury award of $1,04 million in compensatory and punitive damages did not violate the due process clause); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443,462 (1993) (holding that a $10 million punitive damage award - which was 526 times the actual damage - did not violate the due process clause).


315 Id. at 575-581.

316 Whether defendant’s wealth should be taken into consideration is controversial, see, e.g., Pace, supra note 41, at 1584 (stating that a jury should take the defendant’s financial position into consideration “[b]ecause it takes more to punish a wealthy defendant that a poor one.”); A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869,911 (1998) (arguing that wealth should not be considered because punitive damages imposed on the basis of wealth would impose a tax on large and successful corporations, discouraging development).

relation between the plaintiff's compensatory damages ($ 4,000) and the punitive damages awarded by the Alabama Supreme Court ($ 2 million) was 500 : 1. The court held that this was not a "reasonable" relationship. However, the Court did not define a standard when such a relation should be deemed reasonable and explicitly rejected to adopt a mathematical formula that compares actual and potential damages to the punitive damage award. As a third guidepost, the amount of punitive damages must be compared to the civil or criminal penalties that could be imposed for a comparable misconduct. If the award in punitive damages is "substantially greater" than the available statutory fines, there is an indication of excessiveness of the award. In Gore, the maximum civil penalty for BMW's behavior was $ 2,000 (compared to $ 2 million in punitive damages) and, consequently, served as one factor to declare the punitive damage award "grossly excessive".

- CONSTITUTIONALITY OF PUNITIVE DAMAGES

The constitutionality of punitive damages can not only be challenged in light of the Fourteenth Amendment but also under the Fifth and Eighth Amendment.

In providing "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb..." the Double Jeopardy Clause of the Fifth Amendment prohibits punishment of a defendant twice for the same reason. In United States v. Halper this clause was interpreted to limit the amount the government can recover

318 In its previous decision, TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443,462 (1993), however, the Supreme Court held that a $ 10 million punitive damage award which was 526 times the actual damage did not violate the due process clause.

319 BMW of North America, Inc. v. Gore, 517 U.S. 559,582 (1996); some legal scholars propose to adopt a mathematical formula, see, e.g., Polinsky & Shavell, supra note 316, at 875 (proposing to multiply the harm caused (e.g. $ 100,000) by the reciprocal of the probability of the defendant being found liable (e.g. 25 %)).


321 Id. at 584.

for punishment in a civil action after the defendant had already been punished under criminal law.\textsuperscript{323} In this case, the government brought a civil action against the defendant after he had already been sentenced to two years imprisonment. In the civil action a $5,000 penalty was assessed against the defendant. The Supreme Court held that the civil fine was unconstitutional, because it constituted a second punishment for the same offense.\textsuperscript{324}

With the same argument, one could declare a punitive damage award to be unconstitutional in cases where the defendant has either been previously criminally punished or when considering awarded compensatory damages as first punishment and punitive damages as second. However, the Supreme Court in \textit{Halper} held that the protection under the double jeopardy clause is “[n]ot triggered by litigation between private parties,”\textsuperscript{325} but only if one is the government. Given this premise, a punitive damage award that entirely goes to the plaintiff is constitutional under the Fifth Amendment. In some states, however, this award is apportioned between the plaintiff and the state.\textsuperscript{326} Thus, in these cases one could argue that the state acts as a party, so that the defendant would be protected under the double jeopardy clause. This, however, is questionable when considering the fact that the state does not act as a plaintiff in the action but only receives a portion of the punitive damages awarded. Moreover, in most cases the defendant will not have been punished previously under criminal law. Then, the argument that compensatory damages constitute a “punishment” has to be rejected since this kind of damage is intended the plaintiff to the position he was in before the harmful event occurred but does not pursue the goal of punishing the defendant.

\textsuperscript{324} \textit{Id.} at 448-449.
\textsuperscript{325} \textit{Id.} at 451.
\textsuperscript{326} See \textit{supra}, note 296.
Punitive damages awards also have been attacked under the Eighth Amendment, because they can constitute excessive fines, the imposition of which is prohibited under this Amendment. However, in *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal Inc.*, the Supreme Court held that the Excessive Fines Clause did not apply to damages awarded in litigation between private parties. In particular, the Court stated that this Clause "[d]oes not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." This language reveals that in jurisdictions where the plaintiff receives the entire amount of punitive damages this award should not be unconstitutional. However, constitutional concerns could arise under this Amendment when the punitive damage award is apportioned between the plaintiff and the state. The Court in *Browning-Ferris* did not provide a solution for this concern, but left this question explicitly open.

- **Comment**

As we can see, punitive damages are subject to a controversial discussion in the United States. It should be emphasized that this discussion centers on three different points: whether punitive damages should be subject to federal or state tort reform, what solutions can be provided in order to determine their reasonableness, and whether they have to be deemed unconstitutional when the state gets part of them. However, the existence of punitive damages has not been questioned.

With regard to the following discussion on the introduction of punitive damages in German law, the controversy about federal or state tort reform will never be raised,

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327 U.S. Const. amend. VIII, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
330 *Id.* at 276 note 21.
because tort law in Germany is federal law. Thus, only the latter mentioned issues (reasonableness and state apportionment) remain to be answered under German law.

(B) PUNITIVE DAMAGES UNDER GERMAN LAW

Since punitive damages do not exist in Germany, there are obviously not many cases dealing with this issue. The only chance for courts to decide on this issue arises when the plaintiffs seek to enforce a foreign judgment of a jurisdiction that recognizes punitive damages in Germany. That was the case in 1992, where the plaintiff, John Doe, a U.S. and German citizen, sought to enforce a judgment issued by the Superior Court of California against the defendant living in Germany. The U.S. judgment awarded the plaintiff $750,260 in damages, including $350,260 in past and future medical expenses, cost of placement, pain and suffering, and $400,000 in punitive damages. The trial court (Landgericht Dusseldorf, regional court) declared the U.S. judgment to be enforceable in Germany. The Court of Appeals (Oberlandesgericht Dueseeldorf, regional appeal court) declared the judgment to be enforceable to the extent of $275,325. Before the Supreme Court, which subsequently dealt with the issue, the defendant requested dismissal of the action, and the plaintiff requested to receive the entire amount of damages. The Supreme Court held that the complaint had to be dismissed with regard to the punitive damages, because punitive damages were incompatible with basic principles of German law. Other than that, the plaintiff prevailed.

331 The name “John Doe” is the code name given to the plaintiff by the Superior Court of the State of California, see, BGHZ 118,312,313.

332 BGHZ 118,312 ff.: Both plaintiff and defendant used to live in South California before where the plaintiff, at the age of 14, was sexually abused by the defendant. After a lifelong sentence of imprisonment had been issued against the defendant by another U.S. court, the defendant escaped to Germany on May 10, 1984. The defendant, at the time of the decision, lived in Germany where he owed real estate.
- **HOLDING OF THE GERMAN SUPREME COURT IN BGHZ 118,312: “PUNITIVE DAMAGES ARE INCOMPATIBLE WITH BASIC PRINCIPLES OF GERMAN LAW”**

The Court started its analysis by focusing on §§ 723 sec II, 328 sec. I ZPO (Code of Civil Procedure). These sections contain the rules governing the enforceability of foreign judgments. § 723 sec. II, cl. 2 ZPO refers to § 328 sec. I ZPO which states in its Nr. 4 that the “Recognition of a judgment issued by a foreign court is impossible if the recognition of this judgment leads to a result that is obviously incompatible with basic principles of German law, in particular, if the recognition violates constitutional rights.” The court held that, in general, punitive damages are incompatible with German law, because they violate constitutional law and are incompatible with principles of German tort law.333 With regard to constitutional law the Court addressed issues similar to those addressed under U.S. law. In particular, it held that punitive damages constitute a double punishment, and therefore violate art. 103 sec. III GG (prohibition of double punishment)334, that their determination and their relation to the actual harm caused is too indefinite so that they violate the principle that a punishment has to be definite (art. 103 sec. II GG)335, and that they violate the principle of the reasonableness of the means set forth in art. 20 sec. III GG.336 With respect to the incompatibility with German tort law, the Court stated that deterrence and punishment are objectives that are only known to German criminal law.337 Furthermore, the Court held that punitive damages lead to an enrichment of the plaintiff but that the general rules governing the law of damages, §§ 249 -253 BGB, solely seek to compensate the plaintiff for the harm he suffered.

333 BGHZ 118,312,337-345.
334 BGHZ 118,312,337. Art. 103 sec. III GG reads: “Nobody may, on the basis of the general criminal laws, be punished multiple times for the same offense.”
335 BGHZ 118,312,345.
336 BGHZ 118,312,343.
337 BGHZ 118,312,338.
- **Counter-arguments: Rejection of the Supreme Court’s view.**

Although these arguments do not seem to leave room for an introduction of punitive damages in German law, it will be proved that every single argument provided by the Supreme Court can be rejected, and that there are several reasons why punitive damages should be adopted.

The issue of double punishment is addressed in both countries. In U.S. law, the Supreme Court focused on the fact that the Double Jeopardy Clause of the Fifth Amendment does not apply to private parties. This is also true for German law. Although one objective of punitive damages is the punishment of the defendant, the language used in art. 103 sec. III GG (“...on the basis of the general criminal laws...” and “…offense…”) implies that a double punishment is prohibited when it is based on *criminal* law. However, if punitive damages were introduced in German law, they would supplement tort law and not criminal law. Furthermore, punitive damages differ from criminal sanctions addressed in art. 103 sec. III GG in that they are not imposed by the government upon a private party but are awarded in civil litigation between two private parties. Thus, art. 103 sec. III GG is not applicable for punitive damages, at least as long as the government does not receive a portion it.

The same is true for art. 103 sec. II GG which, according to its wording (“An offense can only be punished if the punishability was definitely determined by law...”), equally applies to punishments issued under criminal law. Moreover, the criticism on the indefiniteness of punitive damages can be solved by introducing a law which sets forth and defines the objectives, prerequisites, amounts, and factors according to which punitive damages should be awarded. Because of this, the argument based on art. 20 sec. III GG (reasonableness of the means) has to be rejected since the reasonableness of punitive damages could be determined explicitly in a statute. Consequently, the

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338 The same solution is provided in U.S. law by the proponents of a federal reform on punitive damages.
Supreme Court’s arguments based on art. 103 sec. II GG and art. 20 sec. III GG are not convincing.

The Supreme Court’s arguments that the objectives of punitive damages (deterrence and punishment) are known to criminal law only, and that §§ 249-253 BGB generally seek to compensate instead of punishing, are generally true. However, with its §§ 253, 847 BGB (pain and suffering), German tort law seeks to achieve two goals, compensation and “satisfaction” (retaliation).339 Thus, with the latter goal at least the notion of punishment is not unknown to tort law. This finding can even be enhanced by the fact that German contract law recognizes in its § 336 - 345 BGB contractual penalties. Thus, it can be concluded that the notion of punishment is not exclusively to be found in criminal law. Accordingly, the Courts arguments are not compelling.

As a result of the precedent analysis we can see that every single argument provided by the Court could be rejected. Thus, we now turn to the arguments that favor the introduction of punitive damages.

(C) ARGUMENTS IN FAVOR OF THE INTRODUCTION OF PUNITIVE DAMAGES IN GERMAN LAW

The main argument in favor of punitive damages is provided by the goals of punitive damages. Punitive damages deter the actual tortfeasor and other potential tortfeasors from engaging in misconduct that brings or could bring harm to potential plaintiffs. Cases like Grimshaw v. Ford Motor Co.340 could happen in Germany all the time. And, indeed, in 1994 the automobile manufacturer Opel violated its duty to recall “Astra” vehicles that used to catch fire as a result of popping gas out of defective fuel tanks. Although Opel already had knowledge of the existence of the defective condition,

339 THOMAS, supra note 66, § 847 BGB, Rn. 4.
it did not intervene. Thus, the manufacturer exposed numerous users to a high risk of danger to life and limb. One of the explanations for this kind of corporate conduct is that manufacturers in Germany do not have the fear of paying a high amount of damages. Of course, they would be liable for plaintiff's economic loss if the plaintiff is able to fulfill his burden of proof. However, noneconomic loss is compensated at a minimum level and rarely exceeds DM 100,000. Criminal prosecution may be started, but, even if it is successful, it punishes the individual, not the entity. The administrative fine of DM 50,000 set forth in § 15 of the Product Safety Act hardly deters manufacturers from engaging or repeating their wrongful conduct. Given this situation, the introduction of punitive damages would constitute an effective deterrence mechanism and at the same time provide an incentive for manufacturers to create safer products. Moreover, it would guarantee that plaintiffs receive adequate compensation for the harm they suffered.

However, manufacturers and other opponents to this proposal will provide the same arguments against punitive damages as those used in the United States. Some of them have already been presented earlier. Other important arguments often stated are that punitive damages will cause unnecessary litigation by increasing the plaintiff's motivation to go to court, that they are or will be "skyrocketing", and increase insurance costs. Empirical analyses show, however, that this fear is over-exaggerated. For the

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341 Bodewig, supra note 273, at 346 note 36.
342 It is not overseen that at the end the shareholders and the consumers carry the entity's financial loss which is going to be reflected in increased product prices. However, as for shareholders, the ones that have a high stock are partly responsible for the corporation's decision. Thus, it is not unfair that the effects of punitive damages affect them. Shareholders with a low stock will suffer only a small loss. As for the consumers it has to be said that nobody is forced to buy products of a company which increased their prices since there is enough competition.
343 As note by U.S. Senator Ernest Hollings (D-S.C.): "[W]e could spend an afternoon pointing out the good that product liability has done. We do not get blown up by that Pinto gas tank. Cars have all antilock brakes. That elevator is checked...", see, 142 Cong. Rec. S2344 (daily ed. Mar. 20, 1996) (statement of Sen. Hollings).
344 Pace, supra note 41, at 1575.
United States it has been found that from 1965 to 1990, there were only 355 punitive damage awards in product liability cases, and more than half of those were reduced in settlement or by appellate courts.\(^{346}\) Nothing else is to be expected in Germany, if the legislature enacts a reasonably designed statute on punitive damages that foresees the imposition of punitive damages as “ultima ratio”.

(D) PROPOSAL

From the precedent analysis can be concluded that the introduction of punitive damages in Germany is not only possible but also desirable. From the legal point of view there are no hurdles that could not be taken. However, the most important prerequisite is that one wants and dares to introduce something that is new, which comes from a different legal system, and which might not please everyone.

As can be gathered from the preceding it is the German legislature which should introduce punitive damages by statute. In order to meet the constitutional requirements capped punitive damages should be adopted. Prerequisites (\textit{e.g.} reckless conduct), determinative factors (degree of recklessness or reprehensibility, wealth etc.), and caps should be explicitly defined in the statute. Moreover, a comment to the statute should be issued in order to provide examples for the (non-) imposition of this kind of damages in different areas of tort law (motor vehicles, aviation etc.). Further upcoming problems could by providing own solutions combined with borrowing solutions from the law governing punitive damages in the United States.

\footnote{See, Eaton \& Talarico, \textit{supra} note 298, at 637, and 650 (noting that products liability cases only accounted 1.3 \% of tort claims filed in Georgia courts outside Atlanta and that punitive damages were rarely awarded); Michael Rustad, \textit{In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data}, 78 Iowa L. Rev. 1 (1992).}

\footnote{Rustad, \textit{supra} note 345, at 57-58.}
3. LIABILITY UNDER § 823 SEC. II BGB

§ 823 sec. II BGB\textsuperscript{347} is the second section under which the defendant in a product liability action could be held liable. It requires the existence of a protective law that must have been negligently or intentionally violated by the defendant. According to art. 2 EGBGB a protective law is every legal norm that intends the protection of an individualized group of persons. Thus, a law that seeks to protect the public at large does not fulfill this requirement.\textsuperscript{348}

A) PROTECTIVE LAWS CONCERNING THE MOTOR VEHICLE AREA

With regard to the motor vehicle branch, three recognized protective laws can be of importance. First, in cases where bodily injury or even the death of a consumer has been caused by a defective product, §§ 212, 222, 223, and 230 StGB\textsuperscript{349} can be relevant. Under these sections negligent or intentional behavior of the manufacturer’s employees will be prosecuted.\textsuperscript{350} At the same time those provisions constitute protective laws under § 823 sec. II BGB for a violation of which the plaintiff has a claim to be compensated. Second, the Road Traffic Registration Act (Strassenverkehrs-Zulassungs-Ordnung, StVZO) that also constitutes a protective law, has to be mentioned. This law could be violated by an automobile accessories manufacturer when a product is going to be marketed although it lacks a necessary operating permission.\textsuperscript{351} Finally, the Produktsicherheitsgesetz from August 1997 has to be considered as protective law, as it intends to protect the individual consumer from being exposed to dangerous products.

\textsuperscript{347} See, § 823 sec. II BGB, supra note 91.
\textsuperscript{348} THOMAS, supra note 66, § 823 BGB, Rn. 141; HEIN KOETZ, DELIKTSRECHT, Rn. 170 (6th ed. 1994).
\textsuperscript{349} See, StGB, supra note 81..
\textsuperscript{350} See, e.g., BGH NJW 1995,2930 - Holzschutzmittel (Wood preservative).
\textsuperscript{351} This would constitute a violation of §§ 22, 22a StVZO.
Thus, its negligent or intentional violation also gives the plaintiff a valid claim under § 823 sec. II BGB.

**B) Peculiarities of § 823 sec. II BGB compared to § 823 sec. I BGB**

**I.) Compensation for pure economic loss**

The main difference between § 823 sec. I BGB and § 823 sec. II BGB resides in the fact that only under the latter can the plaintiff get compensation for pure economic loss as long as this kind of compensation is intended by the violated protective law. This kind of compensation does not exist under § 823 sec. I BGB as here the damage is recoverable only if it is the result of a violation of one of the enumerated protected rights of this section.\(^\text{352}\)

**II.) Distribution of burden of proof**

§ 823 sec. II, cl. 2 BGB states that the defendant can only be held liable if he acted with fault, even if the protective law does not require such a behavior. Accordingly, a shift in the burden of proof with regard to fault to the defendant as it exists under § 823 sec. I BGB\(^\text{353}\) would be a violation of the section’s wording, and therefore, has generally not been recognized by the courts. Therefore, the normal rules of providing evidence are applicable, which means that the plaintiff generally has to prove all prerequisites that favor his claim, including the faulty violation of the protective law. However, also under this section a lightening for plaintiff’s claim has been established by the Supreme Court. It held that in cases where it is sure that the violation of a protective right occurred, the fault of the defendant is presumed.\(^\text{354}\)

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\(^{352}\) Hein Koetz, Deliktsrecht, Rn. 75 (6th ed. 1994).

\(^{353}\) See supra, note 90.

\(^{354}\) BGHZ 51,91 (103 f.) - Huehnerpest (Fowl pest).
C. LIABILITY UNDER THE PRODUCT LIABILITY ACT (PRODUKTHAFTUNGSGESETZ)

Since 1990, a product liability action can not only be based on traditional tort law (§§ 823 - 853 BGB) but also on the Product Liability Act (Produkthaftungsgesetz, ProdHaftG).355. The peculiarity of this Act resides in the fact that it establishes strict liability for all three kinds of product defects (manufacturing, design and instructions or warnings defects).356 This means that, contrary to traditional tort law, only the existence of a product defect and its causality for the resulting harm are necessary requirements in order to establish a valid claim. The breach of a duty or fault of the defendant are not prerequisites, therefore, his provision of exculpatory evidence with regard to these two elements is irrelevant. Accordingly, the plaintiff initially bears a lighter burden of proof under this statute357 than under the main provision of traditional tort law, § 823 sec. I BGB. However, this seeming advantage for the plaintiff is balanced out by many disadvantages which are evaluated together with similarities and other advantages in the following comparison to §§ 823 - 853 BGB.

1. STRUCTURE OF THE STATUTE

In total, the statute contains 19 sections. § 1 sec. I ProdHaftG358 is the statute’s main provision, because it establishes strict liability for the manufacturer whose defective products cause a harmful event. § 1 sec. II and III ProdHaftG359 contain

355 See, ProdHaftG, supra note 32.
356 See, § 1 sec. I ProdHaftG [Liability]:
(1) If a person is killed by the defectiveness of a product, his body or health is injured or a thing is damaged, the maker of the product is obliged to compensate the injured person for damages arising therefrom. This is only applicable in a case of damage to property if a thing other than the defective product is damaged and that other thing according to its nature is destined for private use or consumption and has been applied by the injured person mainly for that purpose.
357 See, § 1 sec. IV, cl. I ProdHaftG which reads: “The burden of proof concerning the defect and the causality between the defect and the damage lies on the person who suffered the damage.”
358 Supra note 356.
359 § 1 sec. II and III ProdHaftG read:
(2) The duty to compensate of the maker [of the defective product] is excluded if:
provisions under which defendant’s liability is excluded, and § 1 sec. IV ProdHaftG distributes the burden of proof. § 2 ProdHaftG\textsuperscript{360} defines the notion of product, followed by the definition of “defect” under § 3 ProdHaftG\textsuperscript{361}. Potential defendants are explicitly mentioned in § 4 ProdHaftG\textsuperscript{362}, and § 5 ProdHaftG\textsuperscript{363} contains the rule for joint

\begin{enumerate}
\item he did not the thing into circulation;
\item according to the circumstances, the conclusion is that the product did not yet have the defect which caused the damage when the maker put it into circulation;
\item that he did not make the product for sale or any other form of distribution for economic gain, nor did he make or market it within the scope of his professional activity;
\item the defect is based on the fact that the product, at the time when the maker put it into circulation, was in compliance with the compulsory requirements of the law applicable therefore;
\item the defect could not be discovered considering the state of science and technology at the time when the maker put the product on the market.
\end{enumerate}

(3) The duty to compensate of the maker of a part-product is furthermore excluded if the defect was caused by the construction of the product into which the part-product was integrated, or resulted from the instructions of the maker of the product. The first sentence shall also apply to the makers of raw materials mutatis mutandis.

\textsuperscript{360} § 2 ProdHaftG [Product]: Product within the meaning of this Act is every movable thing, also when it forms the part of another movable thing or of an immovable thing, as electricity. Excepted are agricultural products of the land, animal husbandry, bee-keeping and fishery (natural agricultural products), which have not undergone primary manufacturing process; the same applies to hunter’s booty.

\textsuperscript{361} § 3 ProdHaftG [Defect]:

(1) A product has a defect if it fails to offer the safety which, by considering all circumstances, especially:

\begin{enumerate}
\item its offering;
\item the use, which can fairly be relied upon;
\item the time at which it has been put on the market
\end{enumerate}

can be legitimately expected.

(2) A product does not have a defect merely for the reason that subsequently an improved product was put on the market.

\textsuperscript{362} § 4 ProdHaftG [Producer]:

(1) A producer within the meaning of this Act is who produced the final product, a raw material or a part-product. A person is also considered a producer if he, by lending his name, his trade mark or other distinctive mark, holds himself out as producer.

(2) A person is furthermore considered a producer if he introduces or passes a product for the purpose of sale, lease, hire-purchase or any other form of marketing for economic gain within the scope of his business activity within the territorial scope of application of the Treaty Establishing the European Economic Community.

(3) If the producer of a product cannot be ascertained, every supplier is deemed its producer, unless he gives the name of the producer or of the person who was his supplier, to the person suffering the damage, within one month following the date on which a demand therefor was delivered to him. This also applies to an introduced product if, in that case, the person specified in subsection (2) cannot be ascertained, even though the name of the producer is known.
tortfeasors, which refers basically to §§ 421 - 426 BGB. With regard to contributory negligence, § 6 ProdHaftG\(^{364}\) applies the same rules as § 254 BGB to which it refers. §§ 7 to 10 ProdHaftG\(^{365}\) contains peculiarities that have to be taken into consideration in cases of bodily injury or death. § 11 ProdHaftG\(^{366}\) establishes a deductible in situations where harm to property occurred. The statute of limitation, according to which a claim is barred after three years from the time at which the plaintiff obtained knowledge or could have had knowledge of the damage, the defect and the defendant, is contained in § 12 ProdHaftG\(^{367}\), followed by the statute of repose in § 13 sec. I ProdHaftG\(^{368}\), under

\(^{363}\) § 5 ProdHaftG [When several persons are liable]:

If several producers are jointly liable for the same damage, they are jointly and severally liable. The relationship as among the persons liable, unless otherwise provided, the obligation to make restitution, as well as the amounts of damages, depends on the circumstances, especially on the extent to which the damage was caused mainly by one or another party; otherwise §§ 421 to 425 as well as § 426 sec. 1, cl. 2 and sec. II of the Civil Code apply.

\(^{364}\) § 6 ProdHaftG [Reduction of liability]:

(1) If the person suffering the damage negligently contributed to the causation of the damage, § 254 of the Civil Code applies; in case of damage to property, fault of the person who has the actual control over the thing is equal to a fault by the person suffering the damage.

(2) The liability of the producer is not reduced if the damage is caused by a defect of the product and, at the same time, by the act of a third party. § 5 cl.2 applies mutatis mutandis.

\(^{365}\) Of particular importance is § 10 ProdHaftG which contains a maximum cap for the compensation of bodily injuries; § 10 ProdHaftG provides:

(1) If personal injuries have been caused by a product or products of the same kind with an identical defect, the person having the duty to pay compensation is liable only to a maximum amount of 160 million DM.

(2) If the compensation payable to several injured parties exceeds the maximum amount of specified in subsection (1), the individual compensations shall be reduced in the same proportion as their total amount relates to the maximum amount.

\(^{366}\) § 11 ProdHaftG [Deductible in case of property damage]:

In case of property damage, the person suffering the damage shall himself bear the damage to the amount of 1.125 DM.

\(^{367}\) § 12 ProdHaftG [Prescription]:

(1) A claim under § 1 is barred after three years from the time at which the person entitled to compensation obtained knowledge of the damage, the defect and the identity of the person liable, or ought to have obtained knowledge thereof.

(2) If negotiations concerning the compensation payable are pending between the person liable and the person entitled, the running of the prescriptive period is stayed until the continuation of the negotiations is refused.

(3) Otherwise, the provisions of the Civil Code on prescription shall apply.
which a claim extinguishes after 10 years from the time at which the product was put on the market. § 14 ProdHaftG declares that the provisions of this statute cannot be excluded or altered by mutual agreement. The applicability of other laws, such as traditional tort law under the Civil Code, is established in § 15 sec. II ProdHaftG. § 16 ProdHaftG defines the scope of the application of this statute and only applies to products that were put on the market before it entered into force. As § 19 ProdHaftG provides that the Produkthaftungsgesetz enters into force on January 1, 1990, liability under this statute cannot be established for products marketed before that time. Consequently, a motor vehicle manufacturer will not be held liable for damages resulting from defective vehicles put in the stream of commerce before 1990. § 17 ProdHaftG, finally, contains only formalities concerning the legislative procedure.

2. Similarities between Produkthaftungsgesetz and traditional tort law

As under traditional tort law, the Product Liability Act (§ 1 sec. II Nr. 5) does not recognize the defendant’s liability for development risks. With regard to damages, both laws deny compensation for pure economic loss and for the defective product itself (§ 1 sec. I, cl. 2). Also, the scope of potential defendants, the rule governing joint and several liability, and the provision for contributory negligence set

\[\text{\footnotesize \cite{368} § 13 sec. I ProdHaftG [Extinction of claims]:}
\]
\[\text{(1) A claim under § 1 becomes extinct in ten years from the time at which the producer of the product which caused the harm put it on the market. This does not apply when there is a legal dispute or a collection proceeding pending.}
\]
\[\text{\footnotesize \cite{369} § 15 sec. II ProdHaftG reads: Liability under other provisions remains unaffected.}
\]
\[\text{\footnotesize \cite{370} See, § 1 sec. II Nr. 5, supra note 359.}
\]
\[\text{\footnotesize \cite{371} For the fact that pure economic loss is not allowed compensation under the Product Liability Act, see,}
\]
\[\text{\footnotesize \text{THOMAS, supra note 66, at § 1 ProdHaftG, Rn. 8.}}
\]
\[\text{\footnotesize \cite{372} See, § 1 sec. I, cl. 2, supra note 356.}
\]
forth in the Product Liability Act are closely related to the rules applicable under traditional tort law.

3. DIFFERENCES BETWEEN THE PRODUCT LIABILITY ACT AND TRADITIONAL TORT LAW

However, there are several aspects in which the Product Liability Act differs from traditional tort law:

A) STANDARD OF LIABILITY

The standard of liability to which the defendant is held under the Product Liability Act is one of strict liability (§ 1 sec. I, cl. 1 ProdHaftG), whereas under traditional tort law negligence is the governing legal standard. Thus, a consumer who sues a motor vehicle manufacturer under the Product Liability Act does not have to prove faulty conduct of the latter. However, this advantage is diminished by the fact that under traditional tort law the breach of a duty of care of the defendant as well as his fault is presumed. Accordingly, in product liability actions the main difference between strict liability and negligence is eliminated. The only advantage that remains under the strict liability standard of the Product Liability Act is that, in contrast to traditional tort law, the defendant’s provision of exculpatory evidence is irrelevant. However, this seeming advantage has lost much of its importance, because under traditional tort law the requirements set by the courts to provide exculpatory evidence are very high, and a defendant will rarely be able to successfully present this kind of evidence. Thus, it can be concluded that, although in theory a big difference between strict liability under the Product Liability Act and traditional tort law exists, this difference is small in reality.
b) No liability for run-away products under the Product Liability Act

As the standard of liability under the Produkthaftungsgesetz is not based on fault, the motor vehicle manufacturer will, in contrast to § 823 sec. I BGB, be held liable for products containing manufacturing defects that are inevitable despite all precautions (run-away products).

c) No duty to observe or recall products under the Product Liability Act

One of the main difference between both laws is that the manufacturer’s duty to observe or recall products after their placement on the market is not established in the Product Liability Act but only exists under traditional tort law. This weakness of the Act resides in the fact that it only covers liability from the time until, or at which, a defective product is marketed but does not cover the time after its marketing. Therefore, the plaintiff will be without remedy if the manufacturer violates one of his post-marketing duties.

d) Limited scope of application of the Product Liability Act

As we have seen, § 16 ProdHaftG in connection with § 19 ProdHaftG limits the scope of the application of the Product Liability Act to products put on the market after January 1, 1990. Liability under traditional tort law, on the other hand, does not contain such a limit. Thus, plaintiffs seeking remedies for damages caused by vehicles marketed before that date can base their action successfully only on §§ 823 I or II BGB.

e) Limited Award of Damages under the Product Liability Act

The damages recoverable under the Product Liability Act are, in contrast to traditional tort law, limited. In cases involving personal injury, the recoverable amount is limited to 160 million DM (§ 10 ProdHaftG). In situations where the plaintiff suffers property damage, he will have to pay a deductible of 1.125,- DM (§ 11 ProdHaftG); moreover, according to § 1 sec. 1, cl.2 ProdHaftG, recovery for property damage is restricted to things which are destined to private use or consumption and which have been applied mainly for that person by the injured person. Thus, recovery for damage on things used commercially will not be awarded. Furthermore, special emphasis should be put on the fact that under the Product Liability Act a recovery for pain and suffering is not recognized, because it does not explicitly mention this kind of damage, a requirement set up by § 253 BGB. These factors constitute the most important disadvantage of the Act and explain why most of the product liability actions will be brought under §§ 823 ff. BGB.

f) Statute of Limitation

Although the time period of the statute of limitations in the Products Liability Act (§ 12 ProdHaftG) and § 852 BGB are both three years, there is a difference. The time limit of § 12 ProdHaftG is stricter in that it runs either if the plaintiff had knowledge or could have had knowledge of the damage, the defect, and the defendant. In contrast, the time limit of § 852 BGB begins to run only if the plaintiff has actual knowledge of the tortuous act and the tortfeasor.

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374 See, § 10 ProdHaftG, supra note 365.
G) Statute of Repose

In contrast to traditional tort law, the Product Liability Act contains in its § 13 sec. 1 ProdHaftG a provision of repose according to which the plaintiff has to file a lawsuit within ten years from the time at which the product has been put on the market.

D. Conclusion

From the preceding analysis of German tort law can be concluded that the plaintiff in a product liability suit has three options how to proceed in his action. He can either base his claim on strict liability under the Product Liability Act, or base his claim on negligence under §§ 823 sec. I, II BGB, or he can combine these two claims. With regard to defendant’s conduct the Product Liability Act applies a strict liability standard. A consumer expectations test is used to determine the existence of a defect. Under traditional tort law, on the other hand, a reasonable manufacturer standard is used to determine whether defendant’s conduct was negligent. In order to determine product defectiveness, however, the courts use a consumer expectations test as starting point which is supplemented by a risk-utility analysis and several other factors (reasonably prudent manufacturer standard, state of science and technology).

As for the relation between the Product Liability Act and traditional tort law it might seem that the former should be favored as basis for plaintiff’s claims because of its strict liability standard which eases plaintiff’s burden of proof. However, the facts that the Product Liability Act fails to address important issues (e.g. post-sale duty to warn and recall) characterizing product liability law, that it does not recognize damages for pain and suffering and even introduces caps on economic damages makes it relatively inefficient. Accordingly, plaintiff’s base their claims in most cases on traditional tort law which has been developed by courts to the extent that it covers every issue arising in modern product liability law. Its further advantage is that it applies a
presumption of the manufacturer’s violation of duty of care and of its fault which eases plaintiff’s burden of proof remarkably. Moreover, the plaintiff can recover for almost every kind of damage, including pain and suffering, except for pure economic loss. Thus, we reach the conclusion that traditional tort law from 1900, as it has been developed by the courts, is much more efficient and advantageous for the plaintiff than the modern Product Liability Act from 1990.

Another important finding is that due to the absence of a statute covering product liability law in its entirety, judicial decisions almost have the same importance as common law in the United States. In the following Chapter II we will even see that in addition to this common factor also the material law in both countries is very closely related to one another. This is true for almost every aspect except the important fact that punitive damages are solely recognized in U.S. law. This, however, could change if the German legislature adopts the proposal to enact a statute introducing capped punitive damages which is not only desirable but also necessary. The, the differences between the law in both countries would be reduced to a few details only.
Chapter II

Product Liability in the Motor Vehicle Area in the United States

A. Sources of Product Liability Law

In the United States three sources of product liability law can be distinguished. The first is state common law, the second one is state and federal legislation, and the third arises out of the Restatements of Torts. This enumeration already points at the interconnection between state and federal law, and for the following discussion, special emphasis must be put on the fact that product liability law as part of tort law, in contrast to Germany, traditionally belongs in the field state law. Accordingly, each of the 50 states has its own product liability law so that there is no uniform product liability law applicable nationwide. Thus, although product liability law is influenced by federal law, we must keep in mind that this is an encroachment upon state law, an important fact in situations where both state and federal law conflict.

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375 Compared to the United States the distribution of competence in Germany is reversed: According to art. 72 sec. I in connection with art. 74 sec. I, Nr. 1 GG, tort law as part of private law is subject to federal legislation excluding the 16 German Laender (states) from enacting separate product liability laws. Thus, there is only one uniform product liability law applicable in the entire country.


377 The idea of a uniform federal common law was rejected by the United States Supreme Court in Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
1. STATE COMMON LAW - COMPARISON TO THE GERMAN CIVIL LAW SYSTEM

Unlike under the German civil law system, the most important source of law in the United States is not legislation but state common law (case law), which finds its roots in English law.378 379

A product liability action can either be brought in the state court system or in the federal court system. In the first one, the action is started in a state trial court380, then on appeal goes to an intermediate appellate court,381 and finally comes to the state Supreme Court382. In the federal court system, in which state law is applied, the action is first brought in a federal District Court383, then goes to a U.S. Court of Appeal (Circuit Court)384, and eventually comes to the United States Supreme Court. However, these two systems are not entirely separated from each other but can be connected in situations where an action brought in the state court system contains issues involving federal law. Then, for example, a decision issued by a state Supreme Court can be appealed to the United States Supreme Court385, which can grant certiorari on the case.

378 HARALD KOCH, ET AL., IPR UND RECHTSVERGLEICHUNG § 15 B. I., II., at 261 - 262.
379 However, in the area of products liability the role of German courts in the development of this field of law is of extraordinary importance and comparable to the role of courts in the common law system of the United States, see, Chapter I, supra, at 15.
380 In Georgia, state trial courts are: Superior Court, State Court, Probate Court, Magistrate Court, Civil Court, Municipal Court.
381 The names of the intermediate appellate courts vary from state to state: E.g., in Georgia, the intermediate appellate court is called “Court of Appeals”, in New York, on the other hand, it is called “Appellate Division”.
382 In Georgia, the Supreme Court which has its seat in Atlanta consists of seven Justices; the current members of the Georgia Supreme Court are: Robert Benham, Chief Justice; Norman S. Fletcher, Presiding Justice; George H. Carley, Justice; P. Harris Hines, Justice; Carol W. Hunstein, Justice; Leah J. Sears, Justice; Hugh P. Thompson, Justice.
383 In Georgia, for example, there are three District Courts (for the Northern-, Middle- and Southern District of Georgia).
384 In total, there are 12 Circuit Courts; each of them has jurisdiction over several states, e.g., in Georgia, the 11th Circuit Court has jurisdiction over Georgia, Florida and Alabama.
385 The United States Supreme Court resides in Washington D.C. and consists of nine Justices; the current members of this court are: Justice Rehnquist (Chief Justice), Justice Thomas, Justice Breyer, Justice Ginsberg, Justice Kennedy, Justice O’Connor, Justice Scalia, Justice Souter, Justice Stevens.
This happened, for example, in *BMW of North America, Inc. v. Gore*,\(^{386}\) where the Supreme Court granted certiorari on the constitutionality of punitive damages awards.

In contrast to Germany, the common law system of the United States is characterized by the doctrine of “stare decisis”,\(^{387}\) which describes the fact that lower courts are bound by precedent cases decided by higher courts.\(^{388}\) In Germany, although decisions issued by the Supreme Court (Bundesgerichtshof) or the regional appeal courts (Oberlandesgerichte) are strong authority, generally, and in theory, no lower court is bound by their decisions. One exception, however, is made for decisions of the Federal Constitutional Court (Bundesverfassungsgericht), which are considered to be binding for all courts like statutory law.\(^{389}\) Another important difference between the U.S. and the German court system concerns the process of fact finding during a trial. In the United States it is the task of the jury\(^{390}\) to find the facts of the case. In contrast, this judicial institution is unknown to German law, and it is the court (the judge(s)) that is (are) charged with this duty.

2. Legislation

In some states the common law of products liability is supplemented by state legislation under which product liability statutes have been enacted. Some of them contain codifications of important matters, such as the applicable standard for the

\(^{386}\) 517 U.S. 559,568 (1996).

\(^{387}\) *Peter Hay, Einführung in das amerikanische Recht* 8 (4th ed. 1995).

\(^{388}\) *Id.*

\(^{389}\) *See*, § 31 sec. 1, II Gesetz ueber das Bundesverfassungsgesetz (Bundesverfassungsgerichtsgesetz, BVerfGG) in der Fassung der Bekanntmachung vom 12. Dezember 1985, BGBl. I S 2229, which reads:

(1) The decisions of the Federal Constitutional Court are binding for the federal and state constitutional organs as well as for all courts and governmental agencies.”

(2) With regard to § 13 Nr. 6, 11, 12 and 14…the decision of the Federal Constitutional Court has the statutory power.

\(^{390}\) The jury “is a body of persons temporarily selected from the citizens of a particular district, and invested with power…to try a question of fact.”, *see,* Henry Campbell Black, *Black’s Law Dictionary* 855 (6th ed. 1990).
determination of design defectiveness\textsuperscript{391} or the treatment of the defendant’s compliance with federal regulatory standards\textsuperscript{392}. These standards can arise out of the National Traffic and Motor Vehicle Safety Act\textsuperscript{393}, which was enacted by Congress in 1966. This Act gives a special agency of the Department of Transportation, the National Highway Transportation Safety Administration (NHTSA)\textsuperscript{394}, the authority to promulgate and enforce mandatory performance standards for motor vehicles (Federal Motor Vehicle Safety Standards, FMVSS).\textsuperscript{395, 396}

Thus, we can see that federal regulatory standards may overlap with state tort law. Out of this overlapping arise two important issues relevant for our topic: first, whether state tort law is preempted by federal law,\textsuperscript{397} and second, if the first question is negated, what consequences result out of compliance with those standards\textsuperscript{398}.


\textsuperscript{394}This agency builds the American counterpart to the German Federal Office for Motor Traffic (Kraftfahrbundesamt).


\textsuperscript{396}As the Traffic Safety Act was passed, the regulatory authority was first delegated to the Secretary of Commerce. However, Congress created the Department of Transportation two months after the Safety Act’s passage and transferred its administration to the newly established Department within which the responsibility for writing the FMVSS rested upon the National Highway Safety Bureau. In 1970, finally, Congress transferred the administration of the Safety Act to the NHTSA, see, John F. McCauley, Note, Cipollone and Myrick: Deflating the Airbag Preemption Defense, 30 Ind. L. Rev. 827, note 29 (1997).


\textsuperscript{398}E.g., in Jackson v. Spagnola, 503 A.2d 944,949 (Pa. Super Ct. 1986) the court dealt with the question whether compliance with federal automobile safety standards immunizes a car manufacturer (Volkswagen) from strict liability; for a further discussion of the compliance issue, see infra, at pp. 128.
3. Restatements

As third legal authority the Restatements of the law issued by the American Law Institute (A.L.I.) must be mentioned. These are compendiums of case law, structured systematically like a statute reflecting current common law and intended to develop the law ("prestatements"). However, it should be stressed that the Restatements are no real source of law, as they do not provide conclusive authority. Nevertheless, they provide persuasive authority and are, especially in the field of product liability, often consulted by courts and legal professionals in order to support their arguments. In product liability law two different Restatements exist: The Restatement (Second) of Torts, Products Liability from 1965 and the Restatement (Third) of Torts, Products Liability, Proposed Final Draft, from April 1, 1997. Most importantly, the Second Restatement literally adopted in its main provision, § 402 A, a strict liability standard

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399 The American Law Institute is an association of Professors of Law, Judges and Attorneys which has been founded in 1923; the A.L.I. pursues the goal of unifying and improving American law; today, the main focus of the institute is the publication of the Restatements of the Law, see Hay, supra note 387, at 14 and note 30.

400 KOCH, supra note 378, at 264.

401 HAY, supra note 387, at 15; KOCH, supra note 378, at 264.

402 A recent example can be found in Banks v. ICI Americas, Inc., 450 S.E. 2d 671 (Ga. 1994) where the Georgia Supreme Court cited to the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, Preliminary Draft No. 1 (April 20, 1993) in order to support its application of the reasonable alternative design requirement as standard to determine design defectiveness; see also, Pries v. Honda Motor Co., Ltd., 31 F.3d 543,545 (7th Cir. 1994) (applying Indiana law), where the court cited to the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, Tentative Draft No. 1 (1994), § 2 (b) and cmt. c.

403 § 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(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.
for "[a]ny product in a defective condition..." without distinguishing between different kinds of product defects. This distinction is now made in § 2 (a) - (c)\textsuperscript{404} of the Third Restatement. This section is at the same time one of the most important and highly criticized provisions set forth in the new Restatement. In reflecting current common law it states that a strict liability standard applies to manufacturing defects only (§ 2 (a)). For design and instructions or warnings defects § 2 (b) and § 2 (c) require the plaintiff to prove the availability of a reasonable and safer alternative design or information. How the legal academy reacted to this change will be discussed subsequently.

B. DEVELOPMENT OF PRODUCT LIABILITY LAW

1. THE PRIVITY REQUIREMENT AND ITS ABOLITION

Like in Germany,\textsuperscript{405} the courts in the United States have dealt with the question whether the existence of privity, a "[m]utual or successive relationship\textsuperscript{406}, between consumers and manufacturers is a prerequisite for bringing a product liability action. In the middle of the nineteenth century the liability of manufacturers for injuries to consumers resulting from defective products was limited by requiring privity in order to

\textsuperscript{404} § 2 of the Restatement (Third) of Torts: Products Liability, Proposed Final Draft, April 1, 1997, provides:
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.

\textsuperscript{405} See supra, at pp. 12.

\textsuperscript{406} Black's Law Dictionary, supra note 390, at 1199.
protect the defendants (manufacturers).407 However, the privity requirement and the protective attitude towards manufacturers were abolished in 1916 in the landmark decision *MacPherson v. Buick Motor Company*, a decision in which Judge Cardozo concluded that the duty to rescue life and limb can not only grow out of a contractual relationship but also out of tort law.409 Subsequently, the holding in *MacPherson* was confirmed in other cases involving motor vehicle manufacturers, which held that modern business transactions no longer involve a only buyer and a seller but the public in general.410 Thus, not only the parties of a contract but also injured third persons can successfully bring a products liability suit against the manufacturer; the same result was reached in 1968 by the German Supreme Court in its famous fowl pest case.411

2. DEVELOPMENT OF THREE THEORIES OF LIABILITY

Today, a plaintiff can bring a product liability action based on three theories of liability: negligence, breach of an express or implied warranty, and strict liability.412 Each of these theories focuses on different aspects. In negligence cases the conduct of the defendant is subject to examination, while breach of warranty cases concentrate on the performance of the product, and for strict liability actions the decisive question is whether a product is defective.413

408 111 N.E. 1050 (N.Y. 1916).
409 Id. at 1053; Judge Cardozo’s words “[T]he law...” have to be read as “Tort law”, see Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 U. Mich J. L. Ref. 197 (1997).
410 See, e.g., General Motors Corp. v. Johnson, 137 F.2d 320 (4th Cir. 1943), holding that a motor truck manufacturer owes the public a duty to use reasonable care in manufacturing and inspecting the vehicle, irrespective of contract; Lang v. General Motors Corp., 136 N.W. 2d 805 (N.D. 1965) (as the defendant had actively advertised its product to the general consumer public, the lack of privity of contract was no defense and did not bar the action).
411 See, Chapter I, supra, at pp. 41.
412 KEITH C. MILLER, AUTOMOBILE ACCIDENT LAW AND PRACTICE, Chapter 7, Products Liability, § 7.01[2], at 7 (1989).
413 Id.
A) NEGLIGENCE

Negligence is the oldest and still the most commonly raised theory of recovery in product liability suits.\(^{414}\) It consists of four basic elements: (1) the existence of a duty to use reasonable care owed to the plaintiff, (2) the breach of that duty of care by the defendant, (3) causal connection between the defendant’s conduct and the plaintiff’s injury (cause in fact and proximate cause) and, finally, (4) actual harm, which the law says is measurable and compensable.\(^{415}\)

\(^{(1.)}\) DEFENDANT’S DUTY TO EXERCISE REASONABLE CARE

This element requires the defendant to conform to a certain standard of conduct necessary to avoid an unreasonable risk of harm to others.\(^{416}\) In order to satisfy the element of duty, the relation between the plaintiff and the defendant must be such that it imposes upon the latter a legal obligation to use some degree of care for the protection of the former.\(^{417}\) In the motor vehicle area this duty has been described as an obligation to make the product safe for the use for which it is intended\(^{418}\) or for purposes for which the manufacturer may reasonably expect the vehicle to be employed\(^{419}\). The manufacturer’s duty to exercise reasonable care extends to manufacturing\(^{420}\), designing\(^{421}\), and inspecting\(^{422}\) the vehicle, as well as warning of hazards related to it\(^{423}\). It must be emphasized that a manufacturer’s duty to inspect and test also extends to

\(^{414}\) Id. at § 7.02, at 8.

\(^{415}\) WILLIAM LLOYD PROSSER ET AL., TORTS 131 (5\(^{th}\) ed. 1994).

\(^{416}\) RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 166 (6\(^{th}\) ed. 1995).


\(^{418}\) Sours v. General Motors Co., 7171 F.2d 1511 (6\(^{th}\) Cir. 1983) (applying Ohio law).

\(^{419}\) This is implied in Stammer v. General Motors Corp., 259 N.E. 2d 352 (1970).

\(^{420}\) Necaise v. Chrysler Corp., 335 F.2d 562 (5\(^{th}\) Cir. 1968).

\(^{421}\) Sours v. General Motors Co., 7171 F.2d 1511 (6\(^{th}\) Cir. 1983) (applying Ohio law).

\(^{422}\) King v. Ford Motor Co., 597 F.2d 436 (5\(^{th}\) Cir. 1979) (applying Alabama law).

\(^{423}\) Id.; Schaeffer v. General Motors Corp., 360 N.E. 2d 1062 (1977).
component parts integrated in the vehicle that were manufactured by another company.\textsuperscript{424}

(A) \textbf{STANDARD OF CARE: REASONABLE PERSON STANDARD}

With regard to the execution of these duties, the manufacturer has to use reasonable or ordinary care. As this is a legal standard against which the defendant’s conduct is measured, the test for negligence is objective.\textsuperscript{425} Accordingly, it neither matters whether he intended to exercise due care nor whether he did the best he could, only whether defendant’s behavior was that of a hypothetical reasonably prudent person placed in the same circumstances is decisive.\textsuperscript{426} In a particular case the answer to that question depends on how the trier of fact (jury) thinks a reasonable person (a reasonable motor vehicle manufacturer) would have acted.\textsuperscript{427}

(B) \textbf{EFFECT OF CUSTOM}

Although industry custom is admissible as evidence of the standard of care owed, it is never conclusive, as some customs may be found to be negligent themselves.\textsuperscript{428} Thus, the standard of care is not defined by what other manufacturers in


\textsuperscript{427} Ford Motor Co. v. Zahn, 265 F.2d 729 (8th Cir. 1959).

\textsuperscript{428} Rossell v. Volkswagen of America, 709 P.2d 517 (Ariz. 1985), cert. denied, 106 S.Ct. 106 S.Ct. 1577, 106 S.Ct. 1577 (1986): The defendant alleged that the “reasonable man” standard was inapplicable in a negligent design case and as product manufacturers are held to an expert’s standard of care, the appropriate standard should be custom in the profession. The Arizona Supreme Court rejected this argument and quoted from Judge Learned Hand in The T.J. Hooper, 60 F.2d 737,740 (2d Cir. 1932): “What usually is done may be evidence of what ought to be done but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.”
the motor vehicle industry are doing, but the test remains what a reasonable manufacturer would have done.\footnote{See, in general, Texas & Pacific Ry. v. Behymer, 189 U.S. 468 (1903).}

\section*{(II.) Breach of Duty to Exercise Due Care}

After it is shown that the defendant (manufacturer) owed a duty of care to the plaintiff (consumer), it must then be shown that the former breached this duty by exposing others to an unreasonable risk of harm. A test for determining whether a risk of harm is unreasonable was provided by Judge Learned Hand in \textit{United States v. Carrol Towing Co.}\footnote{159 F.2d 169 (1947).} In using three algebraic variables he balanced the risks of the defendant's conduct against the benefits (utility) of running the risk and reached the result that where the risk outweighs its utility an unreasonable risk, and thus negligence, is created. The three variables are: (1) the probability that the injury will occur (P), (2) the gravity of the injury (L), and (3) the burden of taking adequate precautions in order to avoid the injury (B). A risk will be deemed unreasonable and liability will be established only if B is less than P multiplied by L. Thus, if B is less than P x L there is no negligence according to the Hand Formula.\footnote{\textit{Id}.} For example, if the gas tanks of a specific automobile model are likely to explode because the manufacturer decided to use thin sealing rings instead of available thick ones for the sealing of the gas tanks. The probability of the occurrence of the injury is high, as is the gravity of the injury (serious burns), while the burden of taking precautions is low, because thicker sealing rings were available at slightly increased costs. Here, the manufacturer has created an unreasonable risk. Therefore, he acted negligently, and in the case of an injury he would be liable.
(III.) Causation

The defendant's negligent behavior must be the cause of plaintiff's injuries in order to impose liability. This involves two determinations: (1) whether the defendant's conduct was the cause in fact of the injuries, and (2) whether it was the proximate cause thereof. The first determination is made by the so-called "but for test", which is comparable to the Aequivalenztheorie in German product liability law.\textsuperscript{432} If the plaintiff would not have been injured but for the defendant's act or omission, the act is a cause in fact of the injury.\textsuperscript{433} The second determination is more a policy assessment than an aspect of causation. Like the Adaequanztheorie in German product liability law, proximate cause limits the responsibility of the defendant, because under some circumstances it would be unfair to hold him responsible for all consequences of his wrongful conduct. Therefore, the common law majority\textsuperscript{434} limits his liability to foreseeable circumstances\textsuperscript{435}. As there is a high number of very complex proximate cause issues, a discussion of these issues is omitted and referred to special literature.\textsuperscript{436}

(IV.) Harm

Finally, once a negligent act (or omission) and causation are established, the plaintiff must show that he suffered damages resulting therefrom in order to impose

\textsuperscript{432} See, Chapter I, supra, at 22.

\textsuperscript{433} Chaney v. Smithkline Beckman Corp., 764 F.2d 527 (8th Cir. 1985).


\textsuperscript{435} Under the foreseeability approach, proximate cause questions can be divided into three basic patterns:
1. Unforeseeable manner: A foreseeable result occurs but it happened in an unforeseeable manner;
2. Unforeseeable result: The foreseeable plaintiff has been injured but an unexpected result or type of injury has occurred;
3. Unforeseeable plaintiff: The injured person was not a member of the group of potential victims that was exposed to a foreseeable risk.

\textsuperscript{436} E.g., PROSSER, supra note 415, at 284-343; EPSTEIN, supra note 416, at 491-558.
liability on the defendant. The plaintiff is entitled to recover for compensatory damages, and, if the prerequisites are met, for punitive damages. Compensatory damages comprise all economic losses and expenses such as medical bills, lost wages or business profits, and pain and suffering. Recovery for punitive damages can only be awarded if the defendant has engaged in "reckless conduct".437

If each of these four (i. - iv.) general elements of negligence is fulfilled, the defendant will be held liable, and the plaintiff will be able to recover. However, as we will see in the section dealing with design and information defects, the general negligence standard has slightly changed to the requirement of proving the availability of a reasonable alternative design or information.438

b) Breach of express or implied warranty

The second theory of liability on which the plaintiff can base his action is breach of warranty. This theory, developed from contract law, is governed by the provisions of Article 2 of the Uniform Commercial Code (U.C.C.).439 Warranties are either express440 or implied, and implied warranties can be given in two different forms, merchantability441 and fitness for a particular purpose442. The prerequisites of this theory are: (1) the existence of an express or implied warranty, (2) breach of that warranty, (3) injury, (4) proximate cause between breach of warranty and injury, (5) reliance of plaintiff on warranty and (6) notice requirement.443 If the plaintiff can prove

438 See infra, at pp. 108.
439 MILLER, supra note 412, at § 7.03, at 33.
440 § 2-313 U.C.C.
441 § 2-314 U.C.C.
442 § 2-315 U.C.C.
443 MILLER, supra note 412, at § 7.03, at 36-64.
the fulfillment of these prerequisites, he will successfully sue the defendant manufacturer.

c) STRICT LIABILITY

The concept of strict liability, thus, of liability without fault, was first applied in the product liability context in cases involving food.444 In modern times, strict liability has been adopted in the landmark case Greenman v. Yuba Power Products, Inc.445. The opinion, by Justice Traynor, stated that due to the manufacturer’s ability to anticipate the occurrence of hazards446, to take insurance against the risk of injuries of consumers, and the possibility of spreading the increasing costs through product prices, and because of increased incentives for manufacturers to provide safer products, strict liability in tort, instead of negligence, should govern products liability cases.447

Almost the same position has been adopted by § 402 A of the Restatement (Second) of Torts, a section, which at its creation in 1965, was supported by Greenman only.448 Although § 402 A does not expressly distinguish between manufacturing, design and instructions or warnings defects,449 in contrast to Greenman, its scope of application was intended to be limited to manufacturing defects.450 However, its broad language allowed the courts to interpret this liability standard to be applicable, at least

444 According to Suvada v. White Motor Co., 210 N.E. 2d 182 (1965), Dean Prosser traced the theory of strict liability back to the year 1431.
446 Especially motor vehicle manufacturers can anticipate that many (serious) accidents will occur in which their vehicles are involved because this is common knowledge.
449 § 402 A only speaks of a “[p]roduct in a defective condition unreasonably dangerous...”.
in its wording, to all kinds of product defects\textsuperscript{451} which were then categorized as manufacturing, design, and instructions or warnings defects.\textsuperscript{452} The controversy arising out of the fact that the Third Restatement limits strict liability to be applicable to manufacturing defects will only be discussed in connection with design defects.\textsuperscript{453}

\textbf{d) Comparison to German Product Liability Law}

With regard to the different theories of liability, U.S. and German product liability laws are very similar. The law in both countries recognizes a negligence and a strict liability theory.\textsuperscript{454} However, in contrast to the United States, a cause of action based on breach of warranty is not recognized in German product liability law; this kind of theory can only be brought under contract law (§§ 459 ff. BGB).

\textbf{C. Manufacturing and Design Defects}

Today, product defects are divided into three different categories: manufacturing defects\textsuperscript{455}, design defects\textsuperscript{456}, and instructions or warnings defects\textsuperscript{457}. In order for the plaintiff to recover in an automotive product liability case, he must show by a preponderance of the evidence that the motor vehicle contained a defect at the time of

\textsuperscript{451} Tdoke, \textit{supra} note 448, at 1191; it has to be stressed that the liability standard applied by the courts to determine design- or information defects may sometimes have been hidden under the label of “strict liability”, however, in reality, most of the courts used a negligence standard to determine these kinds of defects, \textit{see infra} at pp. 107.

\textsuperscript{452} James A. Henderson, Jr. & Aaron D. Twerski, \textit{A Proposed Revision of Section 402 A of the Restatement (Second) of Torts}, 77 Cornell L. Rev. 1512,1515 (1992); Tdoke, \textit{supra} note 448, at 1191.

\textsuperscript{453} \textit{See}, design defects, \textit{infra} at pp. 108,

\textsuperscript{454} In German products liability law, the negligence theory is based upon §§ 823 sec. I and II BGB and the strict liability theory is to be found in § 1 sec. I of the Produkthaftungsgesetz.


\textsuperscript{456} General Motors Corp. v. Edwards, 482 So. 2d 1176 (Ala. 1985).

\textsuperscript{457} LaCoste v. Ford Motor Co., 322 N.W. 2d 898 (Iowa Ct. App. 1982).
the accident. In order to prove the defect, the plaintiff can either provide direct or circumstantial evidence. In addition to this burden of proof, the plaintiff also has the burden to provide evidence that the vehicle was defective when it left the control of the defendant.

1. Manufacturing defects

A product contains a manufacturing defect when it departs from the manufacturer's own design specifications for that product. Typically, manufacturing defects appear in products that are incorrectly assembled, physically flawed, or damaged.

a) Standard of Liability

The governing standard of liability for manufacturing defects is one of strict liability. This is recognized by common law, both Restatements of Torts, and legal

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458 Hurt v. General Motors Corp., 553 F.2d 1181 (8th Cir. 1977) (applying Missouri law); Segler v. Ford Motor Co., 438 So. 2d 297 (Ala. 1983).

459 Direct evidence in automotive product liability cases is usually presented in the form of expert testimony, see, Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 360 N.W. 2d 2 (Wis. 1984).


463 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, P.F.D., § 2, cmt. c, at 17. For example: Manufacturer’s employee is inattentive and installs screws retaining the left front wheel of a passenger car not appropriately. After plaintiff used the car for one week, the wheel falls off while he is driving. Plaintiff can sue the manufacturer (and the employee) in strict liability because there was a manufacturing defect.


465 For the Second Restatement, see § 402 A; for the Third Restatement, see § 2 (a): “[A product:] 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.”
As already stated in Greenman, one of the rationales for the application of such a standard is that it is not only a deterrent for manufacturers to create unnecessary risks but also a safety incentive. Another principle reason why strict liability was introduced is the development of more complex products (e.g. automobiles) in which a multiplicity of hazards could be incorporated that are often hidden from physical view. Closely related to this aspect is the fact that product sellers are generally better able to identify the product risks and that consumers are basically unable to protect themselves from defective products. At the time the consumer discovers product risks it might be too late, and the harmful event might already have occurred. Then, the plaintiff would have difficulty in discovering and proving negligence on the part of the defendant. Moreover, since the defendant has superior knowledge of the product related risks and is generally in a better financial position than the plaintiff, it is easier for him to obtain adequate insurance. In addition, strict liability is based on the grounds that, unlike plaintiffs, the manufacturer is able to spread the risk or loss he suffers through increased product prices.

b) Run-away products

As we have seen under German product liability law, due to a lack of fault, the motor vehicle manufacturer is not liable under the negligence standard of § 823 sec. I BGB for manufacturing defects that are inevitable despite all precautions ("run-away products"). In contrast, such an exemption from liability cannot be made under U.S.

470 Id.
472 Id.
product liability law, as the exclusive standard for manufacturing defects is strict liability. Thus, the non-existence of fault is irrelevant.

2. Design defects

A) Definition and Standard to Determine Design Defectiveness

The definition of design defectiveness depends on how the liability standard for design defects is determined. This, however, is highly controversial.

(I.) Former Common Law Approach and § 402 A of the Second Restatement

In Greenman and § 402 A of the Second Restatement a strict liability standard was adopted for all kinds of product defects without distinguishing between the three categories of product defects. In response to this failure, courts have developed a variety of methods to determine whether a product is defectively designed. Some courts apply, in varying detail, a form of risk-utility or risk-benefit analysis. Under this analysis, the risks and benefits of the product itself or of the product compared to an alternative version are evaluated. If this evaluation shows that the overall risk of injury could have been significantly reduced or avoided by the use of an alternative at reasonable cost without significant loss of utility, the product is considered to be defective.

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476 Tdoke, supra note 448, at 1192.
connection with the application of this test, the courts\textsuperscript{477} often use seven risk-utility factors, which have been developed by Professor Wade (the “seven Wade factors”).\textsuperscript{478}

Other courts\textsuperscript{479} use a “consumer expectations test” to define design defectiveness of a product. Applying this analysis, a product is defective in design if, at the time of sale, it is in a condition that could not have been reasonably expected by the consumer.\textsuperscript{480} Again, different courts\textsuperscript{481} have chosen to adopt an approach introduced by the California Supreme Court in Barker v. Lull Engineering Co.\textsuperscript{482} under which both above mentioned methods are applied in order to determine the defectiveness of a product. Thus, according to this so-called “two-prong” test\textsuperscript{483}, a product is defective either if it fails to meet the requirements of a risk-utility analysis, or if it does not satisfy the consumer expectations.\textsuperscript{484} Still other courts\textsuperscript{485} consider a product to be defective in


\textsuperscript{478} John W. Wade, \textit{On the Nature of Strict Tort Liability for Products}, 44 Miss. L. J. 825,837-838 (1973); the “seven Wade factors” are:

1. The usefulness and desirability of the product — its utility to the user and to the public as a whole.

2. The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury.

3. The availability of a substitute product which would meet the same need and not be unsafe.

4. The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

5. The user’s ability to avoid danger by the exercise of care in the use of the product.

6. The user’s anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.

7. The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

\textsuperscript{479} Lester v. Magic Chef, 641 P.2d 353,357 (Kan. 1982): The Supreme Court of Kansas adopted the consumer expectations test to define the term “unreasonably dangerous” in § 402 A, cmt i (Restatement (Second) of Torts); Rahmig v. Mosley Machinery Co., 412 N.W. 2d 56 (Neb. 1987).

\textsuperscript{480} Tdoke, \textit{supra} note 448, at 1193.


\textsuperscript{483} Chun, \textit{supra} note 474, at 1655 (stating that California and Alaska apply the two-prong test).

\textsuperscript{484} Barker v. Lull Engineering Co., 573 P.2d 443,454 (Cal. 1978).
design if a reasonable product manufacturer who is aware of the product’s risk would not have decided to place it on the market.\textsuperscript{486}

\textbf{(II.) TODAY’S COMMON LAW AND LEGISLATIVE APPROACH AND \textsection 2 (B) OF THE THIRD RESTATEMENT}

Today’s majority opinion\textsuperscript{487} considers a product to be defective in design when the risk of harm posed by the product could have been avoided, or at least reduced, through a reasonable, safer alternative design whose omission rendered the product not reasonably safe. However, this approach is subject to high criticism and has been rejected by a minority of courts\textsuperscript{488} and numerous scholars\textsuperscript{489}. Criticisms have been based on:  

\textsuperscript{485} Nichols v. Union Underwear Co., 602 S.W. 2d 429 (Ky. 1980); Church v. Wesson, 385 S.E. 2d 393 (W. Va. 1989).

\textsuperscript{486} Nichols v. Union Underwear Co., 602 S.W. 2d 429,433 (Ky. 1980).


\textsuperscript{488} Potter v. Chicago Pneumatic Tool Co., 241 Conn. 199,219 (Conn. 1997); Binakonsky v. Ford Motor Co., 133 F.3d 281,285 (4th Cir. 1998) (adhering to the standard to determine design defectiveness established under § 402 A of the Restatement (Second) of Torts).

on the following seven arguments. (1) The approach is neither supported by current law and policy\textsuperscript{490}. (2) Its risk-utility balancing does not constitute a narrow test for determining design defectiveness\textsuperscript{491}. (3) The approach is, to the detriment of the consumer, too manufacturer-friendly in placing an undue burden on plaintiffs\textsuperscript{492}, and (4) must be regarded as a political statement\textsuperscript{493}. (5) Finally, it missed its goal of clarifying product liability law\textsuperscript{494}.

**(iii.) The criticism on today's majority approach**

**(a) Argument of critics that the reasonable alternative design requirement is not supported by current law and counter-arguments**

The first argument brought against the new approach, which is adopted in the Restatement (Third) of Torts as black letter rule in § 2 (b), is that it is based on an inaccurate legal analysis so that it does not reflect the current law and policy\textsuperscript{495}.

In particular, it is contended that only three jurisdictions support the alternative design requirement of § 2 (b).\textsuperscript{496} The jurisdictions that apply this standard as legislation


\textsuperscript{491} Owen, supra note 489, at 241.

\textsuperscript{492} Potter v. Chicago Pneumatic Tool Co., 241 Conn. 199,217 (Conn. 1997); Vandall, supra note 490, at 269,279.

\textsuperscript{493} Price, supra note 489, at 1355; Vandall, supra note 490, at 279.

\textsuperscript{494} Vandall, supra note 490, at 278.

\textsuperscript{495} Potter v. Chicago Pneumatic Tool Co., 241 Conn. 199,219 (Conn. 1997); Vandall, supra note 490, at 261.
Illinois, Louisiana, Mississippi, New Jersey, Ohio, and Texas)⁴⁹⁷ should not be taken into consideration, because, due to the fact that the founders of the American Law Institute, which issues the Restatements had an "aversion against legislation", this would violate basic principles of the A.L.I.⁴⁹⁸. Unlike § 2 (b), its predecessor, § 402 A, is the provision that should be considered as accurately reflecting the law⁴⁹⁹, because it is based on over 500 years of tort cases that have been "put into the paper shredder"⁵⁰⁰ by the new approach.

- Counter Arguments

In this line of arguments, however, several factors are neglected. First, the Reporter's notes expressly cite to the jurisdictions that have adopted the reasonable alternative design requirement through legislation.⁵⁰¹ This shows that the Reporters (and the A.L.I.) agree to take them into account. Only if they had not done so would there be a basis for criticism, because in that case they would have neglected an important source of law. Moreover, the critics overlook the fact that the personnel composition of the A.L.I. has changed compared to former times so that, even if the founders of the A.L.I. had an antipathy against legislation, there is now room for a different opinion. In the same way the contention that the reasonable alternative design standard has only been adopted by three jurisdictions, is wrong. In total, six jurisdictions have codified this

⁴⁹⁶ Vargo, supra note 489, at 556; Vandall, supra note 490, at 274.
⁵⁰⁰ Vandall, supra note 490, at 265.
⁵⁰¹ RESTATEMENT (THIRD) OF TORTS, Products Liability, P.F.D., Reporters notes to § 2, cmt. d, I.(citing Mississippi, New Jersey and Texas), cmt. d, II (citing Ohio).
standard and 13 have adopted it as their case law. Thus it is out of question that the new Restatement is not supported by current law.

In response to the argument that the approach chosen under § 402 A has been based on 500 years of case law and still reflects the current law, it should be noted that in fact this section was only based on one case, *Greenman v. Yuba Power Products, Inc.* Furthermore the critic’s argument discloses that they neglect the factor that law, especially the common law, is exposed to a high dynamism. This means that law can change in a short period of time, and what might have been “true” in former times may now have become questionable.

**(B) CRITIC’S ARGUMENT THAT THE NEW APPROACH DOES NOT LEAVE ROOM FOR A STRICT LIABILITY APPROACH**

Another argument on which the critics of the new approach focus is that it does not leave room for a strict liability standard for design defects, although it would be available. In not doing so it has to be considered as giving a misleading trend in a wrong direction, i.e., through creating a disincentive for manufacturers to produce

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502 Illinois, Louisiana, Mississippi, New Jersey, Ohio and Texas, see, P.F.D, Reporter’s note to § 2, cmt. d I., II.


504 Tooke, *supra* note 448, at 1197.

505 377 P.2d 897 (Cal. 1962).

506 Rabin, *supra* note 409, at 204.


508 *Id.*
safer products.\textsuperscript{509} However, the severity of this argument can be qualified by considering the following aspects. First, it can be said that the new approach, in establishing a negligence liability standard, does not in fact create a totally different standard compared to that which courts formally applied under the approach contained in § 402 A. Although some courts used to cite the term “strict liability”, they carried out a fault-based liability scrutiny, which was hidden behind the label of “strict liability”.\textsuperscript{510} Thus, the criticized change appears to be “more semantic than real”.\textsuperscript{511} Finally, the existence of strict liability can also be viewed as a disincentive and overdeterrence for manufacturers to create new and better products by using new technologies.\textsuperscript{512}

\textbf{(C) DISPROVING OF THE ARGUMENT THAT THE REASONABLE ALTERNATIVE DESIGN APPROACH IS A “GRAB-BAG” APPROACH}

It has been held that the reasonable alternative design requirement does not constitute a proper balancing test for design defect cases in that it uses a “grab-bag” approach, which throws almost everything into the balance.\textsuperscript{513} Indeed, it is true that the comment to § 2 (b),\textsuperscript{514} as well as the courts approving this section,\textsuperscript{515} mention several factors that can be relevant in determining whether the omission of a reasonable alternative rendered a product not reasonably safe. But, in order to make a decision on a case-by-case basis possible, it is necessary that a variety of factors are available to carry out the above named determination. This makes the law flexible and allows its application not merely to a few, but to a broad range of different cases that are based on

\textsuperscript{509} \textit{Id.} at 1274.

\textsuperscript{510} Chun, \textit{supra} note 474, at 1670 and note 122.

\textsuperscript{511} Banks v. ICI Americas, Inc., 450 S.E. 2d 671,674 note 3 (Ga. 1994); Chun, \textit{supra} note 474, at 1670.

\textsuperscript{512} Phillips, \textit{supra} note 489, at 1274.

\textsuperscript{513} Owen, \textit{supra} note 489, at 241.

\textsuperscript{514} \textsc{Restatement (Third) of Torts: Products Liability}, P.F.D., § 2, cmt. f.

\textsuperscript{515} \textit{See, e.g.}, Banks v. ICI Americas, Inc., 450 S.E. 2d 671,675 and note 6 (Ga. 1994).
different fact patterns. Thus, instead of condemning the availability of various factors, one should appreciate its existence.

(d) Disproving of the Argument that the New Approach Neglects the Consumer Expectations Test

Some scholars lament that the reasonable alternative design requirement does not give an adequate position to, or even neglects, the role of consumer expectations. However, although it is correct that consumer expectations alone are no longer considered to be the determinative factor in showing design defectiveness, this result is justified because the drafters of the new Restatement and the courts share the same view that the reasonable alternative design requirement is the preferable standard. Furthermore, the importance of consumer expectations is not neglected within the third Restatement, because it considers them to “constitute an important factor in determining the necessity for” and “the adequacy of” an alternative design.

- Comparison to German Product Liability Law

In this context it is interesting to compare the standard of determination for design defects chosen in U.S. law to the one applied in German law. We have seen that the common law majority in the United States uses a risk-utility test in which the reasonable alternative design requirement plays an important role. However, a consumer expectations test supplements this approach. German traditional tort law and the Product Liability Act, on the other hand, use a consumer expectations test as a starting point in

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517 Restatement (Third) of Torts: Products Liability, P.F.D., § 2, cmt. g.

518 Restatement (Third) of Torts: Products Liability, P.F.D., § 2, cmt. g.
Nevertheless, at least under traditional tort law, a risk-utility balancing test is used in addition to that. Thus, German and U.S. law only differ in that they use another sequence in their determination of design defects. The result of this determination, however, will be similar since the law in both countries basically applies the same factors.

(E) Argument that the New Restatement is Too Manufacturer-Friendly - To the Detriment of the Consumer

An important argument against the new standard for design defects focuses on the aspect that it protects the potential defendants (manufacturers) and, at the same time ignores, or even damages, the interests of the plaintiff (consumer). In particular, it is argued that through the requirement of showing a reasonable alternative design, which can be called "radical' negligence, the plaintiff has to jump higher hurdles than in the case of strict liability or traditional negligence. This is true, because the plaintiff bears the burden of knowledge and proof. Of course, one could reply that he could use expert testimony to show the availability of a reasonable alternative design. But it should be considered that obtaining expert testimony in these cases creates enormous costs, a factor which might deter the plaintiff from bringing suit, and which can lead to the elimination of smaller suits. This effect constitutes, in the eyes of the critics, the purpose of the new Restatement. One objection to this is that the plaintiff can make

519 See Chapter I, supra, at 90.
520 Professor Vandall considers §2 (b) as a "wish list from manufacturing America", see, Vandall, supra note 490, at 261.
521 Vandall, supra note 490, at 262.
523 Vandall, supra note 498, at. 1425.
524 Vandall, supra note 490, at 277-278.
525 Vandall, supra note 498, at 1426.
use of § 3 of the Restatement (Third), which provides that, in certain circumstances, he is allowed to provide circumstantial evidence without having the burden of proving the specific nature of the defect. Nevertheless, it must not be neglected that, although this might be a reduction of the plaintiff’s burden, it does not rescue him from his burden of proof. Furthermore, the question has to be raised whether the protection of the manufacturer can be justified under the aspect of fairness. Against the position taken by the majority approach, it can be argued that a motor vehicle manufacturer can take insurance against the risk of injury to consumers through defective products and that he can spread the increased costs by raising his product prices. Although the consumer could insure against bodily harm or damage to his property, he can neither spread these costs, nor is he as financially strong as the manufacturing company. Thus, the latter is able to protect the consumer better than the consumer can. In connection herewith, it is held in support of the majority opinion that a manufacturer might find it difficult, if not impossible, to provide himself with adequate insurance. Assuming this contention is true, this is a risk of which a manufacturer has to think before entering in business. If he is willing to take the profits of making business, then he should also carry the losses. If he is not willing to do that, he should quit. Thus, the mentioned counter argument has to

526 § 3 Circumstantial Evidence Supporting Inference of Product Defect
It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff: (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.


529 Restatement (Third) of Torts: Products Liability, Tent. Draft No. 1, 1994, § 2, cmt. a, at 13; see, Gray, supra note 489, at 1134 and note 34.
be rejected, so that under the aspect of fairness the direction chosen by the majority of courts, legislators, scholars and the Third Restatement can not be approved.

- COMMENT: SOLVING THE PROBLEM THROUGH PRESUMPTION OF AVAILABILITY OF AN ALTERNATIVE DESIGN

It has been stressed that the majority approach does not provide adequate protection for the consumer. Although the adoption of strict liability, not only for manufacturing but also for design and warnings defects, could be considered as one possibility for solving the problem, it would be too radical from the point of view of the manufacturer. Therefore, I favor the following proposal. Similar to German law,\textsuperscript{530} a balanced compromise could be found through the introduction of a presumption that a reasonable alternative design was available for the manufacturer at the time of sale. Then, the plaintiff would be relieved from his burden of proof, and he would no longer be deterred from bringing a products liability action, giving his suit a better chance of succeeding. Now, the manufacturer would have to prove that a reasonable alternative was not available at the time of sale, a result which is fair with regard to the fact that he is the one who produces the product and the danger, not the “innocent” consumer. The question that arises, however, is how can a defendant prove that a reasonable alternative design did not exist? Here, the comment to the new Restatement provides one answer. The defendant has to show that his product conforms either to industry custom, or that it “reflects the safest and most advanced technology” that was available at the time or that it “reflects technology at the cutting edge of scientific knowledge.”\textsuperscript{531} Moreover, the defendant would meet this burden of proof if he could show that the costs of the alternative design are unreasonably higher than its benefits.

\textsuperscript{530} See, Chapter I, \textit{supra}, at pp. 41.

\textsuperscript{531} \textit{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY}, P.F.D., § 2, cmt. d.
(F) ARGUMENT THAT THE REASONABLE ALTERNATIVE DESIGN APPROACH OF THE THIRD RESTATEMENT IS A POLITICAL STATEMENT

Some scholars consider the new Restatement as a political statement. They base their statement on the fact that the writings of the last twenty years of the Reporters of the Restatement (Third) of Torts, Professors Henderson and Twerski, disclose their affection for conservatism, negligence, and pro-manufacturer attitude. Against this, one may object that the so-called “Habush-Amendment” has been introduced. It provides that the plaintiff does not always need to prove the availability of a reasonable alternative design. When a product possesses only low social utility but a high risk of danger, this requirement can be dropped. However, it has to be outlined that only the comment to § 2 (b) refers to this amendment, whereas the black letter text of § 2 (b) does not take any position thereto. In addition, the cases dealing with products with low social utility and high danger will neither represent the majority in product liability cases in general, nor will one find them in the motor vehicle area, because automobiles and motorcycles have to be considered as highly socially valuable for the reasons set forth above. Thus, the advantageous effect for the plaintiff resulting from the Habush-Amendment will generally not find application in the motor vehicle area.

(G) CONCLUSION

It has been shown that the reasonable alternative design requirement established in the majority of jurisdictions and contained in the Restatement (Third) of Torts is the prevailing approach to determining design defectiveness, and that almost every

532 Phillips, supra note 489, at 1265; Price, supra note 489, at 1277; Vandall, supra note 490, at 279.
533 Phillips, supra note 489, at 1265.
534 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, P.F.D., §2, cmt. e is called the “Habush Amendment” because one of the advisers, Robert Habush, a plaintiff’s lawyer, proposed this amendment, see, Henderson & Twerski, supra note 102, at 587.
argument brought against it can be objected to. Critics allege that the weakest point of this approach is its favoring of manufacturers, which goes to the detriment of the consumer. If this were true, we could find contrary tendencies in the development of product liability law in Germany (and in the whole European Union) compared to the United States, because the laws in the Member states of the European Union are characterized by a growing trend towards consumer protection. However, it seems that the critics of the reasonable design requirement overlook one important fact. In the overwhelming majority of cases the plaintiff voluntarily offers evidence on this issue. Thus, it seems that this evidence, as a practical matter, is already part of plaintiff’s case. In presenting this kind of evidence, plaintiffs presumably expect to increase the likelihood of winning the case. Thus, the argument presented by the critics seems to be of more theoretical than practical importance. Nevertheless, the introduction of evidence on a reasonable alternative design still places a high burden on plaintiffs (e.g. increased financial expenses for expert witnesses). Therefore, a more equalized balance of power between the plaintiff and the motor vehicle manufacturer could be established by adopting the proposal of introducing a presumption of availability of an alternative design.

D. SPECIAL ISSUES PERTAINING TO AUTOMOBILE DESIGN LITIGATION

1. CRASHWORTHINESS: DEFINITION AND DEVELOPMENT OF THE CRASHWORTHINESS DOCTRINE

In connection with design defects the problem commonly referred to as the issue of "crashworthiness", "enhanced injury", or "second collision" has been raised since the mid-1960s. The doctrine of crashworthiness, which most frequently arises in automobile accident cases, deals with the question whether a motor vehicle manufacturer can be held liable for plaintiff's enhanced injuries in the following situation. Initially, a traffic accident caused by circumstances other than the vehicle's defect (e.g. through plaintiff's or another driver's negligence) occurred, and the plaintiff suffered some injuries (e.g. a broken arm) as a result of this accident. However, the plaintiff alleges that his initial injuries were enhanced (e.g. he was burnt) by a defect in the vehicle (e.g. a faulty designed gas tank), in particular, by the vehicle's failure to reasonably protect its occupants in the case of an accident.

In 1966, in *Evans v. General Motors Corp.*, the Seventh Circuit denied this question. In this case the plaintiff's decedent was killed when his Chevrolet station wagon was involved in a side collision. The plaintiff alleged that the car's design was defective in that it lacked side rails, which would protect occupants in a side impact collision. The court held that an automobile manufacturer does not have the duty to construct a crashworthy vehicle. In its reasoning the court argued that a

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537 The courts consider the three mentioned terms to be interchangeable, see, e.g., Sumnicht v. Toyota Motor Sales, U.S.A., Inc. 360 N.W. 2d 2 (1984); see also, MILLER, supra note 412, § 7.05[4], at 131-133.

538 Volkswagen of Am., Inc. v. Young, 321 A.2d 737,739-745 (Md. 1974); Binakonsky v. Ford Motor Co., 133 F.3d 281,284 (4th Cir. 1998); Miller, supra note 412, § 7.05 [4], at 133-134.

539 359 F.2d 822 (7th Cir. 1966) (applying Indiana law), cert. denied, 385 U.S. 836 (1066); *Evans* was overruled later in Huff v. White Motor Co., 565 F.2d 104,110 (7th Cir. 1977).

540 Evans v. General Motors Corp., 359 F.2d 822,824-825 (7th Cir. 1966).
manufacturer's duty only extends to build an automobile which is safe for its intended purposes, and that such purposes do not comprise collisions with other vehicles, although they might be foreseeable for the manufacturer.\textsuperscript{541}

However, in 1968, the Court of Appeals for the Eight Circuit took the opposite point of view in \textit{Larsen v. General Motors Corp}\textsuperscript{542}. In this case the plaintiff collided head-on with another vehicle while driving his 1963 Chevrolet Corvair and contended that the design and placement of the steering column was defective, leading to aggravated injuries. The court first held that automobile manufacturers can anticipate the risk and the occurrence of collisions of vehicles, because it is common knowledge that they are driven on crowded roads, in high-speed situations, and in any weather condition. Based on this finding, the court then concluded that a manufacturer has the duty to design a vehicle so as to withstand at least some highway crashes and to minimize foreseeable harm resulting out of such crashes. Thus, the court established the manufacturer's duty to build crashworthy motor vehicles.

Today, the controversy on the issue in question is settled, and the overwhelming majority of jurisdictions approves the position taken in \textit{Larsen}, holding a motor vehicle manufacturer potentially liable for injuries aggravated because of the defective design of the vehicle if it was not reasonably crashworthy.\textsuperscript{543} However, the manufacturer's duty to

\textsuperscript{541} \textit{Id.} at 825.

\textsuperscript{542} 391 F.2d 495 (8th Cir. 1968) (applying Minnesota law).

\textsuperscript{543} \textit{See}, e.g., Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974): The manufacturer has been held liable because of the defective design of a fuel tank catching fire in a rear-end collision; Horn v. General Motors Corp., 17 Cal. 3d 359 (1976): Liability of manufacturer has been established for the faulty design of a horn cap coming off the steering wheel and exposing sharp prongs aggravating the injuries the driver would have suffered from the initial collision; Daly v. General Motors Corp., 575 P.2d 1162 (1978): Decedent was ejected and killed when the door of his Opel opened in a collision with a metal divider fence; the plaintiff contended that the vehicle was not crash-worthy because the door latch was defectively designed; Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980) (applying New Jersey law): Plaintiff (a policeman) contended that the door of the 1974 Dodge Monaco police car was defectively designed because it was not strong enough to resist foreseeable side-impact collisions (here: a collision with a steel pole); the court held that Chrysler had a duty to protect vehicle occupants against harm resulting from such automobile accidents; Camacho v. Honda Motor Co., 741 P.2d 1240 (Colo. 1987), cert. denied, 485 U.S. 901 (1988) : A motorcycle may be defective because it lacks crash bars protecting
build crashworthy vehicles also has limits, because he cannot be required to construct automobiles and motorcycles that are crash-proof or accident-proof orthogonal or that have the crash-resistance of an M-2 army tank.

A) ISSUES ARISING IN CONNECTION WITH THE CRASHWORTHINESS DOCTRINE

(i.) DETERMINATION OF DEFECT AND OF WHAT HARM WOULD HAVE OCCURRED IN ITS ABSENCE

The plaintiff, who alleges in a crashworthiness case that the motor vehicle should have been designed more safely in order to avoid enhanced injuries, must establish that a reasonable alternative design could have been adopted, which not only would have reduced the plaintiff's harm but also increased the overall safety of the vehicle. Moreover, the plaintiff must show that the defect was an essential factor in increasing his damage beyond the harm that would have occurred as result of the initial collision. Thus, it has to be determined what portion of the harm occurred as a consequence of the collision (in absence of the defect) and which portion was caused by the vehicle defect. This is important and necessary to apportion liability between the one responsible for the initial collision on the one hand and the vehicle manufacturer on the other hand. If this apportionment can be proven and accomplished, the latter will usually not be held liable for the entire damage but only for that portion of the harm

the driver's legs; for an exhaustive review and listing of the cases which follow Larsen, see, Barry Levenstam & Daryl J. Lapp, Plaintiff's Burden Of Proving Enhanced Injury In Crashworthiness Cases: A Clash Worthy of Analysis, 38 DePaul L. Rev. 55,61 note 33 (1988).


545 Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976), applying Nebraska law, (Bright, J., dissenting).

546 See, e.g., General Motors Corp. v. Edwards, 482 So. 2d 1176,1188 (Ala. 1985); Miller v. Todd, 551 N.E. 2d 1139,1143 (Ind. 1990); Hillrichs v. Avco Corp., 478 N.W. 2d 70,75 (Iowa 1991).

547 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, P.F.D., § 16, cmt b, at 291-292.
which had been caused by the vehicle defect (divisible injury).\textsuperscript{548} The manufacturer, then, is jointly and severally liable with the other party who is responsible for causing the other part of the damage.\textsuperscript{549} As to the provision of evidence for the apportionment of injuries and responsibility, courts must rely on expert testimony (e.g. engineers or medical doctors) in order to obtain a result on this difficult issue.\textsuperscript{550}

\textbf{(II.) EXTENT OF MANUFACTURER’S LIABILITY IF THERE IS NO PROOF FOR THE APPORTIONMENT OF HARM}

A problem arises in cases in which the injuries are indivisible, when it cannot be proven which part of the damage occurred because of the initial collision and which part was caused by the vehicle defect.

\textbf{(A) COMMON LAW APPROACH}

Between the courts there is a split of authority with regard to this issue. The majority of courts\textsuperscript{551} hold that in such a case the manufacturer is liable for the entire harm suffered by the plaintiff from both the defect as well as the initial collision. Thus, the burden of proving the divisibility of the injury shifts from the plaintiff to the defendant, who will be liable for all the harm unless he can show an apportionment of

\textsuperscript{548} Larsen v. General Motors Corp., 391 F.2d 495,503 (8th Cir. 1968) (applying Minnesota law); Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978); \textsc{Restatement (Third) of Torts: Products Liability}, P.F.D., § 16 (b).


\textsuperscript{550} Hillrichs v. Avco Corp., 478 N.W. 2d 70 (Iowa 1991); Reed v. Chrysler Corp., 494 N.W. 2d 224 (Iowa 1992).

the damages. In this situation the manufacturer will again be jointly and severally liable with the other party who caused the harm, however, the manufacturer will generally be financially stronger than the other party (e.g. an individual) and can therefore be considered as the “deepest pocket”. Consequently, the plaintiff will be well advised to try hard to fulfill every requirement necessary in order to succeed in his suit against this defendant.

A minority of courts, however, argue that the plaintiff must prove the extent of the increased harm, which means that he has to show that the initial collision-related injuries can be distinguished from the enhanced injuries, if this is impossible he will not be able to recover.

(B) Restatement approach

The Restatement (Second) of Torts addresses the issue of apportionment of damages in enhanced injury cases in its § 433 B (2). This section provides that among two tortfeasors, the first is the one causing the initial collision, the second one is the manufacturer who is responsible for the vehicle defect, the one bearing the burden of proof for this apportionment is he who claims that the harm is apportionable. Thus, the motor vehicle manufacturer who seeks to limit its liability to the harm caused by the defect by claiming that plaintiff’s damage is divisible would bear the burden of proof.

A provision similar to § 433 B (2) of the Second Restatement can be found in § 16 (c) of the Restatement (Third) of Torts. This section reflects the view of the

553 For the minority approach to which is often referred to as the “Huddell-approach”, see, e.g., Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976) (applying New Jersey law); Duran v. General Motors Corp., 688 P.2d 779 (N.M. Ct. App. 1983); Sumner v. General Motors Corp., 538 N.W. 2d 112 (Mich Ct. App. 1995).
554 § 16 (b) and (c) of the Restatement (Third) of Torts read:
(b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller’s liability is limited to the increased harm attributable solely to the product defect.
common law majority in that it holds the product seller liable for all of the plaintiff’s harm if his harm is not apportionable. Although, in contrast to its predecessor, (§ 433 B (2)) § 16 (c) does not explicitly shift the burden of proof for the apportionment of damages to the defendant, its effect is practically the same, because the defendant’s only chance to escape liability for the entire harm is to prove the divisibility of the plaintiff’s injuries.\textsuperscript{555} Thus, both Restatements support the position taken by the common law majority.

(c) **COMMENT**

The approaches taken by the common law majority, on the one hand, and the minority of courts on the other hand, constitute two extreme positions. The “Fox-Mitchell approach” (majority view) goes entirely to the detriment of the manufacturer as he is liable for all of plaintiff’s damages, and the “Huddell-approach” (minority position) takes the opposite point of view in not allowing the plaintiff to recover if he cannot prove the apportionment of damages. The question that arises now is which of the two approaches should be approved.

In order to provide an answer to this question the following background has to be considered. In motor vehicle crashworthiness cases we typically have two wrongdoers, first, the one causing the collision, and second, the motor vehicle manufacturer responsible for the defect in the vehicle. Before reaching the issue of apportionment of damages, the plaintiff usually has already proven that the defect was a substantial factor in increasing his harm. Thus, it is clear that the manufacturer was a cause in fact of the harm to the plaintiff. In this situation it would be unjust to allow the

\textsuperscript{555} *Restatement (Third) of Torts: Products Liability*, P.F.D., § 16, Reporters’ Note to cmt d, at 300.
manufacturer who has been proved to be a tortfeasor to escape liability just because there was another tortfeasor involved in the harmful event and the circumstances are such that an apportionment of damages is impossible.\textsuperscript{556} Accordingly, the "Huddell-approach" has to be rejected, and the solution provided by the common law majority ("Fox-Mitchell-approach") to be approved.

**B) COMPARISON TO GERMAN PRODUCT LIABILITY LAW**

Under German product liability law two solutions could be provided in order to solve the problem of apportionment of damages in enhanced injury cases. § 830 sec. I, cl. 2 BGB\textsuperscript{557} could be applied directly or by analogy. § 830 sec. I, cl. 2 BGB refers to § 830 sec. I, cl. 1 BGB and provides that each of several parties involved in the tortuous act is liable for the *entire* damage, if it cannot be discovered which party caused the damage. In addition, it is recognized that this section also applies to situations in which the extent of harm caused by each wrongdoer is not provable\textsuperscript{558}. In both cases, the tortfeasors would, like in U.S. product liability law, be jointly and severally liable (§§ 840 sec. I, 421 ff. BGB). However, § 830 BGB is designed for situations in which several persons act deliberately together. This can be concluded from its wording, as § 830 sec., cl.1 speaks of a tortuous act that must have been committed "jointly", § 830 sec. II only applies to "instigators" or "accomplices" in the wrongful act, and § 830 sec. I, cl. 2 finally speaks of "participants" (Beteiligte), a term that in this context describes persons acting deliberately together.\textsuperscript{559} In crashworthiness cases, however, the person

\textsuperscript{556} \textsc{Restatement (Third) of Torts: Products Liability}, § 433 B (2), cmt d.
\textsuperscript{557} § 830 BGB [Accomplices and participants]

(1) If several persons through a jointly committed tortious act have caused damage, each of them is responsible for the damage. The same applies if it cannot be discovered which of several participants has caused the damage through his action.

(2) Instigators and accomplices are in the same position as joint actors.

\textsuperscript{558} BGH NJW 1990,2882; Thomas, supra note 66, § 830 BGB, Rn. 9.

\textsuperscript{559} Thomas, supra note 66, § 830 BGB, Rn. 1.
causing the initial collision and the motor vehicle manufacturer responsible for the vehicle defect do not act deliberately together but have to be considered as independently acting wrongdoers. Thus, § 830 sec. 1, cl. 2 BGB cannot be applied directly to these kind of cases.

Nevertheless, this section could be applied if two prerequisites are fulfilled. First, there must be a gap of statutory regulation with regard to this issue, and second a similar state of interest must exist. Because the issue in question is not explicitly addressed by the German Civil Code, the first prerequisite is fulfilled. With regard to the second requirement, it should be said that § 830 sec. 1, cl. 2 BGB serves the purpose of eliminating the difficulties that the plaintiff has to face in situations where it is either unclear, which person was the cause in fact of the harm, or where it is clear that each participant caused the harm, and only the extent of the damage attributable to the different tortfeasors is not provable. Here, like in U.S. product liability law, it would be unjust to let one of the tortfeasors escape from liability. The same is true in automobile crashworthiness cases where the manufacturer caused at least part of the harm because the vehicle was defective. Thus, a similar state of interest exists, and both prerequisites of an analogous application of § 830 sec. 1, cl. 2 BGB are met. Accordingly, this section can be applied in analogy, which means that in enhanced injury cases where the extent of plaintiff’s injuries cannot be apportioned, the motor vehicle manufacturer is liable for all of plaintiff’s harm. Finally, we can see that German product liability law is in accord with the common law majority view as well as both Restatements’ approaches under United States product liability law.

561 BGHZ 55,86; BGH ZIP 1994,374; THOMAS, supra note 66, § 830 BGB, Rn. 7.
2. **Preemption of State Tort Law by Federal Law and Compliance with Federal Safety Standards**

Closely related to the issue of crashworthiness are two other, very important issues. The first is the issue of preemption of state tort law by federal law, and the second focuses on the question of what effects result from compliance with federal safety standards.

**A) Preemption - Background Information**

Preemption finds its roots in art. VI, cl. 2 of the United States Constitution (Supremacy Clause) and is defined as a "[d]ocument adopted by the United States Supreme Court holding that certain matters are of such national, as opposed to local, character that federal laws preempt or take precedence over state laws." Thus, if there is preemption, neither state common law nor statutory law can be applied to a case. In the motor vehicle product liability context, the issue of preemption arises most frequently in situations where the NHTSA promulgates Federal Motor Vehicle Safety Standards (FMVSS), which it is empowered to do under the traffic Safety Act. One of those standards is FMVSS 208 which requires manufacturers to install occupant restraint systems in their automobiles. The kind of restraint system that has to be

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562 See U.S. Const., art. VI, cl. 2.

563 BLACK'S LAW DICTIONARY, supra note 390, at 1177; see also, Painter's Local Union No. 567 v. Tom Joyce Floors, Inc., 398 P.2d 245,246 (Nev. 1965) (stating that “Preemption rests upon the supremacy clause of the federal constitution, and deprives a state of jurisdiction over matters embraced by a congressional act regardless of whether the state law coincides with, is complementary to, or opposes the federal congressional expression.”).

564 49 C.F.R. § 571.208.

565 There are active and passive occupant restraint systems. A safety system is characterized as “passive” rather than “active” when it does not require any independent action taken by the vehicle occupants to render it effective. Encompassed within the definition of passive occupant restraint systems are, for example, windshield, roof, head restraints, energy absorbing steering columns, and airbags. In opposite to that, active restraint systems comprise door locks and seat belts which have to be fastened manually, see, Higgs v. General Motors Corp., 655 F.Sup. 22,24 (E.D. Tenn. 1985); Kurt B. Chadwell, *Automobile*
installed depends on the year in which the vehicle was manufactured. For passenger cars that have been manufactured on or after September 1, 1989, but before September 1, 1996, for example, it allows manufacturers to choose from three options. The first option is a complete passive restraint system, automatic seat belts with or without airbags. The second option is a passive protection for frontal crashes, for example, automatic shoulder belts or airbags, plus manual lap belts for lateral crashes and rollovers with a seat belt warning system, or as a third option, a manual lap and shoulder belts with a seat belt warning system.\(^\text{566}\) As a practical matter, it is likely that most of the manufacturers will choose to install \(^\text{567}\) automatic seat belts rather than airbags since the latter are more expensive. In such a situation plaintiffs often allege in products liability actions that the manufacturer failed to install an airbag in the vehicle which rendered it defective in design.\(^\text{568}\) The manufacturer, on the other hand, will bring two defenses in order to avoid liability. First, he will argue the inapplicability of state tort law, because the field of occupant restraint systems has already been addressed by federal law (FMVSS 208.) Therefore, the manufacturer will argue that state law is preempted under the Supremacy Clause. Second, he will contend that he complied with FMVSS 208 since he chose to install one of the safety features (automatic seat belts) required under this standard. He will further argue that, as a result of such compliance, he should be immunized from tort liability under state law.\(^\text{569}\)

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\(^{\text{567}}\) 49 C.F.R. § 571.208, s 4.1.4; see also, Irving v. Mazda Motor Corp., 136 F.3d 764 (11th Cir. 1998).

\(^{\text{568}}\) Chadwell, supra note 565, at 150.


\(^{\text{569}}\) See, e.g., Doyle v. Volkswagenwerk, A.G., 481 S.E.2d 518,520 (Ga. 1997).
B) Difference between the "preemption" and "compliance"

ARGUMENT

Although the manufacturer's arguments related to preemption and compliance seem to be similar, a sharp distinction must be drawn between the two.

(I.) Preemption

The key factor to determine whether state tort law is preempted by federal law is the intent of Congress.\(^{570}\) In other words, the decisive factor is whether Congress, by enacting a statute, intended to preempt state law or not. In order to make this determination, courts must consider the language, history, structure, and purpose of the statute.\(^{571}\) Thus, courts deciding on this issue have to make these findings by exclusively taking into consideration federal law.\(^{572}\) If the court comes to the conclusion that Congress intended state law to be superseded, it is not applicable, and the defendant would escape liability. If the court reaches the opposite result, state courts will be able to decide on the further issues of the case.

(II.) Compliance

The question of which consequences result from compliance with federal safety standards arises only if the court comes to the conclusion that state law is not preempted. The answer to this question depends on what the law of the specific state provides with regard to this issue.\(^{573}\) As we will see in the further discussion, the majority of jurisdictions today holds that compliance with federal safety regulations is


\(^{572}\) Restatement (Third) of Torts: Products Liability, P.F.D., § 4, cmt e, at 141.

\(^{573}\) Restatement (Third) of Torts: Products Liability, P.F.D., § 4, cmt e, at 141.
relevant and admissible, but not controlling, evidence of defendant’s exercise of due care and product defectiveness.\textsuperscript{574}

Consequently, it can be concluded that the question of preemption is determined by the courts as a matter of federal law, whereas the issue of compliance is to be decided as a matter of state law. Moreover, the two doctrines can be distinguished with regard to their consequences. While preemption of state law immunizes the defendant from state tort liability, this is not necessarily the case where he complied with federal safety regulations.

\textbf{c) \textit{Recent development and changes in the preemption doctrine}}

\textbf{(I.) Three categories of preemption: Express-, conflict-, and occupation of the field preemption}

Before analyzing the court decisions regarding the preemption doctrine in the context of motor vehicles, it is important to keep in mind that the United States Supreme Court distinguishes between three different categories of preemption. First, preemption of state law can take place where Congress explicitly states this intent in the statute’s language. Second, if there is no explicit statutory language, state law is preempted when it regulates a field that Congress intended to be occupied exclusively by federal law, and third, preemption takes place where state law conflicts with federal law.\textsuperscript{575} Since the two latter forms of preemption are not explicitly stated in a statute’s language, they are both forms of implied preemption.\textsuperscript{576}

\textsuperscript{574} See infra, at 152.


Express preemption occurs when Congress declares its intent to preclude state law in a particular area through the use of explicit language.\(^{577}\) In this context, in has to be stressed that the Traffic Safety Act contains in its § 30103 (b)\(^{578}\), a preemption clause which has been interpreted differently by the courts. Occupation-of-the-field preemption occurs when Congress intends to entirely preclude state law in a particular field by enactment of specific legislation.\(^{579}\) Conflict preemption, finally, exists when state law conflicts, or is otherwise inconsistent, with applicable federal law\(^{580}\) so that it is impossible for a party to comply with both state and federal law.\(^{581}\)

**(II.) The Preemption Doctrine in the Context of Motor Vehicles Pre-Cipollone\(^{582}\), Freightliner\(^{583}\), and Medtronic\(^{584}\)**

From the mid 1980s until the early 1990s several lawsuits were filed in both state and federal courts claiming that the manufacturer’s failure to install safety features such as airbags rendered the vehicle defective. In most of these lawsuits the defendants brought the preemption defense. At the federal district level, of the sixteen courts addressing the issue of preemption of “no-airbag” claims\(^{585}\) only a few\(^{586}\) found these


\(^{578}\) Pub. L. No. 103-272, 108 Stat. 745,943 (1994) (codified as amended at 42 U.S.C. § 30103 (b) (1995)). This section corresponds to § 1392 (d) (1988) and is frequently referred to as the preemption clause. § 30103 (b) reads: “When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard practicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.”


\(^{581}\) McCauley, *supra* note 396, at 840.


claims not to be preempted by federal law. At the federal appellate level, a number of Circuit Courts have considered the issue and held that “no-airbag” claims were preempted the Traffic Safety Act and federal safety standards.\footnote{587} In contrast, most of the state courts that have addressed the issue, take the opposite position.\footnote{588} The differences between courts arguing in favor and against preemption reflect a number of different concerns and interpretations of the Traffic Safety Act.

\textbf{(a) Different interpretations of the Traffic Safety Act’s preemption clause (§ 30103 (b)): Preemption of state common law liability?}

§ 30103 (b) of the traffic Safety Act states that “When a [federal] motor vehicle safety standard is in effect..., a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle... only if the standard is identical to the standard prescribed under this chapter.” A controversy among the courts focuses on the question of whether the preemptive effect of this section also applies to common law actions. If yes, this action would have to be dismissed, and judgment would have to be issued in favor of the defendant manufacturer. § 30103 (b) mentions that action taken by the “state” or “political subdivision of a state” can be preempted. This does not include courts or juries, because they make part of the independent judicial branch and cannot be considered as


\footnote{588} See, cases cited by Chadwell, \textit{supra} note 565, note 99.
dependent political organs. Nevertheless, some courts have held that because of the language of this section, it can be applied to common law actions as well as to state regulatory bodies. These courts argue that § 30103 (b) does not explicitly state that a safety standard can only be effected by a regulatory body. They further hold that a common law decision, according to which an automobile is defective because it is not equipped with a specific safety feature, (e.g. airbag) is a safety standard set by the state when it enforces the decision. Accordingly, not only a state or a political subdivision of a state, but also a court or a jury is precluded by § 30103 (b) from imposing liability based on a common law standard that is not identical to the federal standard. Given that FMVSS 208 allows manufacturers to choose from three different occupant restraint options (automatic seat-belts, airbag, etc.), a jury finding that an airbag should have been installed is a common law standard which is not identical to the federal standard. Thus, these courts came to the conclusion that state common law is expressly preempted by the traffic safety Act’s preemption clause.

However, other courts have interpreted § 30103 (b) differently. They have concluded that this section does not preempt state tort law claims in light of the Traffic Safety Act’s savings clause, § 30103 (e). According to this rationale they further

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589 See also, McCauley, supra note 396, at note 90: “There do not appear to be any court decisions holding that a jury is a political subdivision.”


592 Id.; however, among the courts finding preemption, the majority found implied preemption instead of express preemption, see infra.


594 § 30103 (e) corresponds to § 1397 (k) (1988) and is referred to as the savings clause. It states that “Compliance with any Federal Motor Vehicle Safety Standard issued under this title does not exempt any person from liability under common law.”

held that the preemption clause only precludes states from implementing motor vehicle safety regulations which differ from their federal counterparts but do not address state common law. 596 Hence, in preserving common law claims in § 30103 (e), Congress distinguished between the imposition of sanctions by the state, or a political subdivision, for non-compliance with a regulatory provision and awards of tort damages compensating for injuries. 597

(B) DIFFERENT ASSESSMENT OF OCCUPATION-OF-THE FIELD PREEMPTION

Another source of conflict between the courts concerns the question of whether Congress intended to occupy the entire field of motor vehicle safety through the enactment of the Traffic Safety Act in 1966. The District Court in Staggs v. Chrysler Corp. 598 cited International Paper Co. v. Ouellette 599 for the holding that general savings clauses such as § 30103 (e) will not preserve common law actions that interfere with or frustrate the purposes of the legislative act as a whole "[w]here Congress...has drawn a comprehensive statute for dealing with a particular subject." 600 In application of this rationale to the airbag cases, the court in Staggs found that where Congress enacted a carefully drafted complex regulatory scheme for motor vehicle safety, the implementation of non-identical state standards is precluded. This opinion has been shared by the District Court in Doty v. Ford Motor Co. 601. In this decision, the court held that "Congress has legislated so comprehensively in the area of motor vehicle safety through the Safety Act that it has left no room for the States to supplement

597 Id.
599 479 U.S. 481, 493-494 (1987): The court held that where Congress enacted a carefully written and comprehensive statute, the inclusion of a savings clause should not preclude a court from finding that Congress impliedly preempted a particular field of law.
federal law.” 602 In contrast, the court in Garret v. Ford Motor Co. 603 held that two aspects undermine the occupation-of-the-field argument favored in Staggs and Doty. First, the court did not consider the Traffic safety Act to be a comprehensive legislative scheme. 604 Second, the court concluded that, according to the language of the traffic Safety Act, it is most reasonable to interpret this statute as not preempting common law claims. 605

(c) Conflict Preemption

Still another point of disagreement between courts is whether state common law decisions would conflict with federal law to an extent that would preempt the former. As mentioned earlier, conflict preemption occurs when a state law directly conflicts with federal law, making it impossible for a party to comply with both state and federal law. Courts arguing in favor of preemption contend that Congress intended FMVSS 208 to be a minimum as well as a maximum standard for automobile safety. The rationale for this argument is that a common law judgment holding a manufacturer liable because the automobile was defectively designed due to the absence of an airbag would force manufacturers to install this kind of safety feature into their vehicles. 606 Since state common law would de facto eliminate the choices given to manufacturers by FMVSS 208 to integrate different kinds of passive safety restraints, it is argued that such a result stands in conflict with federal law. 607

604 Id. at 409.
605 Id. at 412; see also, Perry v. Mercedes-Benz, 957 F.2d 1257,1264 (5th Cir. 1992) (holding that there is no occupation-of-the-field preemption under the traffic safety Act).
However, not all courts have agreed with this argument. The court in Richart v. Ford Motor Co.\textsuperscript{608}, for example, rejects the proposition that a state tort damage award compels automobile manufacturers to install passive restraints, thereby foreclosing the choice authorized under FMVSS 208. The court held that damage awards do not necessarily impose a legal duty on manufacturers to change their product design. It argued that such an award is one part of the risk of doing business and putting products on the market. Rather than eliminating an option given by federal law, a damage award holds motor vehicle manufacturers liable for harm resulting from their negligence in choosing among federally authorized options.\textsuperscript{609}

(d) Controversy about the Importance of Uniformity

A final point of divergence between the courts is whether the state's role in setting safety standards is subordinated in the interest of national uniformity created by the Traffic Safety Act. Some courts have held that one significant purpose of the Traffic Safety Act was to create uniformity with regard to motor vehicle safety standards.\textsuperscript{610} According to this premise, they concluded that Congress must have intended to preempt state common law, because the adoption of common law safety standards by single states would frustrate Congress' goal of establishing uniform safety standards throughout the whole country.\textsuperscript{611} On the other hand, the argument that uniformity is the controlling purpose of the Traffic Safety Act has been rejected by several other

\textsuperscript{608} 681 F.Supp. 1462 (D. N.M. 1988).


courts. According to these authorities uniformity was only one of Congress’ objectives. The main purpose pursued by Congress in passing the traffic Safety Act was to reduce traffic accidents, deaths, and injuries. Given this premise, states must be able to set identical or even higher safety standards than those set by the federal government. Consequently, rather than conflicting with Congress’ intent, state tort damage awards, through which liability for defective design is imposed on automobile manufacturers, are consistent with the Traffic Safety Act’s purpose.

(E) COMMENT

We have seen that from the mid-1980s until the early 1990s courts were in disagreement on whether state common law liability was preempted by the Traffic Safety Act or federal safety standards. An important point that should be emphasized for the following discussion is that among the courts favoring preemption a majority found implied preemption, occupation-of-the-field preemption or conflict preemption, while only a few courts argued in favor of express preemption. It is against this backdrop I now discuss recent Supreme Court decisions and their impact on the preemption doctrine.

(III.) THE CHANGE OF THE PREEMPTION DOCTRINE BROUGHT BY CIPOLLINE, FREIGHTLINER AND MEDTRONIC

A dramatic change in federal preemption analysis came with the Supreme Court’s decisions in Cipollone v. Liggett Group, Inc., Freightliner Corp. v. Myrick, and Medtronic, Inc. v. Lohr.

614 Id. at 1463.
(A) The Supreme Court’s decision in Cipollone: If there is express preemption, there is no need for an implied preemption analysis

Although Cipollone did not address the preemption issue in the context of motor vehicles, but rather dealt with a claim against cigarette manufacturers, it is still important for our analysis, because in this case the Supreme Court shed a different light on the preemption issue. In Cipollone, the son of a woman who developed cancer after she had been smoking regularly for more than 40 years brought an action against the cigarette manufacturers. Among other things, he alleged that the cigarettes were defective in design because of the manufacturer’s failure to use safer alternatives, and that they negligently failed to appropriately test and advertise their products (warnings defect). The manufacturers, on the other hand, raised the preemption defense, contending that the Federal Cigarette Labeling Act of 1965\(^{619}\) and the Public Health Smoking Act of 1969\(^{620}\) protected them from liability under state common law. The court had to consider whether these claims could survive the language of the Act’s preemption clauses, according to which states were barred from imposing other warning requirements relating to the advertisement or promotion of cigarettes.\(^{621}\) The issue in Cipollone was whether the Act’s preemption provisions precluded state common law claims - the same issue has been raised in the airbag cases. In the first part of its analysis

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\(^{621}\) § 4 of the Federal Cigarette Labeling Act of 1965 made it unlawful to sell or distribute cigarettes in the United States unless the package bore a label stating: “Caution: Cigarette Smoking May Be Hazardous to Your Health.” § 5 of the Act contains the preemption provision:

“(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.”
the court reviewed some of the basic principles governing the preemption doctrine. These are the inviolability of the Supremacy Clause and the presumption that historic police powers of the states, such as tort law, are not superseded by federal law unless it is the clear and manifest purpose of Congress. Most importantly, the court then held that “When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a ‘reliable indicium of congressional intent with respect to state authority,…there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.” Since the 1965 Act and the 1969 Act contained express preemption provisions, the Supreme Court determined that its only task was to “[I]dentify the domain expressly preempted by each of those sections,” whereas there was no need to perform an implied preemption analysis. In applying the above mentioned rule and the presumption against preemption, the court then determined that a narrow reading of both Acts’ preemption clauses was necessary. Finally, the court held that none of plaintiff’s claims were preempted by the Act of 1965, but, because of the broader language used in the Act of 1969, some of his claims were.

From the preceding, it can be concluded that Cipollone dramatically changed previous preemption analysis by holding that where Congress has explicitly addressed the preemption issue in a statute, the preemptive scope of this statute is limited to its

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622 See, e.g., Tebbets v. Ford Motor Co., 665 A.2d 345,346 (N.H. 1995); Irving v. Mazda Motor Co., 136 F.3d 764,767 (11th Cir. 1998) (stating that “[t]he provision of tort remedies...is one that has traditionally been regarded as properly within the scope of the states’ rights.”).


625 Id.

626 Id.

627 Id. at 518-519 and 530-531.
express terms precluding a finding of implied preemption. Thus, it seems that Cipollone constitutes a case for the plaintiff rather than for the defendant.

However, the language used in Cipollone qualifies this finding. In analyzing the language of the 1969 Cigarette Act, the Court stated that the words "[no] requirement or prohibition" suggest that there is no difference between positive enactments and common law. In contrast, the Court found that this phrase "[e]asily encompass[es] obligations that take the form of common law rules." This finding was further enhanced by the statement that "[state] regulation...can be exerted through an award of damages...which is designed to be a potent method of governing conduct and controlling policy." Accordingly, the Court held that state common law liability can be considered as a type of "regulation". This is the key factor to determine the scope of application of a preemption clause, since courts arguing in favor and courts arguing against preemption agree that a preemption clause generally encompasses "state regulations" or "state regulatory bodies." Thus, since state regulations comprise common law liability, a preemption clause similar to the one of the 1969 Cigarette Act will generally expressly preempt state common law. Consequently, Cipollone constitutes a better case for defendants that raise the preemption defense than for plaintiffs.

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628 Id. at 521.
629 Id.
630 Id.
631 See infra, notes 590,596 (Some courts interpret the Traffic Safety Act's preemption clause to apply to "state regulatory bodies" and common law. Other courts restrict its scope to "state regulations").
(B) THE INTERPRETATION OF CIPOLLONE IN FREIGHTLINER: CIPOLLONE ONLY DEVELOPED AN INFERENCE BUT NOT A RULE

In Freightliner Corp. v. Myrick 632 the Supreme Court altered its position regarding the issue of preemption previously taken in Cipollone. In Freightliner, one of the plaintiffs, Ben Myrick, was the driver of an oncoming vehicle that was hit by a tractor-trailer, which ended up jackknifing into oncoming traffic when suddenly braking. The plaintiff alleged that the tractor trailer, manufactured by Freightliner, was defective in design because it was not equipped with anti-lock brakes. Like in the airbag cases, the relevant safety standard, FMVSS 121, gave manufacturers the choice of whether to install anti-lock brakes or not. Because of this, the manufacturers argued that state common law actions dealing with their failure to install this kind of safety feature were impliedly preempted due to a conflict between the FMVSS and the plaintiff’s claim which made it impossible to comply with both federal and state law. The peculiarity in this case, however, resided in the fact that the applicable federal safety standard (FMVSS 121) was not in effect at the time at which the harmful event occurred. Prior to that time the Ninth Circuit Court had reviewed FMVSS 121 and found that the standard was neither practicable nor reasonable, because the NHTSA had failed to take into consideration the high failure rate of anti-lock brake devices and created a more hazardous highway situation than existed before the standard became operative.633 Therefore, the Ninth Circuit Court suspended FMVSS 121.

The court in Freightliner first analyzed whether there was express preemption and found that because of the suspension of FMVSS 121 there could be no express preemption.634 Since there was no federal safety standard in effect at the time, the court

633 Id. at 285.
634 Id. at 289.
rejected the manufacturer’s argument that the plaintiff’s claims were precluded by implied conflict preemption. The court held that it was not impossible for them “[t]o comply with both federal and state law because there simply was no federal standard to comply with.”635 Most importantly, however, the court reconsidered Cipollone and held that Cipollone only established an inference, but not a rule, that where a particular field of law is expressly preempted in a statute by Congress, matters outside this field are not preempted.636 Thus, the court in Freightliner read Cipollone in a way that the existence of an express preemption clause merely creates a presumption that Congress did not intend to preempt matters not explicitly contained in the provision. However, an implied preemption analysis is thereby not excluded but can still be used in order to extend the preemptive scope of a statute.637

(c) The Supreme Court’s opinion in Medtronic

A third decision in which the Supreme Court recently addressed the issue of preemption is Medtronic, Inc. v. Lohr.638 The plaintiff’s cardiac pacemaker, manufactured by Medtronic, failed in 1990, leading to a complete heart block and requiring her to undergo several surgeries. The plaintiff alleged that the pacemaker was defective in manufacture and design, and that the defendant had failed to warn her or her physicians of the product’s tendency to fail despite knowledge of previous product failures. Medtronic argued that the plaintiff’s claims were preempted by § 360 k (a)639

635 Id. at 288.
636 Id. at 288 (“At best, Cipollone supports an inference that an express preemption clause forecloses implied preemption; it does not establish a rule.”).
637 Id.
639 21 U.S.C. § 360 k (a) (1996); this section reads:
“Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement
(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
of the Medical Device law. As in Cipollone, the court in Medtronic reviewed the basic principles governing the preemption doctrine and stated that there is a presumption against preemption of state police power and that Congress’ intent is the “ultimate touchstone” in preemption cases.\textsuperscript{640} In addition, the court confirmed Cipollone in holding that there is no need to “[g]o beyond § 360 k (a)’s preemptive language to determine whether Congress intended...to preempt...state law...”\textsuperscript{641} and that the court’s only task is to determine the domain that is expressly preempted by this section.\textsuperscript{642} In its analysis the court concluded that according to the language used in § 360 k and its legislative history, state common law may set higher safety standards than prescribed by federal law\textsuperscript{643} and that none of the plaintiff’s claims were preempted\textsuperscript{644}, \textsuperscript{645}

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(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.”
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\textsuperscript{640} Medtronic, Inc. v. Lohr, 116 S.Ct. 2240,2250 (1996).

\textsuperscript{641} Id. at 2243.

\textsuperscript{642} Id.

\textsuperscript{643} Id. at 2244 and 2255.

\textsuperscript{644} Id. at 2259.

\textsuperscript{645} In its analysis of the preemption issue the Court in Medtronic had to deal with a complex fact pattern. This is one reason why this decision cannot be considered as a comprehensive framework for a preemption analysis. The Medical Device Amendments (MDA) from 1976 classified medical devices in three categories. Pacemakers are Class III devices which either present a potential unreasonable risk of illness or injury or which are of substantial importance to prevent impairment of human health. Before a new Class III device may be introduced on the market the manufacturer must provide the Food and Drug Administration (FDA) with “reasonable assurance” that the device is safe and effective. In order to establish this assurance the device is subject to a rigorous premarket approval (PMA) process under which the manufacturer has to submit detailed information regarding safety and efficacy of their devices, which the FDA then reviews, spending an average of 1,200 hours on a single submission. However, a “grandfather” clause of the medical device law foresees an important exception to this PMA process. This provision (also known as “§ 510 (k) process”) permits most Class III devices to be sold without going through the premarket approval process. New devices may be marketed simply by notifying the FDA of the intent to market at least 90 days prior to marketing, and by demonstrating the new product’s “substantial equivalence” to a “predicate device” (a device that was already on the market when the medical device laws were passed in 1976 or that has itself received a “substantial equivalence” determination). As most Class III devices today, also the plaintiff’s pacemaker reached the market through this quicker procedure (it is completed by the FDA in an average of 20 hours). Medtronic claimed that Lohr’s negligent design claim was preempted by the § 510 (k) process because defendants fulfilled the federal “substantial equivalence requirement”. Plaintiff Lohr contended that the § 510 (k) premarket notification process imposes no “requirement” on the design of defendant’s pacemaker. The Supreme Court held that the § 510 (k) process did not “require” Medtronic’s pacemaker to take a
Thus, it can be concluded that the court in *Medtronic* returned to adopt the limited scope of application of the implied preemption doctrine established under *Cipollone*.

(iv.) **The Aftermath: Application of Cipollone, Freightliner, and Medtronic to the Motor Vehicle Product Liability Context by U.S. Courts of Appeals and State Supreme Courts**

Although one might think that after *Cipollone*, elucidated by *Freightliner*, and *Medtronic*, the preemption discussion must be more clear, uniform, and consistent than before, a review of recent U.S. Courts of Appeals cases and State Supreme Court decisions reveals a different picture.

At least four Circuit Courts have dealt with this issue in the context of motor vehicle product liability after 1995. They have held unanimously that the automobile manufacturer’s liability based on state common law is either expressly or impliedly preempted by the Traffic Safety Act and the relevant Motor Vehicle Safety Standards. In addition, at least eight State Supreme Courts have addressed the same

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646 Montag v. Honda Motor Co., 75 F.3d 1414, 1417 (10th Cir. 1996): Plaintiff’s wife, Diane Montag, was killed when her 1988 Honda Prelude collided with a freight train. Although she was wearing a seat belt, she was ejected from her car and received serious brain injuries from which she dies 21 months later. The Plaintiff alleges that the car’s seat belt was defectively designed and that Honda failed to install an airbag as an alternative restraint system. The defendant argued that federal motor vehicle safety regulations barred plaintiff’s claim. The court held that plaintiff’s claim was impliedly preempted.; Harris v. Ford Mortor Co., 110 F.3d 1410, 1416 (9th Cir. 1997): While driving a rented 1992 Mercury Topaz, plaintiff, sixteen year old Jennifer Harris, lost control of the vehicle, smashed into a tree and sustained serious injuries. She alleged, among other things, that the car was defectively designed and that Ford was negligent in failing to install a driver side airbag. Ford raised the preemption defense. The court held that plaintiff’s action was expressly preempted by the Traffic Safety Act; Gracia v. Volvo Europa Truck, N.V. 112 F.3d 291 (7th Cir. 1997): While driving as a passenger in a 1986 Volvo truck, plaintiff, Gracia, was catapulted through the windshield opening on the pavement when the truck rear-ended another vehicle. She sustained a spinal injury. Plaintiff alleged that the truck was defective under Illinois common law for the windshield retention system was unreasonably dangerous and inadequate to prevent the windshield from ejecting during impacts. Volvo argued that Gracia’s claim is preempted by the traffic safety Act. The court held that § 30103 (b) expressly preempted plaintiff’s claim; Irving v. Mazda Motor Corp., 136
issue in this period of time. However, in contrast to the four federal courts, there is a split of authority among the state courts as to whether the Traffic Safety Act and the FMVSS preempt state common law actions. According to the Supreme Courts of New Hampshire, Indiana, Arizona, New York, and Ohio, these actions are neither expressly nor impliedly preempted.\(^{647}\) In contrast, the Supreme Courts of Pennsylvania, Mississippi, and Idaho have concluded that such state tort claims are preempted.\(^{648}\) The differences between the courts finding preemption and those finding no preemption reflect basically the same considerations that have already been discussed by courts prior to Cipollone, Freightliner, and Medronic.\(^{649}\) Therefore, these arguments do not

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\(^{647}\) Tebetts v. Ford Motor Co., 665 A.2d 345,346-347 (N.H. 1995): Plaintiff’s daughter, Rebecca Tebetts, was fatally injured while driving a 1988 Ford Escort. Plaintiff, Jo-Ann Tebetts alleged that the car was defectively designed for that it did not contain a driver-side airbag. Ford argued that plaintiff’s claim was preempted by the Traffic Safety Act and FMVSS 208. Wilson v. Pleasant, 660 N.E. 2d 327,330,339 (Ind. 1995): The estate of automobile driver who died in automobile accident brought negligence action against the vehicle manufacturer based on the manufacturer’s failure to install an airbag; Munroe v. General Motors Corp., 938 P.2d 1114,1120 (Ariz. 1997): While driving a 1990 Chevrolet Corsica, plaintiff, Kenneth Munroe, collided with another vehicle and was rendered quadriplegic. Plaintiff contended that General Motors was failed to equip the car with a supplemental driver side airbag. General Motors raised the preemption defense; Drattel v. Toyota Motor Corp., 662 N.Y.S.2d 535,537-538 (N.Y. App. Div. 1997): A motorist who was injured in an automobile accident sued the manufacturer, alleging that the vehicle was defectively designed in that it was not equipped with a driver side airbag; Minton v. Honda of Am., Inc., 684 N.E.2d 648,662 (Ohio 1997): Executor of estate of motorist who was killed in a head-on collision brought a products liability action against the manufacturer (Honda). The plaintiff alleged that the vehicle was defectively designed because it did not contain an airbag.

\(^{648}\) Zimmermann v. Volkswagen of Am., Inc. 920 P.2d 67,72 (Idaho 1996) (Failure to include lap belt claim); Cooper v. General Motors Corp., 702 So. 2d 428,433-444 (Miss. 1997) (Failure to install airbag claim); Celucci v. General Motors Corp., 706 A.2d 806,811-812 (Pa. 1998) (Failure to install airbag claim).

\(^{649}\) See supra, at pp. 132; see, e.g., Harris v. Ford Mortor Co., 110 F.3d 1410,1412 and note 3 (9th Cir. 1997) (focusing on the uniformity argument); id. at 1413 (stating that the language of § 30103 (b) preempts state common law claims); Gracia v. Volvo Europa Truck, N.V. 112 F.3d 291,298 (7th Cir. 1997) (holding that uniformity was Congress’ an essential goal that would be frustrated if state common law claims were not preempted; id. at 297 (arguing that § 30103 (b) has to be interpreted as to encompass state common law liability).
need to be repeated. Instead, we now focus on how the courts applied the leading U.S. Supreme Court cases.

(a) Controversy about the similarities of the preemption clauses in Cipollone and Medtronic to § 30103 (b) of the Traffic Safety Act

One important argument of courts finding preemption is that the preemption clause of the Traffic Safety Act (§ 30103 (b)) uses language similar to the one used in the preemption clause of the Public Health Cigarette Smoking Act of 1969, which was at issue in Cipollone. Since under the 1969 Act some of plaintiff’s claims were preempted, it is argued that the Traffic Safety Act must have the same effect. The 1969 Act provided in its preemption clause that “[N]o requirement or prohibition…shall be imposed under state law…”. In Cipollone, the Supreme Court held that the preemptive scope of this clause not only encompasses enactments by legislatures or agencies but also state common law, because the “[e]ssence of the common law [is] to enforce duties that are either affirmative requirements or negative prohibitions.”

The court in Gracia v. Volvo Europa Truck, N.V. and Harris v. Ford Motor Co. argued that the term “safety standard” used in § 30103 (b) of the traffic safety Act’s preemption clause cannot be distinguished from the terms “requirement or prohibition” in the 1969 Cigarette Act. Therefore, the courts concluded that § 30103 (b) also preempts state common law. To reinforce this argument, the court in Harris pointed to the dissenting opinion in Medtronic where it was held that “[c]ommon law

650 Gracia v. Volvo Europa Truck, N.V. 112 F.3d 291,297 (7th Cir. 1997); Harris v. Ford Mortor Co., 110 F.3d 1410,1414 (9th Cir. 1997).
652 Id. at 522.
653 112 F.3d 291 (7th Cir. 1997).
654 110 F.3d 1410 (9th Cir. 1997).
655 Gracia v. Volvo Europa Truck, N.V. 112 F.3d 291,297 (7th Cir. 1997); Harris v. Ford Mortor Co., 110 F.3d 1410,1414 (9th Cir. 1997).
damage actions do impose requirements.”

This argument is consistent with the earlier finding that the Supreme Court in *Cipollone* considered state common law as safety “regulation”.

**B) Finding Preemption on the Ground that Freightliner Rejected Cipollone**

Another argument which courts finding preemption often provide is that the reluctant attitude of the Supreme Court towards implied preemption in *Cipollone* was rejected three years later in *Freightliner*. In *Freightliner*, the Supreme Court held that the court in *Cipollone* did not establish a rule but at best an inference that an express preemption clause forecloses implied preemption. Therefore, the U.S. Court of Appeals in *Montag v. Honda Motor Co.* and in *Irving v. Mazda Motor Corp.*

, did not consider themselves to be bound by *Cipollone* and found implied preemption. The Circuit Court in *Gracia* even cited *Freightliner* in order to support its finding of express preemption. However, the courts in *Gracia* and *Irving*, although citing *Medtronic*, seem to have ignored that *Medtronic* confirmed the position taken by the United States Supreme Court in *Cipollone*. Accordingly, the decisions issued by these Circuit Courts should be disagreed with.

**(v.) Comment**

Eventually, it can be concluded that the discussion of the preemption issue is, even after *Cipollone, Freightliner*, and *Medtronic*, still highly controversial. To a
certain extent this is due to the fact that in these decisions the United States Supreme Court failed to establish a clear standard on how to handle this issue. However, part of the reason why the Court was not able to provide a comprehensible framework for a preemption analysis is that *Freightliner* and *Medtronic* dealt with peculiar and complex fact patterns which limited the establishment of clear guidelines. Congress, on the other hand, could make an end to this controversy by clearly stating its intent in the legislation. However, Congress has not attempted to resolve this issue. Instead, it has enacted statutes containing "preemption clauses" that tend to reflect an intent to preempt and "savings clauses" that tend to reflect an intent to preserve common law liability. One reason for this congressional ambivalence may be found in the political domain. That is, it was probably easier to pass legislation without directly resolving the preemption issue than it would have been had the issue been clearly resolved. As long as such a clarification is missing, the controversy on how to interpret federal statutes containing preemption and savings clauses will continue among federal and state courts.

**(VI.) COMPARISON TO GERMAN PRODUCT LIABILITY LAW: NON-EXISTENCE OF A PREEMPTION ISSUE**

In German law the area of private law that includes tort law is, according to Art. 72, 74 sec. I, Nr. 1 GG, solely regulated by the federal government. This is reflected in the fact that there is only one nationwide applicable tort law. Consequently, the issue of preemption does not exist in the German law of product liability.

**3. THE EFFECTS OF COMPLIANCE AND NONCOMPLIANCE WITH FEDERAL SAFETY STANDARDS**

As we have seen, the issue of what effects the motor vehicle manufacturer's compliance with federal safety standards has regarding its liability under state common law arises only if state tort law is not preempted by federal law.
a) Compliance: The Old Common Law

The issue in question was addressed by the United States Supreme Court for the first time in 1892 in *Grand Truck Railroad Co. v. Ives*[^662]. In this case, safety regulations prescribing the nature and placement of precautionary measures, such as crossing signals and flagmen, were imposed upon a railroad company. The issue was whether, in case of an injury, the company could be held liable under a negligence standard, although it complied with the safety regulations. The Supreme Court held that regardless of such compliance, common law dictates that “everyone must so conduct himself...as that...he will not injure another, in any way.”[^663] Thus, compliance with safety standards did not mean that the defendant automatically met the duty of care which would immunize him from liability under a negligence standard. The Supreme Court’s approach in *Ives* has been adopted by the majority of American courts[^664], mostly arguing that the defendant’s standard of due care has to be established by the characteristics of the particular case and not by compliance with safety standards.[^665]

In contrast, a minority view[^666] considered statutory compliance to immunize the defendant from liability. However, the court in *Shramek v. Huff*[^667] supporting this view, neither cited to sources for its holding nor provided sufficient reasoning for its opinion, and therefore the minority view must be rejected.

[^662]: 144 U.S. 408 (1892).
[^663]: *Id.* at 421.
[^667]: 280 N.W. 450 (Neb. 1938).

Today, the overwhelming majority of jurisdictions holds that compliance with product safety statutes and regulations is relevant and admissible, but not controlling, evidence of a defendant's exercise of due care and product defectiveness. The rationale for this rule is that statutes, ordinances, and regulations are considered to act only as a minimum floor of satisfactory behavior. Consequently, the judicial system has to serve as an additional check, which allows it to consider specific facts, the existence of which may justify the imposition of a higher standard of care than the one dictated by the regulation. However, a few courts give regulatory compliance substantial weight, or even recognize it as conclusive evidence for non-negligence or non-

668 Sours v. General Motors Corp., 717 F.2d 1511,1517 (6th Cir. 1983) ("GM's alleged compliance with FMVSS 216...was properly left for the jurors to factor into the calculus..."); Shipp v. General Motors Corp., 750 F.2d 418,421 (5th Cir. 1985); Jackson v. Spagnola, 503 A.2d 944,949 (Pa. Super Ct. 1986) ("The introduction of [the federal automobile safety standard] into evidence was proper, although compliance by Volkswagen with the standards is 'only a piece of the evidentiary puzzle' and does not grant immunity from state liability."); Brooks v. Beech Aircraft Corp., 902 P.2d 54,63 (N.M. 1995) ("Evidence of compliance with applicable regulations is relevant to whether the manufacturer was negligent..."); Doyle v. Volkswagenwerk, A.G., 481 S.E.2d 518,521 (Ga. 1997).


defectiveness. A similar point of view has been taken by a minority of states that have enacted statutes establishing a rebuttable presumption that the product is not defective or in an unreasonably dangerous condition.

C) Compliance: Arguments Against Common Law Liability When There is Compliance

Although the majority of courts and secondary authority (Restatements, legal scholars) reject compliance as a complete defense to tort liability, the motor vehicle manufacturer as defendant in a products liability suit might still try to convince the court of the opposite in order not to be held liable. To reach this goal he could present six arguments which will subsequently be analyzed: (1) that statutory compliance as a defense leads to a reduction of costs spent on lawsuits, (2) that it prevents the tort system from "getting out of control", (3) that an extra judicial check is not needed, (4) that instead of jurors the agency's experts should regulate industry conduct, (5) that there is a need for uniformity and, finally (6) that it would create incentives for the development and marketing of new products.

With the first argument, it is alleged that a statutory compliance defense would reduce the costs arising out of tort litigation, because such a defense would create an incentive for manufacturers to adhere to regulations deterring them at the same time from engaging in undesired behavior. Thus, fewer trials would take place, and fewer costs would be spent on lawsuits. Against this argument one can object that a plaintiff

672 Jones v. Hitle Services, Inc. 549 P.2d 1383,1390 (Kan. 1976); Lorenz v. Celotex Corp., 896 F.2d 148 (5th Cir. 1990), reh'g denied, 901 F.2d 1110 (5th Cir. 1990); Ramirez v. Plough, Inc. 863 P.2d 167,176 (Cal. 1993).


674 Warren, supra note 669, at 798-806.

675 Id. at 798.
will only be dissuaded from filing suit if he knows prior to that, that the defendant complied with all safety standards. Generally, the plaintiff lacks this knowledge, because he only gets to know these facts in the discovery phase of the suit. Furthermore, even if fewer trials may take place if regulatory compliance were adopted as a defense, it may not be neglected that the trial phase is only one of many phases through which a lawsuit passes. A high amount of judicial resources are spent in pretrial matters, hearings, motions, including the discovery period. On the other hand, it may not be neglected that recognizing the compliance defense would make it more difficult for plaintiffs to ultimately prevail. Plaintiff’s attorneys working on a contingent fee would have an economic incentive to screen cases more carefully. Cases that are not likely to be won will not be filed in the first place. A decrease in the amount of litigation would reduce litigation costs. Thus, it is true that a recognition of compliance as a defense will save judicial expenses.

The second argument that a statutory compliance defense prevents the tort system from “getting out of control” is based on the allegation that awards in tort suits have reached astronomical amounts which sometimes lead to unjust compensation, results that could be avoided by adopting such a defense. However, this argument overlooks the fact that increases in tort liability awards find their origin in several other, more important sources, such as an increased number of injured persons and injuries,

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676 Id.
677 Id.
678 However, the question remains whether a reduction of claims pursuing a decrease in litigation costs is desirable. On the one hand, one could argue that this would relieve courts from being overwhelmed by a large amount of actions. Efficiency and care for the single case would increase. On the other hand, potential plaintiffs would, as a practical matter, be deprived in their right to file suit against manufacturers. Furthermore, plaintiff attorneys would not make as much profit as they would were the compliance defense not recognized. However, whether the number of claims should be reduced should primarily be a matter of procedural or “formal” law (e.g. introduction of statutes of limitation or minimum amounts to file an action) rather than of substantial law.
more expensive losses, and higher medical costs.\textsuperscript{680} Moreover, it must be stressed that a decrease of jury awards to plaintiffs could be achieved more efficiently by other means, such as inventing maximum caps on damages for pain and suffering\textsuperscript{681} and on punitive damages,\textsuperscript{682} rather than introducing statutory compliance as a defense. Because of this, the second argument is not compelling.

With regard to the statement that an extra judicial check is superfluous when a manufacturer has already complied with regulatory safety standards, the following aspects have to be taken into consideration. Safety standards in the motor vehicle area are issued by a governmental agency, the NHTSA. This kind of agency, however, may be influenced by interest groups, such as an automobile lobby group, or be subject to political pressure.\textsuperscript{683} Therefore, a judicial system, whose characteristic is its independence from any political or industrial pressure, is needed to ensure justice, fairness, and public safety and to avoid that the law is made by interest groups\textsuperscript{684}.

The fourth argument goes in the same direction as the third one by contending that lay jurors do not have the capability of assessing complex technical information in a short period of time, while the regulatory agency’s experts do have the necessary

\textsuperscript{680} Warren, \textit{supra} note 669, at 801.

\textsuperscript{681} The appropriateness and legality of introducing this kind of caps is controversial, \textit{see, e.g.}, Best v. Taylor Machine Works, 179 Ill. 2d 367 (Ill. 1997) (holding that legislatively imposed caps on noneconomic damages (compensation for pain and suffering) are unconstitutional under Illinois’s constitution because they confer exclusive privilege on a specific group of people (business, doctors).

\textsuperscript{682} Also the introduction of caps on punitive damages is subject to controversy, \textit{see, e.g.}, Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993) (holding that a statute imposing a flat cap of $250,000 on punitive damages was unconstitutional because it violated plaintiff’s right to a jury trial); Robert L. Rabin, \textit{Federalism and the Tort System}, 50 Rutgers L. Rev. 1,30 (1997) ("[c]aps are debatable").

\textsuperscript{683} The following example demonstrates the seriousness of this statement:


\textsuperscript{684} Warren, \textit{supra} note 669, at 804.
scientific education. Therefore, the assessment of whether a safety standard is appropriate should be left to them.\textsuperscript{685} In objection to this argument, it must be said that in cases involving technical questions, evidence is presented by expert witnesses who provide scientific explanations so that the ordinary person can understand the facts of the case. Accordingly, the jurors as well as the judges, who are generally regarded as laymen in the scientific field, will get the necessary information. However, it is questionable whether jurors will be able to understand evidence presented by expert witnesses. In comparison to experts working for administrative agencies (e.g. NHTSA) most jurors will not have the educational background to grasp in every detail scientific issues that require fundamental technological knowledge, skills, or experience (e.g. aviation or automobile product liability cases). Consequently, a jury will not be able to assess complex scientific fact patterns as well as agency experts. On the other hand, experts of governmental agencies may be influenced by political or industrial groups\textsuperscript{686}, whereas a jury is politically neutral\textsuperscript{687}. Accordingly, governmental safety regulations may not reflect the optimal level of safety. Therefore, the assessment of whether such a regulation is appropriate should ultimately be left to the jury and the judge.

With the fifth argument it is alleged that a regulatory compliance defense would contribute to more uniformity and clarity of the law.\textsuperscript{688} Admittedly, liability under common law does sometimes lead to inconsistent outcomes, which could be avoided by introducing the compliance defense on a federal or at least a state level. However, the price for this increase in consistency would have to be paid for by society, as public

\textsuperscript{685} Id. at 804-805.

\textsuperscript{686} See, e.g., David A. Kessler, Remarks by the Commissioner of Food and Drugs, 50 Food & Drug L.J. 327,327 (1995) (stating that “Over the past two years six FDA field staff have been offered bribes for special treatment. The products involved ranged from spices and seafood to surgical instruments and foodstuffs. There were six attempted bribes,...one attempt on the West Coast, and five an the East Cost.”).

\textsuperscript{687} Warren, supra note 669, at 805.

\textsuperscript{688} Id.
health and safety would be jeopardized\textsuperscript{689} because plaintiffs would no longer be able to successfully challenge the appropriateness of regulatory safety standards, a price which is much too high. Consequently, this leads to a rejection of the fifth argument.

The final argument centers on the allegation that a statutory compliance defense will help developing and marketing new products, because manufacturers will be more confident in creating them if they know that when meeting safety standards they will be immunized from liability.\textsuperscript{690} However, until this day, the regulatory compliance defense has not been recognized by the majority of jurisdictions and, nevertheless, manufacturers still continue to develop and market new products, because the goal of achieving higher profits is incentive enough for them.\textsuperscript{691} Thus, this argument also is not compelling.

**D) COMPLIANCE: COMMENT**

The presentation of the foregoing arguments leads this author to the conclusion that the current common law majority opinion, which is also reflected in the Traffic safety Act (§ 30103 (e)), the Restatement (Second) of Torts, and the Restatement (Third) of Torts, is the better view. That is, that compliance with federal regulatory motor vehicle standards issued by the NHTSA should be admissible but not conclusive evidence. The main argument which provides the basis for this conclusion is that those safety standards are only minimum requirements. Thus, it is up to the state courts to establish higher standards by taking into consideration the particular facts of each case under a reasonable person standard.

\textsuperscript{689} Id.

\textsuperscript{690} Id. at 806.

\textsuperscript{691} Id.
e) Noncompliance

After having discussed the effects of compliance with federal regulatory standards, we now turn to the consequences resulting out of noncompliance with those requirements. In the leading case dealing with noncompliance with such standards, Martin v. Herzog, Judge Cardozo concluded that the unexcused violation of statutory safety standards is more than mere evidence of negligence, it is negligence in itself, or "negligence per se". Today, the majority of courts still holds that such a violation constitutes negligence per se or causes products to be defective as a matter of law in cases involving design or failure to warn defects. Other courts consider noncompliance as evidence of negligence or product defectiveness or give it presumptive effect.

However, like in Martin v. Herzog, most courts recognize that noncompliance does not constitute proof of negligence when the violation of the safety standard is excused or justified. The same position has been taken in §§ 288 A and 288 B of the

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692 126 N.E. 814 (N.Y. 1920).
693 Id. at 814-815.
698 § 288 A reads: Excused Violations (2)... violation is excused when (a) the violation is reasonable because of the actor’s incapacity; (b) he neither knows or should know of the occasion for compliance; (c) he is unable after reasonable diligence or care to comply; (d) he is confronted with an emergency not due to his own misconduct; (e) compliance would involve a greater risk of harm to the actor or to others.
699 § 288 B reads:
Restatement (Second) of Torts. In contrast, § 4 (a) of the Third Restatement applies a
standard that is slightly different from the common law rule and the Second
Restatement. Under this section, noncompliance with safety standards is considered to
render the product defective, but an excuse for this wrongful behavior is not recognized.
Because of this, § 4 (a) has been subject to criticism.\textsuperscript{700} It is argued that in eliminating
the “excused violation,” the new Restatement ignores the limits set to negligence per se
by common law.\textsuperscript{701} However, this argument has to be rejected, and the rule set forth in §
4 (a) should be considered appropriate in the area of product liability. The peculiarity in
this field is that the manufacturer usually knows, or at least should know, about
mandatory safety requirements prior to the marketing of his products. Therefore, if he
sees that a product does not meet the statutory or regulatory standards, he still has the
ability to postpone the sale until compliance is achieved.\textsuperscript{702} Consequently, an excuse for
noncompliance of the sort that exists in negligence actions generally is not appropriate
in product liability actions. Therefore, § 4 (a) of the new Restatement has to be entirely
approved and should be adopted by the courts in cases involving safety standards
governing product designs or instructions or warnings.

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Effect of Violation
(1) The unexcused violation of the legislative enactment or an administrative regulation which is adopted
by the court as defining the standard of conduct of a reasonable man, is negligence in itself.
\textsuperscript{700} D'Angelo, \textit{supra} note 669, at 471-474.
\textsuperscript{701} Id. at 472.
\textsuperscript{702} \textit{Restatement (Third) of Torts: Products Liability, P.F.D.}, § 4, cmt. d, at 140. Example: In the
test phase prior to marketing the new “Model T” manufactured by X does not meet mandatory crash test
standards for side impact collisions. Nevertheless is the sale of the cars authorized by X because the
divergence between the mandatory crash test standards and the actual achieved results is “marginal”. X
knew that he did not comply with mandatory safety standards prior to sale. He could have postponed the
delivery of the cars until full compliance was achieved. His failure to do so constitutes negligence and
renders the vehicle defective. He is not excused because the divergence was only “marginal”.
E. Warning and Instruction Defects

1. Definition

Besides the possibility of being held liable for manufacturing or design defects, the motor vehicle manufacturer may also be subject to liability because it failed to provide adequate instructions or warnings to its vehicles at the time of sale.\textsuperscript{703} Although closely related, instructions and warnings are not the same. Whereas instructions inform the consumer about the safe use of the product,\textsuperscript{704} warnings call attention to the existence and nature of risks involved in the use of a product so that consumers are able to avoid harm either by behaving appropriately or by choosing not to use the product.\textsuperscript{705} Accordingly, even if the motor vehicle functions perfectly and is completely free of defects in manufacture or design, it may still be considered to be defective.\textsuperscript{706} In these cases, the defect is the manufacturer’s failure to provide the necessary information.\textsuperscript{707}

\textsuperscript{703} Today, the automobile manufacturer’s duty to instruct and warn is widely recognized, see, e.g., Leichtamer v. Am. Motors Co., 424 N.E. 2d 568 (1981) (Two people were killed and two others were injured in the rollover of a Jeep CJ-7 while they were driving an off-road recreational area. The court held that the manufacturer could be liable for failing to warn that the Jeep does not provide occupant safety in the event of a forward pitch-over accident.); LaCoste v. Ford Motor Co., 322 N.W. 2d 898 (Iowa Ct. App. 1982) (Plaintiff’s decedent sustained fatal injuries when he was stuck between a 1975 Ford pickup truck and a building. The plaintiff contended that the truck’s transmission had shifted from park to reverse after the decedent got off the truck with the engine running. The plaintiff prevailed because the transmission design was defective and the manufacturer had a duty to warn of the truck’s known tendency to behave in this way.).

\textsuperscript{704} Hiigel v. General Motors Corp., 544 P.2d 983 (Colo. 1975) (stating that instructions refer to the proper use of the vehicle); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, P.F.D., § 2, cmt i, at 31.

\textsuperscript{705} Hiigel v. General Motors Corp., 544 P.2d 983 (Colo. 1975) (holding that the manufacturer must not only provide instructions regarding the proper use of the vehicle but must also alert the user to the dangers involved in its use); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, P.F.D., § 2, cmt i, at 31.

\textsuperscript{706} MILLER, supra note 412, § 7.05[5], at 148-149.

\textsuperscript{707} Id.
The manufacturer’s duty to warn of dangers at the time the vehicle is sold has to be distinguished from his post-sale duty to warn\(^{708}\). Whereas the first duty arises only at the time of manufacture and sale, the latter duty arises when the manufacturer becomes aware of a dangerous condition of its vehicles subsequent to the time at which they were placed on the market.\(^{709}\) Furthermore, a difference must be made between the post-sale duty to warn and the manufacturer’s duty to recall\(^{710}\) its vehicles.

2. Extent of duty to instruct and/or warn at time of sale

The automobile manufacturer’s duty to instruct or warn extends to the purchasers of its vehicles as well as to other foreseeable users.\(^{711}\) However, the scope of its duty to warn is not unlimited since the majority of jurisdictions takes the position that a manufacturer’s duty to warn encompasses only risks that were known or should have been known to a reasonable person.\(^{712}\) Nevertheless, the manufacturer’s duty to warn not only extends to dangers associated with the intended use of the product but also to misuses if the manufacturer is aware of a tendency towards this type of misuse\(^{713}\). In order to determine which type and extent of warning must be provided in particular circumstances depends on several factors such as the likelihood that an accident will occur, the type and severity of harm arising out of the accident, the

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\(^{708}\) See infra, at 163.

\(^{709}\) MILLER, supra note 412, § 7.05[5], at 155.

\(^{710}\) See infra, at 165.

\(^{711}\) MILLER, supra note 412, § 7.05[5], at 148-149.


\(^{713}\) LaCoste v. Ford Motor Co., supra note 703; Mazikoske v. Firestone Tire & Rubber Co., 500 N.E.2d 622 (Ill. 1986) (Plaintiff was injured when he attempted to mount a 16-inch tire on a 16.5-inch wheel. The tire exploded and the plaintiff contended that the defendants were negligent in failing to warn of the dangers involved in such a mismatch. The court held that the defendants had the alleged duty to warn when the existence of a mismatch would not be obvious to users.).
manufacturer's burden to provide a warning, and the nature of the product itself.\textsuperscript{714} When applying these factors to motor vehicles, we reach the following result: motor vehicles, by their very nature, provide a high potential of danger. It is not possible to make them completely safe for their occupants nor for other road-users that might be involved in traffic accidents (e.g., pedestrians). Moreover, there is always a certain likelihood that an accident might occur due to several circumstances (driver's failure, other road-user's failure; defect in vehicle, bad road conditions, etc.). In case of an accident, property damage, bodily injury or even death are likely to occur. On the other hand, the manufacturer can, at the time of sale of its vehicles, easily provide information necessary for the consumer in order to avoid some of the risks (e.g., provision of a sticker that a passenger-side airbag should be disengaged when transporting little children). Indeed, automobile manufacturers regularly equip their cars with driver manuals in which they provide this kind of information. Although a whole product series of hundreds of thousands of vehicles has to be equipped with such precautionary features, they are available at relatively low costs and bring a high benefit. Therefore, the burden of motor vehicle manufacturers to provide adequate instructions or warnings is relatively low.

3. Burden of proof and causation

In order to successfully sue a manufacturer, the plaintiff must show that the defendant provided an inadequate warning which rendered the vehicle defective. Like in design defect cases, the plaintiff has to provide evidence that a reasonable alternative warning was available which would have reduced the risk of harm.\textsuperscript{715} Furthermore, he


\textsuperscript{715} Jugle v. Volkswagen of Am., Inc., 975 F.Supp. 576,582 (D. Vermont 1997); \textsc{Restatement (Third) of Torts: Products Liability}, P.F.D., § 2 (c); in contrast to a claim based on design defectiveness, the provision of evidence for a reasonable alternative warning (or instruction) is generally easy since no
must show by a preponderance of the evidence that the manufacturer’s failure to provide such a warning was the proximate cause of the injury. Accordingly, the manufacturer cannot be held liable when the danger involved in the use of the vehicle is obvious or generally known to the user. Furthermore, the plaintiff must prove that if the manufacturer had given an adequate warning, it would have been followed. However, like in German law, plaintiff’s burden of proof is eased with regard to this requirement since the courts have established a presumption that if adequate warnings had been given they would have been followed. Consequently, the burden of proof shifts to the defendant who now has to prove that the plaintiff would not have followed an appropriate warning had it been given.

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technical issues are involved (e.g., the plaintiff can simply allege that a sticker warning of the danger of transporting children on the airbag-equipped passenger seat should have contained a “read warning sign” instead of words); accordingly, plaintiffs will be able to financially afford bringing a failure to warn claim; thus, the argument made in context with design defects that financially small actions will be eliminated does not apply here.

716 See, e.g., Conti v. Ford Motor Co., 743 F.2d 195 (3d Cir. 1984), cert. denied, 470 U.S. 1028 (1985), applying Pennsylvania law (Plaintiff’s husband who had been driving standard transmission automobiles for more than 25 years started turned the ignition key of a 1980 Ford Mustang while the car was in gear. The car lurched backwards and plaintiff, who wanted to enter the car, lost her balance and fell. The plaintiff alleged that the manufacturer was liable for failing to provide an adequate warning of the danger of starting a standard transmission car while in gear. The court held that there was no evidence that the driver would have paid greater attention when starting the car even if supplementary warnings were contained in the operator’s manual or on a sticker located in the interior of the car); Jugle v. Volkswagen of Am., Inc., 975 F.Supp. 576,582 (D. Vermont 1997).

717 Claytor v. General Motors Corp., 286 S.E.2d 129 (1982) (stating that it is common knowledge among mechanics that the application of excessive force can cause serious injuries); Baughmann v. General Motors Corp., 627 F. Supp. 871 (D. S.C. 1985), aff’d 780 F.2d 1131 (4th Cir. 1985), applying South Carolina law (holding that a truck manufacturer has no duty to warn of the danger of explosive separation of multi-piece truck rims when the plaintiff was an experienced tire repairman who was familiar with relevant safety procedures for mounting wheel and rim assemblies); Morris v. Adolph Coors Co., 735 S.W.2d 578 (Tex. Ct. App. 1987) (holding that there is not duty to warn of the risk of driving intoxicated because there is a general awareness of this risk); Crow v. Manitex, Inc., 550 N.W.2d 175 (Iowa Ct. App. 1996); Payne v. Quality Nozzle Co., 643 N.Y.S.2d 623 (N.Y. App. Div. 1996); Brand v. Mazda Motor Corp., 978 F.Supp. 1382,1389 (D. Kansas 1997) (“Kansas law does not recognize a duty to warn...when the user already knows of the danger.”).

718 MILLER, supra note 412, § 7.05[5], at 154.

719 See, Chapter I, supra, at 62.

4. POST-SALE DUTY TO WARN

The foregoing explanations dealt with the manufacturer’s duty to provide adequate instructions and warnings at the time of sale of his products. However, once vehicles have been put on the market, they might develop dangers which were not discoverable at the time of their manufacture (e.g. anti-lock braking systems might fail or airbags might explode without impact etc.). In this situation the question arises whether the manufacturer also has a duty to warn of dangers in the vehicle subsequent to its putting in the stream of commerce, for a violation of which he could be held liable (post-sale duty to warn). The courts provide different answers to this question. The majority of jurisdictions\(^2\) holds that the manufacturer has a continuing post-sale duty to warn under particular circumstances. Other courts,\(^3\) however, reject the imposition of such a duty when the product was not defective at the time of sale. Still other courts\(^4\) argue in favor of the existence of a post-sale duty to warn but outline that there is no duty to inform about safety advancements in the product which would reduce the risk of danger. The jurisdictions recognizing a post-sale duty to warn make clear that a decision on this issue has to be taken on a case-by-case basis.\(^5\) They limit the

\(^2\) See, e.g. Comstock v. General Motors Corp., 99 N.W.2d 627 (Mich. 1959) (The plaintiff was struck by a 1953 Buick Roadmaster equipped with power brakes. He introduced evidence that demonstrated that shortly after the introduction of the 1953 Buick model difficulties occurred with the power brake system, resulting in sudden brake failures. The defendant manufacturer furnished all Buick dealers with repair kits. However, it never issued a warning to the Buick owners. The court held that the facts of the case imposed a duty on the manufacturer to take all reasonable means to issue warnings directly to the purchasers of 1953 Buicks as soon as the defect was discovered.); Hamilton v. Smith, 773 F.2d 461 (2d Cir. 1985), applying Connecticut law (the court held that the manufacturer of a press brake has a duty to employ a degree of care, both during and after the sale, that a reasonably prudent manufacturer would have taken under similar circumstances); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826,832 (Minn. 1988); Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401,406-410 (N.D. 1994).


\(^4\) See, e.g., Williams v. Monarch Machine Tool Co., Inc., 26 F.3d 228,232 (1st Cir. 1994) (applying Massachusetts law).

imposition of such a duty to situations in where the likelihood of occurrence of injuries outweighs the difficulties a manufacturer has to face in issuing post-sale warnings.\textsuperscript{725} In particular, they consider different factors such as the extent of the risk of harm and the possibility of effectively communicating a warning to the actual user and ask whether a reasonable manufacturer in a similar situation would have issued a warning.\textsuperscript{726} Thus, they apply a negligence standard which finds its basis in a risk-utility analysis applied to a reasonable-person standard.

On the other hand, the jurisdictions rejecting such a duty focus on three different arguments: first, since the product was not defective at the time of sale, a rationale to impose liability on the manufacturer does not exist.\textsuperscript{727} Second, after the sale of the vehicle the manufacturer does not any longer exercise control over its product so that he can no longer be held liable.\textsuperscript{728} Finally, it is argued that imposing such a duty would place an unreasonable burden upon the manufacturers, since they would be required to trace the ownership of each product which may already have been sold years ago.\textsuperscript{729}

- COMMENT

As mentioned above, accidents involving motor vehicles are likely to occur and frequently cause serious injuries. Accordingly, courts following the majority view will hold that a motor vehicle manufacturer has a duty to warn consumers of dangers discovered after the time of sale. This result is achieved by fairly balancing the interests


\textsuperscript{729} Black v. Henry Pratt Co., 778 F.2d 1278,1284 (7th Cir. 1987);
of the consumers not to be exposed to a high risk of harm against the interests of the manufacturer not to be subject to an unreasonable burden. Therefore, the majority view has to be supported.

In contrast, the arguments of the minority opinion are not convincing. This view overlooks that a vehicle does not need to be defective at the time of sale in order to establish a post-sale duty to warn, but the imposition of such a duty is based on a negligence standard taking into consideration what a reasonably prudent manufacturer would have done. Therefore, the argument that the manufacturer does no longer have control over the product is not compelling. Finally, the manufacturer’s difficulty in tracing the owners of vehicles in a dangerous condition is over-exaggerated. Knowing of this difficulty the manufacturer and its dealerships should document data when and to whom which automobile model was sold. True, they will not be able to find every single owner, and therefore a risk of being held potentially liable remains. However, this is the price a manufacturer has to pay when doing business.

5. POST-SALE DUTY TO RECALL

A product recall is defined as "[n]otification of a defect combined with an offer of repair, replacement, or refund."[^730] Thus, it differs from a post-sale warning in that the manufacturer not only informs the consumer of the defect but also takes additional measures to repair or replace it. Whether a manufacturer has the duty to recall vehicles which are in a dangerous condition after they have been sold is controversial.

A) DUTY TO RECALL UNDER COMMON LAW

While some courts\textsuperscript{731} do not recognize a duty to recall unless a statute or governmental regulation specifically establishes this duty, other jurisdictions\textsuperscript{732} take the opposite point of view in holding a manufacturer liable under a negligence standard for breaching his duty to recall.

Some of the arguments provided by those courts refusing to recognize a duty to recall are similar to the ones we have heard in context with the rejection of a post-sale duty to warn. First, it is argued that a duty to recall would place an unreasonable burden upon manufacturers of tracking down each purchaser in order to give notice of a recall.\textsuperscript{733} Second, it is being held that the manufacturer's responsibility to eliminate dangers arising out of the product ends when it left its control and shifts towards the owner of the product.\textsuperscript{734} Furthermore, if liability was established, even if the manufacturer failed to retrofit its products with technological features that have been newly developed after the time of sale, this would discourage the development of new

\textsuperscript{731} Smith v. Firestone Tire & Rubber Co., 755 F.2d 129,134-135 (8\textsuperscript{th} Cir. 1985) (holding that a duty to recall is no logical extension of a duty to warn); Baker v. Firestone Tire & Rubber Co., 793 F.2d 1196,1200 (11\textsuperscript{th} Cir. 1986); Lynch v. McStome & Lincoln Plaza Associates, 548 A.2d 1276,1281 (Pa. Super Ct. 1988); Romero v. International Harvester Co., 979 F.2d 1444,1449-1450 (10\textsuperscript{th} Cir. 1992) (declining to impose a duty to recall or retrofit a product that was not negligently designed at time of manufacture); Eschenburg v. Navistar Int'l Transp. Corp., 829 F.Supp. 210 (E.D. Mich. 1993) (declining to extend a duty to warn to a duty to recall); Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299 (Kan. 1993) (holding that there is no duty to recall or retrofit absent legislation); Gregory v. Cincinnatti, Inc., 538 N.W.2d 325 (Mich. 1995).

\textsuperscript{732} Braniff Airways, Inc. v. Curtiss-Wright Corp., 411 F.2d 451 (2d Cir. 1969) (Manufacturer of airplane engine was aware that that its engines were subject to failure due to defective design eight months prior to a crash leading to the lawsuit. The court held that, although the defect was not discovered by the manufacturer until after sale, the manufacturer had a duty to remedy the engines once their dangerous condition came to the attention of the manufacturer); Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519 (Tex. Civ. App. 1979) (the court held that a duty to recall was appropriate where the manufacturer was aware of a danger to the public irrespective of whether the manufacturer was aware of the danger at the time it sold the product); Eschenburg v. Navistar Int'l Transp. Corp., 829 F.Supp. 210 (E.D. Mich. 1993) (holding that a finding of negligence based on a failure to conduct an appropriate retrofit campaign was independent of the fact that the product was defective); Hernandez v. Badger Constr. Equip. Co., 34 Cal. Rptr. 2d 732 (Cal. Ct. App. 1994) (stating that failure to perform an adequate retrofit campaign was independent of liability for defective design).


\textsuperscript{734} Id.
technology.\textsuperscript{735} In addition, courts argue that the resources of the judicial system are limited and that administrative agencies, such as the NHTSA, are in a much better position to weigh costs and benefits associated with recall and retrofitting programs.\textsuperscript{736}

On the other hand, some of the jurisdictions holding a manufacturer liable for a failure to appropriately recall dangerous products focus on the severity of the harm resulting from such a failure (\textit{e.g.} deaths and severe injuries when manufacturer failed to recall defective airplane engine).\textsuperscript{737} Others, however, reason that where the manufacturer voluntarily conducts a recall campaign he is subject to liability if he fails to perform it appropriately, because he deters other would-be rescuers from intervening.\textsuperscript{738} However, this kind of liability is only imposed where the manufacturer was aware or could have been aware of the post-sale product danger.\textsuperscript{739}

**b) Duty to Recall under the Restatement (Third) of Torts, § 11**

Section 11 of the Third Restatement reflects the position taken by courts generally rejecting a manufacturer’s duty to recall. It states that such liability for failure to recall exists only in two cases: either when this duty is required by statute or governmental regulation, or if the manufacturer voluntarily conducts a recall campaign

\textsuperscript{735} Id. (holding that there is no duty to retrofit or inform users of ne safety improvements); see also, Victor E. Schwartz, \textit{The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine}, 58 N.Y.U. L. Rev. 892,900-901 (1983).


\textsuperscript{738} Bell Helicopter Co., v. Bradshaw, 594 S.W.2d 519,532 (Tex. Civ. App. 1979) (The court stated that “Once the duty [to recall and repair] was assumed, Bell had an obligation to complete the remedy by using reasonable means available to it...”); Blossman Gas Co. v. Williams, 375 S.E.2d 117 (Ga. App. 1988) (The court held that because the defendant volunteered he was obliged to use reasonable care in the performance of the recall).

\textsuperscript{739} Lanclos v. Rockwell Int’l Corp., 470 So.2d 924,930 (La. Ct. App. 1985) (Experts testified that the manufacturer had knowledge that incorporation of available safety devices for wood shapers was necessary); Braniff Airways, Inc., v. Curtiss-Wright Corp., 411 F.2d 451,453 (2d Cir. 1969) (Airplane engine manufacturer was aware of engine defect eight months prior to plane crash but did not take any action. This fact was essential for the court to find negligence).
and in both cases fails to act as a reasonable person in conducting the recall. It thereby rejects the position taken by a significant number of courts that establishes liability for failure to recall, also in the absence of a statutory requirement, since this would place an unjustifiable burden (e.g. incalculable costs) on the manufacturer.\footnote{Restatement (Third) of Torts: Products Liability, P.F.D., § 11, cmt. a, at 244.}

\section*{C) Comment}

A product recall due to a defective design of a particular automobile model affects the whole product series, thus, hundred thousands of cars. In addition to the costs of contacting the consumer the manufacturer will suffer financial loss in recovering and repairing or replacing defective vehicle parts.\footnote{The manufacturer will generally execute repairs free of charge for the consumer, \textit{see}, Balido v. Improved Machinery, Inc., 105 Cal. Rptr. 890,901 (Cal. Ct. App. 1972).} Consequently, compared to a post-sale warning campaign, the financial burden placed upon a manufacturer is even much higher when conducting a recall campaign. The costs in recalling a vehicle series may even be higher than the estimated costs for being held legally liable for a failure to recall. In \textit{Grimshaw v. Ford Motor Co.},\footnote{174 Cal. Rptr. 348 (Ct. App. 1981) (the court held that the decision to expose consumers to such a serious risk of harm was an unethical “cost-benefit analysis” balancing human lives against corporate profit. \textit{Id.} at 384.} for example, it has been stated that the costs of fixing defective fuel systems in Ford Pinto automobiles would have been $137 million. Ford estimated that its liability for 180 burn deaths, 180 serious burn injuries and 2,100 destroyed vehicles resulting from the failure to recall the Pintos would have cost the entity only $49.5 million. Ford chose not to perform a recall campaign.

In order to determine whether liability against a manufacturer should be established, his burden to perform a post-sale warning or recall campaign must be weighed against the risks and probable loss to which potential plaintiffs are exposed. Where the manufacturer’s burden is relatively low (e.g. $5,000) to save the life of a
consumer, liability will be established if he fails to warn about the post-sale dangers or to recall the product. However, where the manufacturer’s burden is too high (e.g. $1 billion) compared to plaintiff’s probable loss (e.g. life), liability should not be established. Although the rescue of life as the highest object of legal protection is favorable, it should be obvious that at some point the cost would be too high to justify action on the manufacturer’s part. The question which remains is where to draw the line between liability and acceptance of manufacturer conduct. A strict mathematical formula cannot be applied to answer this question, because it could not take into consideration every single aspect of an individual case. Instead, the assessment of whether a manufacturer is liable for a violation of his post-sale duties has to be decided on a case-by-case basis. Given that a duty to recall imposes the highest burden on the manufacturer, liability for failure to do so should only be established if the protection of the consumer cannot be achieved by imposing other, less severe post-sale obligations (e.g. post-sale duty to warn). Thus, the duty to recall should be imposed by courts only as “ultima ratio”.

However, as some courts correctly hold, motor vehicle manufacturers should not be subject to liability for failing to recall their vehicles in situations where new safety features have been developed after they have already been put in the stream of commerce. This would place the risk of developing new technologies on the manufacturers and would indeed deter them from improving the safety of their vehicles, a development which would go to the detriment of the consumer. On the other hand, product recalls should not solely be the task of administrative agencies. With regard to motor vehicles, the NHTSA is empowered to order manufacturers to recall dangerous vehicles. This serves the purpose of preventing the occurrence of harmful events. However, since the NHTSA is a governmental agency it might be subject to political influence, or, due to its internal structure, slow to react. Therefore, it is necessary to have courts that decide on the manufacturer’s duty to recall and the consequences of a
failure to exercise this duty. Although, the judicial system will not be able to prevent the occurrence of harmful events, it is still able to provide compensation for the victims. Thus, a combination of administrative prevention and judicial compensation is the best solution to improve traffic safety.

This evaluation leads to the conclusion that the position taken by some jurisdictions as reflected in § 11 of the third Restatement has to be rejected, and that a common law duty to recall should be imposed with the limitations set forth above.

6. **Comparison to German Product Liability Law**

Both U.S. law and German law distinguish between the manufacturer’s pre-sale duty to instruct and warn and its post-sale duty to warn or recall. With regard to the liability for failing to provide adequate information at the time of sale, it is particularly significant that the law in both countries applies the presumption that an adequate warning would have been heeded by the consumer if it had been issued.\(^\text{743}\) Also, like the majority of jurisdictions in the United States, German law has established the manufacturer’s post-sale duty to warn under a negligence standard.\(^\text{744}\) Regarding the issue of recalls, it can be noticed that administrative agencies in both countries (the National Highway traffic Safety Administration in the United States and the Federal Motor Traffic Agency (Karftfahrtbundesamt) in Germany) have the power to initiate recall campaigns. However, in contrast to United States common law, a controversy whether a duty to recall should be recognized in the absence of statutory regulation does not exist among German courts. Nevertheless, the same factors that a number of United States courts take into consideration in their evaluation of recall duties are also being

\(^{743}\) With regard to German law, see, Chapter I, *supra* at 62.

\(^{744}\) See, Chapter I, *supra* at pp. 54.
considered by German courts. Thus, it can be concluded that both laws are very similar and only vary in details.

F. DEFENSES

Besides the preemption and compliance defenses, manufacturers will try to raise several other defenses in order to escape liability. Among those are statutes of limitation, statutes of repose, contributory negligence and comparative fault, product misuse, and product alteration.

1. STATUTES OF LIMITATION

Most states have adopted statutes of limitation under which the plaintiff must bring a products liability suit within a certain period of time, usually two or three years, in order not to be barred from bringing the claim. For the running of this time period the majority of states has, either by statute or common law, established a discovery rule under which the time limitation begins to run from the time at which the plaintiff has or should have discovered either the product defect or the injury.

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745 See Chapter I, supra at pp. 58.
746 See supra, at pp. 128.
747 See, e.g., ARIZ. REV. STAT. ANN § 12-542 (1991 Cum. Pocket Part): An action for personal injury, property damage, or wrongful death must be brought within two years after the cause of action accrues; COLO. REV. STAT. § 13-80-106 (1) (1986): All actions for products liability for personal injury, death, or property damage have to be brought within two years after the claim for relief arises; FLA. STAT. § 95.11 (3): A product liability action must be brought within four years or it is barred; GA. CODE ANN. § 9-3-30, 9-3-31, 9-33-33: Negligence and strict liability actions must be brought within two years of the date of accrual for bodily injury and within four years for property damage.
748 See, e.g., FLA. STAT. § 95.031(2) (the limitation period generally runs from the time the defect is discovered or should have been discovered);
749 Murphy v. Spelts-Schultz Lumber Co., 481 N.W.2d 422 (Neb. 1992) (the time limitation begins when the plaintiff discovers, or reasonably should have discovered the existence of the injury or damage); MISS. CODE ANN. § 15-1-49(2) (Supp. 1993) (the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury).
2. STATUTES OF REPOSE

Based on the concept that after a certain period of time the defendant should no longer be held responsible for harm resulting from the defective product, a number of jurisdictions have enacted statutes of repose which act as an absolute defense.\textsuperscript{750} If a product liability action has not been brought within the time limit set forth in such a statute, the plaintiff is barred from recovery. The terms of the different statutes vary from state to state, and the period of repose ranges from five to fifteen years. While in some jurisdictions the injury must occur within the statutory time limit, other states require the filing of the lawsuit within that time. Thus, in contrast to statutes of limitation, the discovery of the defect or injury by plaintiff is irrelevant.

3. CONTRIBUTORY NEGLIGENCE AND COMPARATIVE FAULT

Contributory negligence is defined as conduct on the part of the plaintiff, which is a contributing cause to his own injuries.\textsuperscript{751} Under traditional common law, a plaintiff’s contributory negligence was an absolute bar to recovery, since it was deemed impermissible to permit recovery in cases where his misconduct partly caused the injuries.\textsuperscript{752} Even where the plaintiff only slightly failed to exercise reasonable care, recovery was not allowed. As a reaction to the harsh consequences resulting from this “all-or nothing approach,”\textsuperscript{753} almost every state has now adopted some form of

\textsuperscript{750} See, e.g., ARIZ. REV. STAT. § 12-551 (1956) (the cause of action must accrue within twelve years of the date of first sale); GA. CODE § 51-1-11 (b) (2) (1982) (the lawsuit must be filed) within ten years of the date of first sale); ILL. REV. STAT. ch. 110, § 13-213 (b) (1984) (the products liability action must be filed within ten years of the date of first sale to a consumer, or within twelve years of the first sale to a non-consumer); N.C. GEN. STAT. § 1-50 (1983) (the lawsuit must be filed within six years of the date of first sale).

\textsuperscript{751} RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 463.

\textsuperscript{752} Butterfield v. Forrester, 103 Eng Rep 926 (KB 1809); PAUL SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER § 9.05, at 256 (1981, Supp. 1997).

\textsuperscript{753} PROSSER, supra note 415, at 568, note 1.
comparative negligence.\textsuperscript{754} Under this concept, each person involved in a harmful event is liable only in proportion to his or her share of fault. Consequently, the plaintiff in a products liability action will now generally be able to recover despite the fact that that his own negligence (\textit{e.g.} driving intoxicated, failure to wear seat belt) contributed to his injury. However, the concept of comparative fault is treated differently among the states. Some states apply a pure comparative fault scheme, others chose to adopt a modified approach.\textsuperscript{755} Under a pure comparative fault concept, which exists in about a dozen jurisdictions,\textsuperscript{756} the plaintiff can recover no matter how great his degree of fault is, provided it is less than 100\%. The amount of damages the plaintiff can recover is then reduced by the percentage of fault attributable to him; for example, if the plaintiff's fault is 30\%, then he can recover 70\% of the damages. Under modified comparative fault a plaintiff is only able to recover if his share of fault is below a certain threshold percentage. In some jurisdictions\textsuperscript{757} the plaintiff will be barred from recovery if his fault is equal or greater than the fault of the defendant. In others,\textsuperscript{758} the plaintiff's claim will only be barred if his fault is greater than that of the defendant. These two forms of modified comparative fault reach different results in cases where both the plaintiff's and the defendant's fault is 50\%. Under the former concept, "not as great as approach," the plaintiff will be barred from recovery, whereas under the latter, "not greater than approach," he will recover 50\% of the damages.

\textsuperscript{754} Today, 46 states have adopted the concept of comparative fault, \textit{see, e.g.}, Hoffmann \textit{v.} Jones, 280 S.2d 431,436 (Fla. 1973); Li \textit{v.} Yellow Cab Co., 532 P.2d 1226 (1975). The only exceptions are Alabama, Maryland, North Carolina, and the District of Columbia, \textit{see, e.g.}, Williams \textit{v.} Delta International Mach. Corp., 619 So.2d 1330 (Ala. 1993); \textit{see also}, O. Stephen Montagnet, \textit{Assumption of Risk in Mississippi: Eliminating the Confusion While Retaining the Defense - Independent of Comparative Negligence Principles}, 64 Miss. L.J. 753,755 and note 14 (1995).

\textsuperscript{755} PROSSER, \textit{supra} note 415, at 579, note 5; MILLER, \textit{supra} note 412, \S 32.01, at 3.

\textsuperscript{756} PROSSER, \textit{supra} note 415, at 579, note 5.

\textsuperscript{757} \textit{See, e.g.}, Arkansas, Colorado, Georgia, Nebraska, and Tennessee, \textit{see}, PROSSER, \textit{supra} note 415, at 579 note 5. B.

\textsuperscript{758} Most jurisdictions apply this kind of modified comparative fault concept, \textit{see, e.g.}, Connecticut, Illinois, Ohio, Pennsylvania, and Wisconsin, \textit{see}, PROSSER, \textit{supra} note 415, at 579 note 5. C.
Whether the comparative fault system not only applies to actions based on negligence but also to strict liability is controversial. Most jurisdictions chose to apply comparative fault to strict liability.\textsuperscript{759} They argue that the semantic difference between “fault” on the one hand, and “strict liability or no-fault” on the other hand, is irrelevant. The main argument of these courts, however, focuses on the fact that if comparative fault principles were not applied to strict liability, the plaintiff would be placed in a worse position than if he had sued in negligence, although strict liability was imposed to protect the consumer. In negligence, plaintiff’s fault only diminishes, but does not completely bar his claim, whereas when he sues in strict liability, his assumption of risk completely forecloses recovery. Since in some jurisdictions assumption of risk is merged into comparative fault, this would lead to the result that assumption of risk in a negligence action would not defeat the plaintiff’s recovery, while the same conduct in a strict liability case would bar his claim. To void this “bizarre anomaly,” comparative fault should also apply to strict liability.\textsuperscript{760} On the other hand, it is also argued that it would be unfair towards manufacturers to disregard the consumer’s misconduct, because this would relieve consumers from all responsibility for safe product use.\textsuperscript{761}

4. Assumption of the Risk

In some jurisdictions the defendant is allowed to bring assumption of risk on the part of the plaintiff as a separate defense. This term is defined as “[p]laintiff’s voluntary exposure to a known risk.”\textsuperscript{762} As can be concluded from this definition, the defendant must establish three elements in order to successfully plead this defense: the plaintiff’s

\textsuperscript{759} See, e.g., Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978); Armstrong v. Cione, 738 P.2d 79 (Haw. 1987).

\textsuperscript{760} Daly v. General Motors Corp., 575 P.2d 1162,1167-1169.


\textsuperscript{762} Montagnet, supra note 754, at 754.
knowledge of the danger, its appreciation by the plaintiff, and his deliberate and voluntary exposure to that danger.\textsuperscript{763} For example, these prerequisites would be fulfilled where the driver of a car knows about steering problems but continues to use it for a trip during his vacation.\textsuperscript{764} Some states take the position that assumption of risk completely bars plaintiff's claim.\textsuperscript{765} Since assumption of risk as a complete defense would lead to inconsistent results in connection with the application of comparative fault principles, most jurisdictions have abolished assumption of risk as a separate defense and recognize it only as a factor in determining comparative fault.\textsuperscript{766}

5. PRODUCT MISUSE, ALTERATION AND MODIFICATION

When the plaintiff uses a vehicle in an abnormal manner or in a fashion not intended by the manufacturer,\textsuperscript{767} or when he negligently repairs it or adds accessories to it, one must consider how this conduct is relevant for his recovery. In some states misues and alteration are statutory defenses.\textsuperscript{768} As for common law, most courts take the position that the plaintiff's damages should be diminished according to the principles of

\textsuperscript{763} Elias v. New Laurel Radio Station, Inc., 146 So.2d 558,561-562 (Miss. 1962).
\textsuperscript{764} Palmer v. Ford Motor Co., 498 F.2d 952 (10\textsuperscript{th} Cir. 1974), applying Kansas law (the driver of a 1968 Ford truck was killed in an accident allegedly due to a steering defect. The court held that the driver's knowledge of steering problems and the continued use of the truck could constitute assumption of risk).
\textsuperscript{765} Tafoya v. Sears, Roebuck & Co., 884 F.2d 1330 (10\textsuperscript{th} Cir. 1989) (applying Colorado law); \textit{CONN. GEN. STAT. ANN.} § 52-572 (1991).
\textsuperscript{766} Daly v. General Motors Corp., 575 P.2d 1162,1172 (Cal. 1978); South v. A.B. Chance Co., 635 P.2d 728 (Wash. 1981); Sanford v. Chevrolet Div. Of General Motors, 642 P.2d 624,628 (Or. 1982).
\textsuperscript{767} See, \textit{e.g.}, Daniell v. Ford Motor Co., 581 F.Supp. 728 (D.N.M. 1984): In an attempt to commit suicide, plaintiff became locked into a trunk of a 1973 Ford for nine days. Plaintiff claimed that the car's trunk lock design was defective for lack of an internal release mechanism. The plaintiff could not recover for breach of implied warranty when the use of the trunk in this fashion was not intended.
\textsuperscript{768} See, \textit{e.g.}, \textit{IND. CODE} § 33-1-1.5-4(3); \textit{N.D. CENT. CODE} § 28-01.1-04.
comparative fault. However, if this kind of conduct was unforeseeable for the defendant manufacturer, the plaintiff's claim is completely barred.

6. COMPARISON TO GERMAN PRODUCT LIABILITY LAW

As we saw earlier, German law explicitly recognizes most of the discussed defenses. This is true for the statute of limitation defense (§ 852 BGB: three years running from the time at which the plaintiff knew of the tortuous act and the tortfeasor; § 12 ProdHaftG: three years from the time in which the plaintiff knew or could have known of the tortuous act), the statute-of-repose defense (§ 13 sec. I ProdHaftG: ten years running from the time at which the product has been put on the market), and the contributory negligence defense (§ 254 BGB). Under the latter, every aspect of the plaintiff's conduct, for example assumption of the risk or negligent conduct such as driving while intoxicated, is taken into consideration in the decision on whether and to what extent he should recover. Furthermore, German law applies in its § 254 BGB and § 287 ZPO an approach similar to the pure comparative fault concept, which is used by some jurisdictions in the United States. However, a concept similar to the modified comparative fault system is unknown in German law.

G. DAMAGES

If the plaintiff has successfully brought a product liability action against the automobile manufacturer, he is entitled to recover damages for the harm he suffered. Damages can be classified in two groups, compensatory damages and punitive damages.


770 Schuh v. Fox-River Tractor Co., 218 N.W.2d 279 (Wis. 1974) (unforeseeable misuse or alteration is a complete bar).

771 See, Chapter I, supra at 65.

772 See, Chapter I, supra at 89.
Compensatory damages can further be divided in economic damages and non-economic damages.\textsuperscript{773}

1. Compensatory Damages

Compensatory damages are awarded to compensate the plaintiff for his injuries and to restore him to the position he would have been in if the injury never had happened.\textsuperscript{774} The plaintiff can recover for compensatory economic damages if he suffered monetary loss. Monetary loss includes financial expenditures for medical treatment, burial and memorial expenses, loss of income, past and future impairment of earning capacity, expenses occurred for substitute domestic services, loss of use of property (e.g. vehicle), and expenses for repair of damaged property.\textsuperscript{775} Compensatory non-economic damages, on the other hand, can be defined as subjective, non-monetary losses.\textsuperscript{776} They include, for example, recovery for pain and mental suffering, loss of care, comfort, companionship and society, and consortium.\textsuperscript{777}

\textsuperscript{773} See, e.g., OR. REV. STAT. § 18.560 (2) (a), (b), (3) (1997).

\textsuperscript{774} Kimberly A. Pace, Recalibrating the Scales of Justice through National Punitive Damage Reform, 46 Am. U. L. Rev. 1573,1578, note 20 (1997).

\textsuperscript{775} OR. REV. STAT. § 18.560 (2) (a) (1997). However, it has to be emphasized that recovery for the defective product itself is - like in German law - considered as pure economic loss for which recovery in most jurisdictions is not allowed because the provision of this kind of remedy is regulated under the Uniform Commercial Code, see, e.g., East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986); Seely v. White Motor Co., 403 P.2d 145,147-148 (Cal. 1965); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Pratt and Whitney, Can., 815 P.2d 601,604 (Nev. 1991). The court held that damages resulting from a defective airplane engine leading to the destruction of the whole plane was mere economic loss not recoverable under tort law. One important rationale for this rule is that otherwise contractual statutes of limitation could be undermined, see, e.g., Spring Motors Distribution v. Ford Motor Co., 489 A.2d 660,663 (N.J. 1985). On the other hand, recovery is - again like in German law - allowed where a defective component part (e.g. a gas pedal) led to the damage of the entire product (e.g. vehicle) if component part and the rest of the product are not deemed to be an integrated whole, see, e.g., East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858,867 (1986) (holding that the turbines of a ship and the ship itself are an integrated whole. The damage of the ship by defective turbines is no damage to other property so that recovery was precluded).

\textsuperscript{776} OR. REV. STAT. § 18.560 (2) (b) (1997).

\textsuperscript{777} OR. REV. STAT. § 18.560 (2) (b) (1997).
2. PUNITIVE DAMAGES

Punitive damages, on the other hand, are monetary damages that are not intended to compensate the plaintiff.\(^778\) Rather, they are awarded to punish a manufacturer for its intentional, malicious, reckless or willful conduct showing its indifference to human safety. The objective of punitive damages is to provide retribution and to deter the actual defendant, as well as other potential defendants, from similar conduct in the future (individual and general deterrent).\(^779\) Unlike compensatory damages, punitive damages are a "[p]ublic remedy for a public wrong."\(^780\) A significant automobile case in which punitive damages were awarded, and that we have discussed in connection with the introduction of punitive damages in Germany and the manufacturer’s recall duties, is *Grimshaw v. Ford Motor Co.*\(^781\).

3. COMPARISON TO GERMAN PRODUCT LIABILITY LAW

Also in this field of comparison, German and U.S. product liability laws have a great deal in common. Like U.S. law, German law recognizes the classification of compensatory damages in economic and non-economic damages.\(^782\) Of particular interest is the fact that the rules regarding recovery for the defective product itself are identical. In both countries, compensation under tort law for the defective product itself is generally precluded by the law governing contracts, which would otherwise be undermined. A common rationale for this rule is based on the fact that the statutes of limitation in contract law vary from the ones in tort law. Nevertheless, an exception to


\(^{779}\) See, e.g., Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1383-1384 (5th Cir. 1991) (upholding the size of a punitive damage award because of its deterrent effect on the manufacturer); RESTATEMENT (SECOND) OF TORTS, § 908, cmt. a.;


\(^{782}\) See, Chapter I, supra at pp. 66.
this general rule is made under both laws in cases where the defective component part of
a product and the product itself are not deemed to be an integrated whole. 783

However, in an important matter German law differs from its American
counterpart. Unlike American law, German tort law does not recognize punitive
damages. As for the rationales and the proposal of introducing punitive damages in
German law it can be referred to the discussion on punitive damages in the first
Chapter. 784

Another point of divergence between the law in both countries is that, as a
matter of fact, damage awards in the United States are generally much higher than in
Germany. Damages for pain and suffering awarded by German courts, for example,
rarely exceed DM 100,000 while U.S. awards for the same kind of damage often exceed
this amount by far. An explanation for this difference may be that in Germany the court
(judge(s)) decides on the amount of damages to be awarded, whereas under U.S. law
this generally is the task of the fact finder (jury). Moreover, U.S. attorneys might be
able to exert more influence on juries (e.g. exposure to emotions suffered by plaintiff)
than German attorneys can on judges. Other aspects explaining this divergence may be
that social security (unemployment insurance, health insurance, pension insurance fund)
in the United States is not as good as in Germany, that medical expenses are higher, and
that attorneys work on contingent fees.

783 See, Chapter I, supra at 65, note 292.
784 See, Chapter I, supra, at pp. 66.
H. CONCLUSION

I. ANALYSIS OF PRODUCTS LIABILITY LAW IN THE UNITED STATES

Regarding the theories of liability (strict liability and negligence), we have seen that the plaintiff can base his claim on strict liability only in the area of manufacturing defects. Although some courts may use the label of strict liability for design and warning defect claims, the majority of jurisdictions apply, in reality, a kind of negligence standard to these two kinds of defects. Within this standard a risk-utility test focusing on the availability on a reasonable alternative design or warning is performed in which consumer expectations are appropriately considered as one of several factors. However, in order to ease the plaintiff's burden of proof, the introduction of a presumption that an alternative design was available should be adopted by state common law.

With regard to the manufacturer's post-sale duties, the courts should unanimously recognize a post sale duty to warn and recall defective vehicles. This recommendation is based on the ground that the responsibility of the manufacturer does not end with the placing of its vehicles on the market, because he created a potential source of danger which constantly has to be monitored, controlled, and eventually eliminated. In this area the National Highway Safety Administration and state common law should function as a double control mechanism in order to increase traffic safety by preventing the occurrence of harmful events through post-sale warnings or recalls.

In addition to the already mentioned controversial aspects of Unites States product liability law, the most difficult and practically relevant issue is the one of preemption of state common law by the Traffic Safety Act and / or Federal Motor Vehicle Safety Standards. This issue is rooted in the federal system of the United States
(see Supremacy Clause)\textsuperscript{785} and requires a balance of power between the federal
government and the individual states. The answer to the question of whether state
common law is preempted or not is decisive for every aspect of the plaintiff’s action and
has to be determined by focusing on Congress’ intent. Currently, neither Congress nor
the Supreme Court provided adequate guidelines on how to determine the issue. In its
recent analysis in \textit{Cipollone, Freightliner}, and \textit{Medtronic}, the Supreme Court did not
take a clear position and left wide room for various interpretations of its holdings. In the
future, however, the Supreme Court should determine precisely if and to what extent
preemption takes place in the motor vehicle area. More blameworthy than the Supreme
Court, however, is Congress. It could avoid the discussion surrounding the preemption
doctrine by clearly stating its intent in its legislation. Until today, Congress has failed to
do so because it was probably easier to pass legislation without directly resolving the
issue. Potential defendants have to be advised in two ways. First, in every design or
warning defect case involving Federal Motor Vehicle Safety Standards, they should
raise the preemption defense. Since the majority of United States Courts of Appeals and
numerous state courts argue in favor of preemption, it is very likely that they will win
the case on summary judgment. Second, since some courts take the opposite opinion,
manufacturers should not only comply with applicable Federal Motor Vehicle Safety
Standards, but rather they should comply in the way that they choose to adopt the safest
of several safety options provided by those standards. Although this will increase costs
on the part of the manufacturer, which will at the end be reflected in the product price
and, thus, be borne by the consumer, this contributes to increase traffic safety and
minimizes the manufacturer’s risk of facing economic loss through damage awards.

\textsuperscript{785} U.S. Const., art VI, cl. 2.
2. **Final aspects in the comparison between United States and German product liability law**

A) **Similarities**

The most important finding in the comparison between product liability law in the motor vehicle area in both countries is that both laws are very similar, and in some aspects even identical. This is particularly true for the recognition of two theories of liability (strict liability and negligence), the existence of three kinds of product defects (manufacturing, design, and instruction or warning defect), the standards applied to determine product defectiveness,\(^7\)\(^8\)\(^6\) the distribution of burden of proof, the defenses, and most of the damages.

Significantly, the extent to which both laws are similar has increased since Germany enacted the Product Safety Act in 1997, empowering, among other agencies, the Federal Office for Motor Traffic to take preventive measures (warning, recall) in order to increase traffic safety. Since the American counterpart, the National Highway Traffic Safety Administration, empowered with similar authority, was established in the late 1960s,\(^7\)\(^8\)\(^7\) today both countries use a combination of administrative preventive check and judicial compensatory check to pursue the common goal of traffic safety.

In addition, even the conceptual difference between German Civil Law and United States Common Law is minimized in the area of product liability, because not only in the United States but also in Germany the rule making and development of this

\(^{786}\) The starting point in German product liability law is a consumer expectations test supplemented with elements of a risk-utility balancing. Under United States law, the starting point is a risk-utility analysis supplemented by taking into consideration consumer expectations.

\(^{787}\) It seems to be the trend that United States product liability law is - at least in some areas - the forerunner of German product liability law. This is not only reflected in the fact that Germany empowered its Motor Vehicle Administration with authority only about 30 years later but also in the fact that the privity requirement in the United States has already been abolished in 1916 (in MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916)) whereas in Germany this only happened in 1968 (in BGHZ 51,91 ff.).
field of law is the task of the courts. The most important explanation for this finding is that in Germany the existing statutes on product liability (the Civil Code from 1900 with its general provisions in §§ 823 ff. BGB and the Product Liability Act from 1990) either do not address product liability issues explicitly (Civil Code) or do address them in an incomplete or inefficient way (Product Liability Act).

Eventually, an explanation for the remarkably significant similarities in product liability law in both countries is a similar economic, social, and political development. Both countries are highly industrialized, technologically developed, and economically strong. In particular, industries in both countries are characterized by a large number of manufacturing companies (e.g. Chrysler, General Motors, Ford; BMW, Mercedes Benz, Audi, Porsche, Volkswagen) involved in worldwide trade. Although a few cultural differences exist, people in both countries join similar education under a democratic system and have basically the same world view. These people constitute society. Law, on the other hand, does not find an end in itself but pursues, among other things, to set standards which are economically, socially, and politically acceptable. Most often, law seeks to find the right balance of interests. As a result, one might say both that law is the mirror of society and that the nature of society is to a certain extent reflected in the governing law.

**B) DIFFERENCES**

On the other hand, three aspects in which both laws differ from each other should be outlined. The first significant difference is that although the law in both countries is very similar in terms of substantive legal doctrine, it is different in terms of practical matters. As for procedural aspects, pre trial discovery exists in U.S. law but is unknown to German law. The fact finding process under U.S. law is left to a jury composed of six or twelve jurors, while in Germany the judge(s) decide(s) exclusively
on this issue. Another important aspect concerns the remuneration of attorneys. In the United States most attorneys work on a contingent fee basis, some on an hourly basis. In Germany, however, contingent fees do not exist. The fees German attorneys receive are regulated in the Federal Attorney Fees Act (Bundesgebührenordnung für Rechtsanwälte, BRAGO).

The second significant difference is that although both countries have a federalist structure, tort law in Germany is exclusively regulated by the federal government, while in the United States this area of law is traditionally a matter of state law. Thus, in the United States there is not a single applicable tort law, but there are 50 tort laws addressing and solving issues sometimes similarly, sometimes differently. On the one hand, this has the advantage that a variety of solutions can be provided by the states, which can experiment in this area of law. On the other hand, this has the disadvantage that United States law is not as clear as German law. The latter fact has raised the question whether United States tort law should be more federalized. The position taken to this complex and difficult question is that the federal government should only slightly interfere, for example by providing optional proposals concerning product liability issues. The rationale for this position is that tort law traditionally belongs to the police powers of the states and is an important part of sovereignty. Moreover, if one pleads for the nationalization of tort law, one must also plead for a nationalization of other matters left to state competence (e.g. criminal law, family law) in order to be consistent. This, however, would violate fundamental principles of the United States federal system.

788 In commercial affairs, however, one professional judge and two honorary judges (persons without professional legal background, usually businessmen or merchants) decide the case, see, § 105 Gerichtsverfassungsgesetz (GVG), in der Fassung der Bekanntmachung vom 9. Mai 1975, BGBl. I S. 1077) (Landgericht, Kammer fuer Handelssachen).
789 BGBl. I S. 907.
Third, the most important point of divergence concerns the recognition of punitive damages. While this kind of damage is recognized in U.S. product liability law as means of retribution and deterrence, it is unknown to German tort law. However, because of these two objectives and in order to create incentives for motor vehicle manufacturers to produce safer products, it is recommended that capped punitive damages should be adopted by the German legislature.
# Appendix

## Examples of Recall Campaigns Carried Out by NHTSA

<table>
<thead>
<tr>
<th>Company</th>
<th>Model</th>
<th>Number</th>
<th>Year</th>
<th>Reason</th>
</tr>
</thead>
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<tr>
<td>Chrysler Corp.</td>
<td>Dodge Ram</td>
<td>960,000</td>
<td>1997</td>
<td>Transmission</td>
</tr>
<tr>
<td>Ford Motor Co.</td>
<td>Crown Vict.</td>
<td>125,000</td>
<td>1997</td>
<td>Structure, hood</td>
</tr>
<tr>
<td>General Motors</td>
<td>Cad. Delville</td>
<td>156,910</td>
<td>1997</td>
<td>Brakes, antiskid</td>
</tr>
<tr>
<td>BMW</td>
<td>318I, IS, IC</td>
<td>410,000</td>
<td>1997</td>
<td>Throttle linkage</td>
</tr>
<tr>
<td>Mercedes Benz, N.A.</td>
<td>S-Class</td>
<td>27,000</td>
<td>1997</td>
<td>Brakes, hydraulic</td>
</tr>
<tr>
<td>VW of N.A.</td>
<td>Audi 90</td>
<td>39,300</td>
<td>1997</td>
<td>Airbag</td>
</tr>
<tr>
<td>Volvo of N.A.</td>
<td>Model 855</td>
<td>12,530</td>
<td>1996</td>
<td>Fuel, throttle linkage</td>
</tr>
<tr>
<td>Toyota Motor Co.</td>
<td>Camry</td>
<td>18,746</td>
<td>1997</td>
<td>Brakes, power assist.</td>
</tr>
<tr>
<td>Nissan Motors Corp.</td>
<td>Altima</td>
<td>36,000</td>
<td>1996</td>
<td>Active Restraint Syst.</td>
</tr>
<tr>
<td>Hyundai Motor Am.</td>
<td>Tiburon</td>
<td>74,965</td>
<td>1997</td>
<td>Visual systems</td>
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<tr>
<td>Ferrari N.A.</td>
<td>F355, F456</td>
<td>346</td>
<td>1997</td>
<td>Brakes, hydraulic</td>
</tr>
<tr>
<td>Rolls-Royce Motors</td>
<td>Silver Dawn</td>
<td>1,621</td>
<td>1997</td>
<td>Brakes, hydraulic</td>
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<tr>
<td>Suzuki Motor Co.</td>
<td>TL 1000 SV</td>
<td>2,935</td>
<td>1997</td>
<td>Steering (motorcy.)</td>
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<tr>
<td>Harley Dav. Mot.</td>
<td>XL, FX, FL</td>
<td>176,515</td>
<td>1996</td>
<td>Fuel injection</td>
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