St. Mary's Law Journal

Volume 36 | Number 2 Article 1

1-1-2005

Determining the Indeterminate Defect.

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Recommended Citation

J. Gregory Marks, *Determining the Indeterminate Defect.*, 36 St. Mary's L.J. (2005).
Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol36/iss2/1

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ST. MARY'S LAW JOURNAL

VOLUME 36 | 2005 | NUMBER 2

ARTICLES

DETERMINING THE INDETERMINATE DEFECT

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St. Mary's Law Journal, Vol. 36 [2004], No. 2, Art. 1

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I. INTRODUCTION

He was lucky to survive the fire. Driving home from work on a country road, Jack Ridgway's pickup truck caught fire for an unknown reason.[1] Sustaining second and third degree burns to twenty percent of his body, Ridgway still managed to escape his burning pickup truck.[2] An inspection afterwards indicated that the fire most likely originated in the engine compartment;[3] however, the actual cause of the fire could not be determined.[4] Nevertheless, Mr. Ridgway brought a products liability lawsuit against Ford Motor Company arguing that under Section 3 of the Third Restatement of Torts, Products Liability, a product defect could be inferred from the circumstances of the accident.[5]

Section 3 of the Third Restatement of Torts provides that a defect can be inferred, even without proof of a specific defect, when the incident that caused the harm was of the kind that ordinarily occurs as a result of a product defect and was not solely the result of causes other than the product defect.[6] Akin to a *res ipsa loquitur* theory, the inference was born out of cases where the product was destroyed, such as airplane crashes and car fires, and therefore, no specific defect could be proved.[7] The inference draws no distinction between a manufacturing defect and a design defect.[8]

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1. Ford Motor Co. v. Ridgway, 135 S.W.2d 598, 599 (Tex. 2004).
2. *Id.* at 600.
3. *Id.*
4. *Id.*
5. *Id.*
6. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998).
7. *See, e.g.*, Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 634 (8th Cir. 1972) (involving an aircraft that crashed at sea and never recovered); Barnett v. Ford Motor Co., 463 S.W.2d 33, 34 (Tex. Civ. App.—Waco 1970, no writ) (containing litigation over a car fire that destroyed the instrument panel).
8. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. b (1998) (stating that Section 3 will most often apply to manufacturing defects but could pertain to design defect cases).

The Texas Supreme Court recently held that Mr. Ridgway's case failed for lack of evidence.[9] Although the court declined to rule on whether Section 3 of the Third Restatement of Torts reflects the law of Texas,[10] the court did suggest that under the proper set of facts, circumstantial evidence could be used to prove an indeterminate defect.[11] As Justice Hecht wrote in his concurring opinion: "Few would question the use of circumstantial evidence to prove products liability in appropriate cases. The hard issue is not whether it can be done, but when and how."[12] This Article attempts to gage the current state of the law on indeterminate defect cases in Texas in the wake of *Ridgway*. It also offers guidance on using circumstantial evidence in Texas product cases.

II. The History and Development of Section 3 of the Third Restatement of Torts

A. *The Prior Cases*

An indeterminate defect claim is just as the name implies; the specific defect is indeterminate, but the circumstances surrounding the accident are such that a defect can be inferred.[13] Section 402A of the Second Restatement of Torts fails to address these types of claims even though several prior cases recognize such a theory.[14] For example, in *North American Aviation, Inc. v. Hughes*,[15] the court allowed an inference of a manufacturing defect when a newly delivered jet caught fire in mid air, even though the plaintiff was unable to furnish a reason for the fire.[16] Likewise, in *Escola v. Coca Cola Bottling Co.*,[17] the court held that an inference of a man-

9. *Ridgway*, 135 S.W. 2d at 602.

10. *Id.* at 601.

11. *Id.*

12. *Id.* at 603.

13. *Compare* Barnett v. Ford Motor Co., 463 S.W.2d 33, 35 (Tex. Civ. App.—Waco 1970, no writ) (permitting proof of the existence of a defect by circumstantial evidence; but, there was no evidence of a specific defect), *with* Gen. Motors v. Hopkins, 548 S.W.2d 344, 349-50 (Tex. 1977), *rev'd on other grounds*, Turner v. Gen. Motors, 584 S.W.2d 844, 851 (Tex. 1979) (allowing the plaintiff to prove a specific defect using circumstantial proof).

14. *See* Restatement (Second) of Torts § 402A (1965) (providing that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user . . . is subject to liability for physical harm thereby caused to the ultimate user").

15. 247 F.2d 517 (9th Cir. 1957).

16. N. Am. Aviation, Inc. v. Hughes, 247 F.2d 517, 521 (9th Cir. 1957).

17. 150 P.2d 436 (Cal. 1944).

ufacturing defect was proper when a bottle exploded under normal handling conditions despite the lack of specific proof of a manufacturing defect.[18]

After Section 402A of the Second Restatement of Torts was adopted, several courts recognized that in some cases there would be no evidence of a specific defect, but that the circumstances of the accident would indicate a product defect. In *Heaton v. Ford Motor Co.,*[19] the court explained that:

> In the type of case[s] in which there is no evidence, direct or circumstantial, available to prove exactly what sort of manufacturing flaw existed, or exactly how the design was deficient, the plaintiff may nonetheless be able to establish his right to recover, by proving that the product did not perform in keeping with the reasonable expectations of the user. When it is shown that a product failed to meet the reasonable expectations of the user the inference is that there was some sort of defect, a precise definition of which is unnecessary. If the product failed under conditions concerning which an average consumer of that product could have fairly definite expectations, then the jury would have a basis for making an informed judgment upon the existence of a defect.[20]

The court held that there were no definite expectations as to how a truck should handle after hitting a five or six inch rock at highway speeds.[21]

A classic analysis of the indeterminate defect claim appears in *Lindsay v. McDonnell Douglas Aircraft Corp.*[22] In *Lindsay*, a Navy aircraft crashed on a routine training flight over the Gulf of Mexico just one day after the aircraft had been delivered to the Navy.[23] The aircraft was never recovered and the crash was not witnessed, although a nearby fisherman did see an aircraft on fire and hear a laboring engine.[24] The pilot and navigator did not report any problems with the aircraft, nor did they eject.[25] In addition, the mechanical problems caused the aircraft delivery to be

18. Escola v. Coca Cola Bottling, Co., 150 P.2d 436, 439 (Cal. 1944).
19. 435 P.2d 806 (Or. 1967).
20. Heaton v. Ford Motor Co., 435 P.2d 806, 808 (Or. 1967) (citations omitted).
21. *Id.* at 809-10.
22. 460 F.2d 631 (8th Cir. 1972).
23. Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 633 (8th Cir. 1972).
24. *Id.* at 634.
25. *Id.* at 638.

delayed.[26] The court held that under these circumstances, the plaintiff was not required to prove a specific defect.[27] Rather, "[i]f [the plaintiff] can show that the crash was caused by some unspecified defect and that no other cause is likely, she has made a submissable case."[28]

The *Lindsay* court gave clues as to when an indeterminate defect claim may be appropriate. Commenting on the unique difficulty of the situation, the court noted that:

> This admittedly poses a difficult evidentiary problem for each side. Circumstantial evidence is about the only evidence available. Courts would prefer even in a strict liability case to have proof of a specific defect causing the accident. But this is not possible in many cases and particularly where the crashed vehicle is not available.[29]

The court noted that the age of the aircraft—less than four hours of flight time—was a strong factor weighing in favor of the inference.[30] However, the court failed to explain how the fact that the aircraft was unavailable and relatively new at the time of the crash was significant to the claim.[31] Furthermore, the court failed to define the discrete elements of proof necessary to make the inference, other than a vague requirement for proof of an unspecified defect causing the crash.[32] The plaintiff had no guidance of how to fulfill this requirement.

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26. *Id.* at 633.

27. *Id.* at 637.

28. *Lindsay*, 460 F.2d at 640.

29. *Id.* at 638.

30. *Id.*

31. *See Lindsay*, 460 F.2d at 633 (declining to explain the importance of the fact that the aircraft was new at the time of the incident, which would support an inference that the defect existed at the time of manufacture); Ducko v. Chrysler Motors Corp., 639 A.2d 1204, 1206 (Pa. 1994) (holding that there is a strong inference that the defect was the fault of the manufacturer when the product has been recently delivered to the user).

32. *See* Ford Motor Co. v. Ridgway, 135 S.W.2d 598, 603 (Tex. 2004) (Hecht, J., concurring) (pointing out that "[f]ew would question the use of circumstantial evidence to prove products liability in appropriate cases. The hard issue is not whether it can be done, but when and how"). Without objective criteria, the court is left with more of a subjective "I know it when I see it" approach. Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 384 (1995).

The court in *Rogers v. Johnson & Johnson Products, Inc.*,[33] however, attempted to define in more detail the elements of proof necessary for such an inference.[34] The court noted that:

> In some instances . . . the plaintiff may not be able to prove the precise nature of the defect in which case reliance may be had on the "malfunction" theory of product liability. This theory encompasses nothing more than circumstantial evidence. . .eliminating abnormal use or reasonable, secondary causes for the malfunction. It thereby relieves the plaintiff from demonstrating precisely the defect yet it permits the trier-of-fact to infer one existed from evidence of the malfunction, of the absence of abnormal use and of the absence of reasonable, secondary causes.[35]

Several courts agree with this "malfunction theory" of products liability.[36] Indeed, the first draft of Section 3 characterized indeterminate defect claims as malfunction claims.[37] However, the articulation of an indeterminate defect claim as a malfunction claim failed to provide the courts with enough specifics to make a rational judgment as to when the malfunction claim applied and when it did not.[38]

B. *Section 3*

Later drafts of Section 3, however, began to analogize indeterminate defect claims to *res ipsa* negligence cases.[39] Eventually, the

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33. 565 A.2d 751 (Pa. 1989).

34. Rogers v. Johnson & Johnson Prod., Inc., 565 A.2d 751, 754 (Pa. 1989).

35. *Rogers*, 565 A.2d at 754 (citations omitted).

36. *See, e.g.*, Garrett v. Nobles, 630 P.2d 656, 659 (Idaho 1981) (reaffirming that a products liability case may be proved by evidence of a product malfunctioning); Tweedy v. Wright Ford Sales, Inc., 334 N.E.2d 417, 420 (Ill. App. Ct. 1975), *aff'd*, 357 N.E.2d 449 (Ill. 1976) (holding that the malfunction made the product unfit); Stackiewicz v. Nissan Motor Corp., 686 P.2d 925, 929 (Nev. 1984) (stating that evidence of a steering malfunction can be sufficient circumstantial proof of a defect).

37. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (Tentative Draft No. 1, 1994) (providing that:

> [w]hen a product fails to function as a reasonable person would expect it to function and causes harm under circumstances where it is more probable than not that the malfunction was caused by a manufacturing defect, the trier of fact may infer that such a defect caused the [harm] and [the] plaintiff need not specify the nature of the defect").

38. Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 372 (1995).

39. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. a (Tentative Draft No. 1, 1994) (stating, "[w]here [a] defendant's negligence is the basis of liability, the

final version of Section 3 adopted a *res ipsa* model.[40] Although the term *res ipsa* is not in the title of Section 3, the first comment notes that the section is historically grounded in the law of negligence, which has long recognized the theory of *res ipsa loquitur*.[41] Furthermore, the elements of proof set out in Section 3 parallel those elements found in the Second Restatement of Torts, Section 328D, entitled "*Res Ipsa Loquitur*."[42]

Res ipsa loquitur, which in Latin means "the thing speaks for itself,"[43] has its origin in negligence.[44] It is not a theory of liability, but rather an evidentiary rule that governs the availability and adequacy of evidence of negligence.[45] As the United States Supreme Court explained:

> *Res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evi-

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doctrine of *res ipsa loquitur* allows the trier of fact to draw an analogous inference of negligence," which is similar to Section 3); *see also* Western Sur. & Cas. Co. v. Gen. Elec. Co., 433 N.W.2d 444, 447 (Minn. Ct. App. 1988) (noting that the use of circumstantial evidence to prove the existence of a defect in a strict liability action is in essence a strict liability version of *res ipsa loquitur*).

40. As will be shown, however, while Section 3 is analogous to a *res ipsa* claim, it is not identical.

41. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. a (1998); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 3 (Tentative Draft No. 1, 1994) (making reference to 328D explaining that liability there under was an "analogous inference" or a "similar inference").

42. RESTATEMENT (SECOND) OF TORTS § 328D (1965). The Restatement states:

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by evidence[.]

Id.

43. BLACK'S LAW DICTIONARY 1311 (7th ed. 1999).

44. One of the earliest decisions to apply the doctrine was *Byrne v. Boadle*, 159 Eng. Rep. 299, 300 (Ex. D. 1863). In that case, a passerby was struck in the head by a barrel of flour that was being lowered by a merchant. *Id.* at 299. The court permitted the presumption of negligence, reasoning that it was "apparent that the barrel was in the custody of the defendant who occupied the premises, . . . and . . . the fact of its falling is prima facie evidence of negligence." *Id.* at 301.

45. Myrlak v. Port Auth. of N.Y. & N.J., 723 A.2d 45, 51 (N.J. 1999); *see also* WILLIAM L. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 346 (William S. Hein & Co. 1982) (1954) (explaining that *res ipsa* is not a "deliberate instrument of policy" and that its only purpose is to permit an inference from circumstantial evidence).

> dence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.[46]

In other words, *res ipsa loquitur* is a rule of logic that only allows a plaintiff to survive a procedural challenge in the absence of evidence.[47]

The doctrine of *res ipsa loquitur* also provides courts with objective criteria as to when the plaintiff has met its burden of presenting enough evidence for the jury to decide whether there is circumstantial proof of negligence.[48] Specifically, under the Second Restatement of Torts, Section 328D, want of due care may be inferred when the event is of a kind which ordinarily does not occur in the absence of negligence and other responsible causes, including the conduct of third persons.[49] In many jurisdictions, the second element of Section 328D is substituted with the requirement that the defendant exercise exclusive control of the instrumentality causing the harm.[50]

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46. Sweeney v. Erving, 228 U.S. 233, 240 (1913).

47. *See* Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 252 (Tex. 1974) (noting, when discussing *res ipsa loquitur*, that "[t]his is not so much a rule of law as it is a rule of logic–unless these factors are present, the jury cannot reasonably infer from the circumstances of the accident that the defendant was negligent").

48. *See id.* at 251-52 (providing that *res ipsa loquitur* does not establish a presumption of negligence). Rather, the jury is free to infer negligence. *Id.* The burden of persuasion still lies with the plaintiff. *Id.*

49. RESTATEMENT (SECOND) OF TORTS § 328D (1965).

50. *See, e.g.*, U.S. Fid. & Guar. Co., v. J.I. Case Co., 432 S.E.2d 654, 657 (Ga. Ct. App. 1993) (stating that "[t]he principal basis for application of the rule of *res ipsa loquitur*" involves the negligent party having "exclusive control of the instrumentality"); Haddock v. Arnspiger, 793 S.W.2d 948, 950 (Tex. 1990) (holding that "*[r]es ipsa loquitur* is applicable only when two factors are present: (1) the character of the accident is such that it would not ordinarily occur in the absence of negligence; and (2) the instrumentality causing the injury is shown to have been under the management and control of the defendant"). *But see* Harrison v. Bill Cairns Pontiac, Inc., 549 A.2d 365, 389 (Md. Ct. App. 1988) (noting that "[a]lthough Maryland courts do not apply the 'exclusive control' test literally, the plaintiff must produce sufficient evidence tending to eliminate other causes"); *Bell*, 517 S.W.2d at 251 (holding that the "control" requirement is not a rigid rule so long as the likelihood of other causes of the accident is so reduced that the jury could reasonably find that the negligence lies at defendant's door).

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Likewise, Section 3 is a rule of logic which sets forth the minimum amount of evidence required before the jury is permitted to infer product liability.[51] In particular, under Section 3, a product defect may be inferred when the incident that caused the harm was of a kind that ordinarily occurs as a result of a product defect and was not solely the result of causes other than the product defect that existed at the time of manufacture.[52] It is not an independent theory of liability.[53]

The *res ipsa* model used by Section 3 has drawn criticism. First, Section 3 received criticism for making, not restating, existing law.[54] The majority of jurisdictions that have considered the issue have rejected the use of *res ipsa loquitur* in a strict liability cause of action.[55] Those courts have reasoned that exclusivity of control

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51. *See* Speller *ex rel.* Miller v. Sears, Roebuck & Co., 760 N.Y.S.2d 79, 82 (N.Y. 2003) (noting, when adopting Section 3 of the Restatement (Third) of Torts, that "[o]f course, if the plaintiff's proof is insufficient with respect to either prong of this circumstantial inquiry, a jury may not infer that the harm was caused by a defective product unless plaintiff offers competent evidence identifying a specific flaw").

52. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998).

53. Some argue that an indeterminate defect claim is an independent theory of liability that is inconsistent with a specific defect theory. *See* Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 382 (1995) (stating that an "[i]ndeterminate defect is based upon neither a claim of manufacturing or design defect, but is a mutually exclusive separate category of liability premised upon the plaintiff's *inability* or unwillingness to specify the nature of the defect"). However, if this were the case, Section 3 would not relate to *res ipsa loquitur* at all because *res ipsa* is not a separate theory of liability. Indeed, under Texas law, a *res ipsa loquitur* claim is submitted to the jury in the same manner as a negligence claim is submitted. *See Bell*, 517 S.W.2d at 255 (proclaiming that when a "plaintiff pleads both *res ipsa* and specific acts and produces evidence of each, the trial court should submit a single general negligence issue").

54. *See* Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 354 (1995) (noting that "[i]n extending *res ipsa* to indeterminate product liability claims, the *Restatement (Third)* is sailing upon largely uncharted waters, along a route which several courts have already rejected").

55. *See* Welge v. Planters Lifesavers Co., 17 F.3d 209, 211 (7th Cir. 1994) (applying Illinois law, the court declared that *res ipsa loquitur* is inapplicable to products liability cases); Brooks v. Colonial Chevrolet-Buick, Inc., 579 So. 2d 1328, 1333 (Ala. 1991) (finding that *res ipsa loquitur* may not be applied to products liability cases); Tresham v. Ford Motor Co., 275 Cal. App. 2d 403, 407 (Cal. Ct. App. 1969) (asserting that "an instruction embodying the doctrine of *res ipsa loquitur* in strict liability cases is not legally supportable"); Ford Motor Co. v. Reed, 689 N.E.2d 751, 754 (Ind. Ct. App. 1997) (announcing that "products liability and the doctrine of *res ipsa loquitur* are antithetical"); Brothers v. Gen. Motors Corp., 658 P.2d 1108, 1110 (Mont. 1983) (stating that *res ipsa loquitur* applies to human conduct, but not to product defects); Myrlak v. Port Auth. Of N.Y. & N.J., 723 A.2d

and management of the instrumentality causing the harm by the defendant is a necessary element in a *res ipsa* claim; but in most product liability cases, the manufacturer has lost control of the product when the harm occurs.[56] Similarly, in product liability cases, the plaintiff is required to prove that the defect existed at the time it left the manufacturer's control, an element not necessary in a *res ipsa* case.[57]

A second criticism of Section 3 is that the details of when and how the rule is applied are found in the comments to the section, rather than in the black letter rule.[58] For example, the black letter rule mentions nothing about factoring in the age of the product when determining whether the inference is applicable.[59] Yet, Comment d notes that the age of the product and possible alteration through repair may prevent the inference that the defect existed at the time it left the manufacturer.[60] Indeed, each of the Restatement's seven illustrations involves new products.[61] Furthermore,

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45, 54 (N.J. 1999) (interpreting Indiana law to hold that the jury may not receive a *res ipsa loquitur* charge, but that plaintiffs may utilize circumstantial evidence to prove a product defect (citing Whitted v. Gen. Motors, Corp., 58 F.3d 1200, 1208 (7th Cir. 1995)); Fulton v. Pfizer Hosp. Prods. Group, Inc., 872 S.W.2d 908, 912 (Tenn. Ct. App. 1994) (reporting that *res ipsa loquitur* "has application only to the law of negligence and does not apply in a products liability" case).

56. *Cf.* Sievers v. Beechcraft Mfg. Co., 497 F. Supp. 197, 202 (E.D. La. 1980) (holding that *res ipsa loquitur* was not applicable where defendant had not exercised exclusive control over the aircraft, which crashed eighteen months after delivery from the defendant).

57. *See* Enrich v. Windmere Corp., 616 N.E.2d 1081, 1084 (Mass. 1993) (holding that even if the evidence supported an inference that the fan manufactured by defendant caused the fire, the court could not infer that the defect existed at the time of sale); *see also* Norris v. Bell Helicopter Textron, 495 So. 2d 976, 981-82 (La. Ct. App. 1986) (stating, if a defect is not directly shown to exist at the time of manufacture, an accident occurring a significant time after manufacture will not support an inference unless the actions of intervening users and maintenance people are accounted for).

58. *See* Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 603 (Tex. 2004) (Hecht, J., concurring) (noting that the comments and illustrations, which detail the considerations that factor into whether to allow an inference, are not reflected in the black letter rule).

59. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998).

60. *See id.* § 3 cmt. d (stating that "[s]uch factors as the age of the product, possible alteration by repairers or others, and misuse by the plaintiff or third parties may have introduced the defect" that caused the harm); Chambers v. Gen. Motors Corp., 333 N.W.2d 9, 10 (Mich. Ct. App. 1982) (holding that "where the part alleged to be defective is accessible to other sources of interference and . . . two or more equally plausible explanations of the defect are reasonable, then a finding of manufacturer liability would be based upon conjecture").

61. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmts. b, c, d (1998) (promulgating seven scenarios involving new products).

Comment b seems to suggest that an inference of indeterminate defect should only arise when the evidence is lost or destroyed.[62] In particular, the comment points out that it is the inability of the plaintiff to prove a specific defect when the evidence indicates the existence of some kind of defect that justifies the section's applicability.[63] In other words, Section 3 is the exception to the general requirement of proving a specific defect and is available only when the evidence is lost or destroyed.[64]

But Section 3 has also been praised for its use of the *res ipsa* model as an analytical framework. Many of the prior decisions have failed to articulate when and how circumstantial evidence can be used to prove a product liability claim relying more on an "I know it when I see it" approach.[65] Section 3 has allegedly provided elements that courts can apply with greater consistency than before. But what are the necessary elements of an indeterminate defect claim under Section 3?

C. *Elements of a Section 3 Indeterminate Defect Claim*

Section 3 of the Third Restatement of Torts, Products Liability, suggests three elements which must be proven by a preponderance of the evidence as a predicate to send an indeterminate defect claim to a jury.[66]

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62. *See* Riley v. De'Longhi Corp., 2000 U.S. App LEXIS 27082, at *2 (4th Cir. 2000) (applying Maryland law, the court noted that "De'Longhi is correct that the indeterminate defect theory applies when an allegedly defective product is lost or destroyed in the accident").

63. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. b. (1998) (explaining that "when the product unit involved in the harm-causing incident is lost or destroyed in the accident, direct evidence of specific defect may not be available. Under that circumstance, this section may offer the plaintiff the only fair opportunity to recover.").

64. *See* Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 381-82 (1995) (noting the applicability of Section 3). The author opines that Section 3 is limited to a range of cases wherein circumstantial evidence supports a reasonable inference of defect, and not as a "catchall" savior for plaintiffs who are otherwise unable to sustain their burden of proof. *Id.*

65. *Id.*

66. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998).

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1. The Danger Created by the Product Failure Must Be Beyond That Contemplated by the Ordinary Consumer

The first element articulated by Section 3 is a requirement that the incident that caused the harm be of the kind that ordinarily occurs as a result of a defective product.[67] This element is notably different than its sister element under *res ipsa loquitur*.[68] Under *res ipsa loquitur*, the event must be of the kind which ordinarily does not occur in the absence of negligence.[69] A car that suddenly goes out of control may be the result of a defect, but it may also be the result of many other causes. However, it cannot be said that a car suddenly going out of control ordinarily does not occur in the absence of a defect.

Comment d goes further to define this element. Comment d specifically states: Section 3 claims are limited to situations in which the product fails to perform its manifestly intended function, thus supporting a conclusion that a defect of some kind is the most probable explanation.[70] In other words, it is the fact that the product fails to perform in the manner that was expected that supports an inference of defect.[71] Using the example cited above, if the car goes out of control due to the steering column breaking, the inference of defect is supported; however, if the car goes out of control due to road conditions, then those circumstances do not support an inference of defect.[72]

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67. *Id.* § 3 cmt. b.

68. *See* Restatement (Second) of Torts § 328D (1)(a) (1965) (explaining the application of *res ipsa loquitur* in a negligence cause of action). The Restatement provides that "[i]t may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when the event is of a kind which ordinarily does not occur in the absence of negligence." *Id.*

69. *Id.*

70. Restatement (Third) of Torts: Products Liability § 3 cmt. d (1998).

71. *See, e.g.*, Garrett v. Nobles, 630 P.2d 656, 659 (Idaho 1981) (noting the mere fact of a product malfunction establishes a prima facia case of products liability); Tweedy v. Wright Ford Sales, Inc., 334 N.E.2d 417, 420 (Ill. App. Ct. 1975) (noting that a malfunction renders a product defective where it is not fit for its clearly intended use).

72. *See* Restatement (Third) of Torts: Products Liability § 3 cmt. d illus. 6 (1998) (providing an example of when an inference of defect may not be drawn). In the example, a driver hits a tree in his new car but does not recall the circumstances of the accident. *Id.* The driver's expert presents credible evidence that the loss of control was due to defect, and the manufacturer's expert presents testimony that it is equally plausible that it was due to driver error. *Id.* In this situation, whether an inference of defect is raised

A manufacturing defect is defined as a situation in which the product is dangerous to an extent beyond that which is contemplated by the ordinary user.[73] If the "malfunction" of the product creates a danger beyond that which is contemplated by the ordinary user, then the "malfunction" speaks for itself when determining whether a defect was a cause of the accident.[74] Certainly, the analysis does not stop there. Another element requires the plaintiff to prove that other possible causes of the accident were not the sole cause of the event.[75] To require that the "malfunction" be of the kind that ordinarily does not occur but for a defect would be too restrictive.

For example, in a vehicle fire case, there are numerous reasons why a fire can occur. The U.S. Fire Administration has reported that fires are due to mechanical or design problems, incendiary or suspicious origins, misuse, operational deficiencies, or other design, construction, and installation deficiencies.[76] Thus, it cannot be said that vehicle fires do not ordinarily occur absent a defect.[77] However, a vehicle that suddenly bursts into flames while driving down the road is a danger that is beyond those that are normally contemplated by the ordinary user. The event itself, combined with evidence demonstrating that other potential causes were not the sole cause should be sufficient to support the inference of defect. Indeed, several courts have held that under similar circumstances, an inference of defect was supported.[78]

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is a fact question determined by a jury. *Id.*; *see also* Speller v. Sears, Roebuck & Co., 790 N.E.2d 252, 252 (N.Y. 2003) (overruling a motion for summary judgment where the court determined the cause of a fire was a question of fact even though the defendant had evidence of an alternative cause).

73. Texas Pattern Jury Charges PJC 7.13 (2002).

74. Cassisi v. Maytag Co., 396 So. 2d 1140, 1149 (Fla. Dist. Ct. App. 1981); Tulgetske v. R.D. Werner Co., 408 N.E.2d 492, 495-96 (Ill. App. Ct. 1980).

75. Restatement (Third) of Torts: Products Liability § 3 cmt. d (1998).

76. U.S. Fire Administration, Highway Vehicle Fires, 2 Topical Fire Research Series No. 4 (July 2001, revised Mar. 2002), *available at* http://www.usfa.fema.gov/downloads/pdf/tfrs/v2i4.pdf (last visited Oct. 21, 2004).

77. *See* Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 604 (Tex. 2004) (Hecht, J., concurring) (explaining that "[i]t cannot be said that fires in pickups do not ordinarily occur absent a product defect; they ordinarily occur for all sorts of reasons").

78. Cincinnati Ins. Co. v. Volkswagen of Am. Inc., 502 N.E.2d 651, 655 (Ohio Ct. App. 1985); *see also* Barnett v. Ford Motor Co., 463 S.W.2d 33, 34 (Tex. Civ. App.—Waco 1970, no writ) (reversing an instructed verdict in favor of a manufacturer because the plaintiff raised a reasonable inference of defect and negated other possibilities).

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2. Other Possible Causes Eliminated As Sole Cause

The second element articulated by Section 3 can be divided into two elements.[79] First, there must be evidence that causes other than the defect were not the sole causes of the event.[80] Second, there must be evidence supporting the inference that the defect existed at the time of sale or distribution.[81] Often times, the evidence supporting the first element will also support the second.[82] For example, evidence that the product was new when it malfunctioned supports the inferences that the event was not caused by an alteration of the product and that the defect existed at the time of distribution.[83]

In comparing the first part of the second element of Section 3, it is obvious that it is notably different than its sister element under *res ipsa loquitur*.[84] Under Section 328D, other responsible causes must be sufficiently eliminated by evidence; whereas, under Section 3, the evidence must only show that other responsible causes were not the sole cause of the event.[85] Comment d states that:

> The defect need not be the only cause of the incident; if the plaintiff can prove that the most likely explanation of the harm involves the causal contribution of a product defect, the fact that there may be other concurrent causes of the harm does not preclude liability under this Section. But when the harmful incident can be attributed solely to causes other than [the] original defect, including . . . conduct of others, an inference of defect under this Section cannot be drawn.[86]

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79. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. b (1998) (providing "the incident that harmed the plaintiff was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution").

80. *Id.*

81. *Id.*

82. *See generally* Cornell Drilling Co. v. Ford Motor Co., 359 A.2d 822 (Pa. Super. Ct. 1976) (opining that a new truck inexplicably catching fire was circumstantial evidence from which to infer defective condition at time of sale).

83. *See* Mote v. Montgomery Ward & Co., 466 N.E.2d 593, 596 (Ill. App. Ct. 1984) (holding that it was reasonable for the jury to conclude that a defect existed at the time of sale when the brand new ladder failed to perform in the manner reasonably to be expected in light of its intended function).

84. *See* RESTATEMENT (SECOND) OF TORTS § 328D(1)(b) (1965) (discussing that other responsible causes must be eliminated in order to state a prima facie *res ipsa* case).

85. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. d (1998).

86. *Id.*

Certainly, the law does not require that the product defect be the sole cause of the accident under a products liability theory.[87] Therefore, any requirement that all other reasonable causes must be negated would be too restrictive. However, if a defect is going to be inferred, the sole cause of the event cannot be attributed to some other cause.[88] For example, if a vehicle goes out of control causing harm to the driver, without any other evidence, the driver's negligence is just as likely the sole cause of the event as a defect.[89] In such a circumstance, a defect could not be inferred.

On the other hand, if the driver heard a loud crack in the steering column before he lost control, it could be argued that the driver's negligence was not the sole cause of the vehicle going out of control.[90] In that case, an inference of defect may be proper even though it could be argued that the driver was negligent in failing to control the vehicle after the crack was heard from the steering column.[91]

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87. *See* Hartzell Propeller Co. v. Alexander, 485 S.W.2d 943, 946 (Tex. Civ. App.—Waco 1972, writ ref'd) (explaining that there may be more than one producing cause of an incident); *see also* TEXAS PATTERN JURY CHARGES PJC 70.1 (2002) (confirming that there may be more than one producing cause).

88. However, just because the defendant presents evidence of an alternative cause of the accident does not preclude submission to the jury if the plaintiff has evidence of a product defect. *See* Speller v. Sears, Roebuck & Co., 790 N.E.2d 252, 254 (N.Y. 2003) (realizing that the plaintiff had ample evidence that the fire started in the freezer, but the defendant had evidence that the fire was actually a grease fire that started on the stove). The court concluded the issue should be decided by the jury. *Id.*

89. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. d illus. 6 (1998) (implying that in cases where the driver's negligence is an issue, it is a fact question as to whether the defective product was a causative instrument of the plaintiff's injury); Jarvis v. Ford Motor Co., 283 F.3d 33, 46-49 (2d Cir. 2002) (finding that the jury could reasonably find that the incident was not due to driver error based on plaintiff's testimony that the van suddenly accelerated, causing an accident). *But see* Fane v. Zimmer Inc., 927 F.2d 124, 131 (2d Cir. 1991) (affirming a directed verdict in favor of a manufacturer in the absence of testimony as to how the accident happened).

90. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. d illus. 5 (1998) (explaining that a plaintiff must demonstrate that the accident was caused by a defect, without necessarily showing which specific mechanism was defective, and thus caused the accident).

91. A classic example of such a scenario in the specific design defect cases are defective tire cases. In those cases, the defendant typically argues that the tire detreading is a nonevent, and that the cause of the harm is the driver's negligence in controlling the vehicle. In such cases, the jury decides if the tire was defective and if the plaintiff was negligent and then compares the responsibility of both. There should be no difference in the inferential defect case.

According to many courts, a necessary element of proof for raising an inference of defect in the absence of direct proof of a specific defect is that the plaintiff "negates other possible causes of failure of the product."[92] Certainly, that was a requirement under the "malfunction theory."[93] However, there is a distinction between the incident that caused the harm and a product failure. In the above example, the incident is the vehicle going out of control, but the product failure is the loud crack in the steering column. An inference of defect would be proper provided that the plaintiff sufficiently overcomes any explanations for the loud crack in the steering wheel (such as misuse or alteration) notwithstanding plaintiff's contributory negligence in controlling the vehicle once the steering column cracked.[94]

3. Defect Existed at the Time of Sale

As Comment d of Section 3 explains, "[e]vidence may permit the inference that a defect . . . caused the product to malfunction, but not the inference that the defect existed at the time of sale or distribution."[95] Thus, another element of proof required before an inference is proper is that the defect existed at the time of purchase

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92. *See* Williams v. Smart Chevrolet Co., 730 S.W.2d 479, 482 (Ark. 1987) (quoting in part, Southern Co. v. Graham Drive In, 607 S.W.2d 677, 679 (Ark. 1980)); *see also* Weir v. Fed. Ins. Co., 811 F.2d 1387, 1392 (10th Cir. 1987) (opining that "[t]he inference of a defect is permissible whenever the plaintiff has introduced evidence that would exclude other causes of the accident"); Campbell Soup Co. v. Gates, 889 S.W.2d 750, 753 (Ark. 1994) (discussing the fact that the car door suddenly flew open while the plaintiff was driving in *Williams* and stating that "this court examined the evidence to determine to what extent the plaintiff had negated other causes of the accident and held that the proof neither went beyond suspicion or conjecture nor raised a reasonable inference that the defect was the cause of the accident").

93. *See* Schlier v. Milwaukee Elec. Tool Corp., 835 F. Supp. 839, 842 (E.D. Pa. 1993) (proclaiming that under the malfunction theory, a plaintiff's case-in-chief must disprove evidence of secondary causes, such as wear and tear, to establish a prima facie case of a defect).

94. *See* Franks v. Nat'l Dairy Prods. Corp., 414 F.2d 682, 687 (5th Cir. 1969) (holding that the plaintiff did not handle the product negligently prior to the explosion and that unexplained occurrences can establish the inference of a defect).

95. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. d (1998).

or delivery to the retailer.[96] In most cases, this means that the product must be relatively new before making such an inference.[97]

Comment d continues, "the age of the product, possible alteration by repairers or others, and misuse by the plaintiff or third parties may have introduced the defect that causes harm."[98] Thus, the plaintiff must negate these other explanations as a cause of the defect. Certainly, the product being new works against these factors as explanations for the defect. As the product ages, it passes between various owners and is subject to repairs, becoming more difficult, if not impossible, for the plaintiff to negate such possible causes. For example, in *Raritan Trucking Corp. v. Aero Commander, Inc.*,[99] the Third Circuit held that an unexplained malfunction of an airplane that had been in service for one year supported a *res ipsa loquitur* claim against the aircraft maintenance provider, but not the aircraft manufacturer.[100] Likewise, in *Parsons v. Ford Motor Co.*,[101] the fact that the vehicle was eight years old held some relevance to the disposition of the case.[102] More importantly, the replacement of the alleged faulty ignition switch during the eight year period of ownership did not support the inference that a manufacturing defect caused the fire.[103]

However, there may be other ways to prove the existence of a defect at the time it left the control of the manufacturer. In *Sipes*

96. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) (explaining that the plaintiff has the burden of proving a defect that existed at the time of the purchase of the product).

97. *See* Dietz v. Waller, 685 P.2d 744, 748 (Ariz. 1984) (holding that evidence that the boat broke up and sank only after ten hours of use on a clear and calm day supported an inference of manufacturing defect in the boat at the time of sale); Mote v. Montgomery Ward & Co., 466 N.E.2d 593, 594 (Ill. App. Ct. 1984) (finding that the collapse of an aluminum stepladder purchased only a few days before the accident injured the plaintiff).

98. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. d (1998).

99. 458 F.2d 1106 (3d Cir. 1972).

100. Raritan Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106, 1110 (3d Cir. 1972).

101. 85 S.W.3d 323 (Tex. App.—Austin 2002, pet. denied).

102. Parsons v. Ford Motor Co., 85 S.W.3d 323, 331 (Tex. App.—Austin 2002, pet. denied).

103. *See id.* at 332 (holding that because Ford Motor Company replaced the ignition switch on recall, the defective switch from the manufacturer could not have been the cause of the fire since the original switch was no longer in the car); Quirk v. Ross, 476 P.2d 559, 563 (Or. 1970) (holding that after two owners, several repairs and servicing, and almost 40,000 miles of use, no inference could be drawn that a defect existed at the time it left the manufacturer's control).

v. General Motors Corp.,[104] an airbag failed to deploy during a collision, resulting in serious injures.[105] The cause of the failure, however, had not been determined.[106] The court nevertheless allowed an inference of a defect because the airbag did not function as designed, there was no evidence of tampering with the airbag since it left the manufacturer's control, and the airbag was under seal.[107] Thus, while the event itself raised the general inference of a defect, the product being under seal supported the specific assumption that the defect existed at the time of sale or distribution.[108]

III. Texas Law on Indeterminate Defect

A. *Precedence for Indeterminate Defect Claim*

In *Ridgway*, the Texas Supreme Court declined to decide whether Section 3 reflected the law of the State of Texas.[109] The court noted that Section 3 applied "to new or almost new products."[110] In addition, the court observed that the truck in which Mr. Ridgway was driving at the time of the occurrence was two years old, had over 54,000 miles, and underwent several repairs and modifications prior to the incident.[111] Therefore, because Section 3 did not apply to Mr. Ridgway's claim, there was no need for the court to decide whether it reflected Texas law.[112] Interestingly, however, Justice Hecht thought it important to express his opinions

104. 946 S.W.2d 143 (Tex. App.—Texarkana 1997, writ denied).

105. Sipes v. Gen. Motors Corp., 946 S.W.2d 143, 146 (Tex. App.—Texarkana 1997, writ denied).

106. *See id.* at 155-56 (implying that the specific reason the airbag failed to deploy was not given at trial by overruling the defendant's contention that expert testimony is necessary to establish a particular defect).

107. *Id.* at 155.

108. *See* Sharp v. Chrysler Corp., 432 S.W.2d 131, 136 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (holding that if the failure of an encased braking system could be determined as the cause of an accident on remand, the fact that the system is sealed and has never been opened allows the jury to draw an inference that the defect existed at the time of manufacture).

109. Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 601 (Tex. 2004) (stating, "[n]o Texas court has ever cited this section, and we do not decide today whether it reflects the law of this state").

110. *See id.* (asserting that "[e]ven if section 3 were the law in Texas, it would generally apply only to new or almost new products").

111. *Id.* at 599.

112. *See id.* at 602 (proclaiming, "we reiterate that because section 3 is not applicable to the facts of this case, we need not decide if it is an accurate statement of Texas law").

about Section 3 even though it clearly would not apply to Mr. Ridgway's claim.[113]

Justice Hecht pointed out that Texas law would allow proof of a defective product by circumstantial evidence in certain cases.[114] Certainly, there is precedent to demonstrate the correctness of that statement. In 1944, the Texas Supreme Court allowed a *res ipsa* claim of negligence against a bottling company to proceed when a bottle unexpectedly exploded.[115] The court held, "it is not necessary that the instrumentality causing the injury be within the physical control of the person sought to be held liable," provided that the plaintiff demonstrates he was not mishandling the product at the time the injury occurred.[116] While that case was pre-strict liability for products, it is clear the court had laid the foundation for the use of circumstantial evidence to prove such claims. In 1977, the court, in dicta, reiterated, "[i]f the plaintiff has no evidence of a specific defect in the design or manufacture of the product, he may offer evidence of its malfunction as circumstantial proof of the product's defect."[117]

The purest example of an indeterminate defect case in Texas is *Barnett v. Ford Motor Co.*[118] There, seven days and 500 to 600 miles after the plaintiff purchased his new Ford Thunderbird, the car spontaneously caught fire while parked, completely destroying the instrument panel.[119] Evidence indicated that the fire started under the dash, there were no combustibles or ignition sources such as gasoline or cigarettes in the car, the car was secure from

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113. *See id.* at 602 (Hecht, J., concurring) (citation omitted) (announcing that "I join in the Court's opinion and write only to explain that while Texas law would allow proof of products liability by circumstantial evidence in certain cases, the black-letter rule of section 3 of the Restatement (Third) of Torts: Products Liability does not accurately restate Texas law").

114. *Ridgway*, 135 S.W.3d at 603 (Hecht, J., concurring) (stating "[f]ew would question the use of circumstantial evidence to prove products liability in appropriate cases").

115. Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968, 970 (Tex. 1944).

116. *Id.* (quoting in part, Benkendorfer v. Garrett, 143 S.W.2d 1020, 1022 (Tex. Civ. App.—San Antonio 1940, writ dism'd)).

117. Gen. Motors Corp. v. Hopkins, 548 S.W.2d 344, 349-50 (Tex. 1977); *see also* Rehler v. Beech Aircraft Corp., 777 F.2d 1072, 1082 (5th Cir. 1985) (explaining under Texas law, "it is not always necessary that there be proof of a specific, particular underlying defect").

118. 463 S.W.2d 33 (Tex. Civ. App.—Waco 1970, no writ).

119. Barnett v. Ford Motor Co., 463 S.W.2d 33, 34 (Tex. Civ. App.—Waco 1970, no writ).

third parties or vandals, and the car had not been altered.[120] Furthermore, based upon circumstantial evidence, plaintiff's expert opined that the fire most likely started due to an electrical failure.[121] Reversing the trial court's instructed verdict, the court of appeals held that the evidence raised an inference of a defect in the wiring as the probable source of the fire, and the defect existed at the time the car left the defendant's control.[122]

B. *Elements of an Indeterminate Defect Claim Under Texas Law*

Justice Hecht, however, did not believe Section 3 accurately reflected Texas law.[123] He accused Section 3 of being "res ipsa lite" and opined that proving a product's defect by circumstantial evidence should be at least as strict as proving negligence under *res ipsa loquitur*.[124] Justice Hecht stated the rule of indeterminate defect as follows:

> An inference of products liability is really two inferences: that the product was defective, and that the defect existed at the time of sale. Applying the principle underlying res ipsa loquitur, neither inference can be drawn without evidence that the injury would not ordinarily have occurred absent a product defect and that defect probably existed when the product was sold.[125]

As previously pointed out, Justice Hecht's requirement, "that the injury would not ordinarily have occurred absent a product defect,"[126] may be too restrictive. In particular, as Justice Hecht argued, "[i]t cannot be said that fires in pickups do not ordinarily occur absent a product defect; they ordinarily occur for all sorts of reasons."[127] Thus, under Justice Hecht's rule of indeterminate defects, circumstantial evidence is inadmissible to prove manufacturer liability regarding a car fire in products liability cases. However, few would argue the *Barnett* court inappropriately al-

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120. *Id.* at 34-35.

121. *Id.* at 35.

122. *Id.*

123. *See* Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 603-04 (Tex. 2004) (Hecht, J., concurring) (concluding that Section 3 from the Third Restatement of Torts does not apply to the law of *res ipsa loquitur* because a plaintiff's claim has to conform to the stricter standards set out in the Second Restatement of Torts, at least).

124. *Id.* at 604.

125. *Id.*

126. *Id.*

127. *Id.*

lowed proof of Ford Motor Company's liability by circumstantial evidence.

In products liability, *res ipsa loquitur's* function as an analytical framework gives courts a starting point for delineating elements to guide them concerning the appropriate use of circumstantial evidence for proving a defect.[128] Negligence and products liability are two different theories and therefore the proof required should be different.

Res ipsa loquitur is a negligence doctrine; it is a circumstantial means of proving a defendant's lack of due care.[129] Strict liability, however, is a theory based upon allocating responsibility due to the condition of the product regardless of the manufacturer's unreasonableness, negligence, or fault.[130] There is a big difference between inferring a defendant's conduct from circumstances of an accident and inferring a condition of a product based upon how that product functioned. This difference becomes more significant when the product fails to function in its manifestly intended manner, and thus creates a danger beyond that expected by an ordinary user of the product.[131]

In both *Barnett* and *Sipes*, the product failed to perform in its manifestly intended manner which led the court to allow the inference of a defect.[132] Certainly, in those cases other reasonable explanations could be eliminated. In *Barnett*, other explanations for the cause of the fire such as gasoline or cigarettes were negated.[133] Likewise, in *Sipes*, the fact that the airbag was under seal eliminated any suggestion of alteration or misuse.[134] However, just as in

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128. Myrlak v. Port Auth. of N.Y. & N.J., 723 A.2d 45, 51 (N.J. 1999) (noting that "the historical antecedent to Section 3 of the Restatement is traceable to the negligence doctrine of *res ipsa loquitur*," and "Section 3 of the Restatement in a products liability case does precisely what *res ipsa loquitur* does in a negligence context").

129. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS 244 (5th ed. 1984).

130. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

131. *See* Cassisi v. Maytag Co., 396 So. 2d 1140, 1146 (Fla. Dist. Ct. App. 1981) (stating that, "evidence of the nature of [the] accident itself may, under certain circumstances, give rise to a reasonable inference that the product was defective because the circumstances of the product's failure may be such as to frustrate the ordinary consumer's expectations of its continued performance").

132. Sipes v. Gen. Motors Corp., 946 S.W.2d 143, 155 (Tex. App.—Texarkana 1997, writ denied); Barnett v. Ford Motor Co., 463 S.W.2d 33, 34-35 (Tex. Civ. App.—Waco 1970, no writ).

133. *Barnett*, 463 S.W.2d at 34-35.

134. *Sipes*, 946 S.W.2d at 155.

a *res ipsa* case, "[t]he possibility of other causes does not have to be completely eliminated, but their likelihood must be so reduced that the jury can reasonably find by a preponderance of the evidence that the [responsibility], if any, lies [with the product]."[135] Sometimes, the possibility of other causes can be reduced by the mere circumstances of the malfunction, while in other cases, additional evidence may be necessary.

C. *Other Issues*

In *Ford Motor Co. v. Ridgway*,[136] the plaintiff asserted a manufacturing defect claim.[137] Indeed, most indeterminate defect claims are manufacturing defect claims.[138] Further, the Third Restatement of Torts specifically provides that "[S]ection 3 allows the trier of fact to draw the inference that the product was defective whether due to a manufacturing defect or a design defect."[139] Under Texas law, however, this creates a problem. Texas law requires proof of a "safer alternative design" under a design defect theory.[140] Therefore, a design defect case brought under Section 3 would seemingly dispense with that requirement.

Also, there is an inconsistency with the circumstantial evidence required to prove an indeterminate defect claim and that required to prove a design defect claim. An indeterminate defect claim is predicated upon a consumer expectation theory.[141] The product must fail to function in its manifestly intended purpose thus creating a danger beyond that expected by the ordinary consumer to

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135. *See* Lozano v. Lazano, 52 S.W.3d 141, 148 (Tex. 2001) (discussing the equal inference rule that states circumstantial evidence may raise multiple inferences, but when none are more probable than others, an inference may not be raised); Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 251 (Tex. 1974) (indicating that as in a *res ipsa* case, the plaintiff in an indeterminate defect case has the burden to prove that his/her harm was more likely than not caused by a product defect that existed at the time of sale or distribution).

136. 135 S.W.3d 598 (Tex. 2004).

137. Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 600 (Tex. 2004).

138. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. b (1998) (stating that "[t]he most frequent application of this Section is to cases involving manufacturing defects").

139. *Id.*

140. TEX. CIV. PRAC. & REM. CODE ANN. § 82.005 (Vernon 1997).

141. *See* Heaton v. Ford Motor Co., 435 P.2d 806, 808 (Or. 1967) (noting that in a case in which no evidence is available to prove a manufacturing flaw or a design defect a plaintiff may nonetheless recover by proving the product did not meet a consumer's expectations).

create an inference of a defect.[142] But a design defect claim is based upon a risk/utility test.[143] It involves a weighing process among various design alternatives.[144] Consumer expectations, however, do not take into account "whether the proposed alternative design could be implemented at [reasonable] cost, or whether [an] alternative design would provide greater overall safety."[145]

However, the illustrations to Section 3 of the Third Restatement of Torts indicate that it does not contemplate the normal design defect case being brought as an indeterminate defect case.[146] Rather, the Restatement illustrations indicate that the indeterminate defect claim could be useful in those situations where the plaintiff can prove the probability that a defect caused the accident, but cannot prove whether the defect was due to a flaw in the design or manufacturing.[147] Thus, the indeterminate defect claim is just that: The defect cannot be determined, but the circumstances of the product failure suggest a defect.[148] Such claims are not based upon design defect or manufacturing defect; they are simply indeterminate.

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142. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (stating a design defect applies "where the defective condition of the product makes it unreasonably dangerous to the user or consumer").

143. *See* TEXAS PATTERN JURY CHARGES PJC 71.4B (2000) (providing in part that, "[a] 'design defect' is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use").

144. *See* Wortel v. Somerset Indus., Inc., 770 N.E.2d 1211, 1218 (Ill. App. 2002) (stating that evidence of a design alternative is but one factor in the risk/utility analysis).

145. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (Tentative Draft No. 1, 1994).

146. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. b (1998) (contemplating that the indeterminate defect claim would have the nature of a manufacturing defect claim). "Although the rules in this Section, for the reasons . . . stated, most often apply to manufacturing defects, occasionally a product design causes the product to malfunction in a manner identical to that which would ordinarily be caused by a manufacturing defect." *Id.*

147. *See id.* § 3 cmt. b illus. 3 (providing an example of when it is not known whether the cause of the mishap was a manufacturing or design defect).

148. *See id.* § 3 cmt. b illus. 4 (suggesting that the failure is a manufacturing defect as opposed to a design defect). Thus, while most crashworthiness cases are characterized as a design defect, it is unlikely that such claims could be brought as an indeterminate defect claim. *Id.*

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Some have argued that an indeterminate defect claim should be premised upon the absence of evidence of a specific defect.[149] Once a plaintiff proceeds upon a theory of specific defect, then the plaintiff can no longer pursue an indeterminate defect claim.[150] Some courts have gone so far as to hold that there is no reason to permit an indeterminate defect claim if evidence of specific defect is available.[151] Thus, the argument is that an indeterminate defect claim is a mutually exclusive theory of liability "premised upon the plaintiff's *inability* or unwillingness to specify the nature of the defect."[152]

As a practical matter, it is unlikely that a plaintiff would rely upon an indeterminate defect claim unless he was unable to prove a specific defect claim. A specific defect case is much stronger than an indeterminate defect case and a jury is likely more persuaded by direct evidence rather than circumstantial evidence. Likewise, a jury is more persuaded by proof of a specific defect whether by circumstantial evidence or direct evidence than by inferring an unknown defect from circumstantial evidence. Indeed, the successful indeterminate defect case is rare.[153] But nevertheless, there may be circumstances where, due to economic concerns, a plaintiff may wish to proceed under an indeterminate defect claim even though evidence is available to prove a specific defect case.[154] Likewise,

149. *See* Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 381-82 (1995) (stating that a plaintiff that brings "evidence of a specific defect no longer has a claim of indeterminate defect").

150. *Id.*

151. *See* Gunstone v. Blum, 825 P.2d 1389, 1393 (Or. Ct. App. 1992) (stating plaintiff alleged a specific defect and thus was not allowed an inference that the product was defective merely because he suffered an injury); Helms v. Halton Tractor Co., 676 P.2d 347, 348 (Or. Ct. App. 1984) (holding that plaintiff who alleged a forklift has a specific product defect could not recover on an indeterminate defect claim).

152. Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 382 (1995).

153. The vast majority of indeterminate defect cases fail to survive summary judgment or instructed verdict. *See, e.g.*, Hernandez v. Nissan Motor Corp., 740 S.W.2d 894, 895 (Tex. App.—El Paso 1987, writ denied) (noting that appellees received an instructed verdict with the court entering a take nothing judgment); Revlon, Inc. v. Hampton, 551 S.W.2d 121, 121-22 (Tex. Civ. App.—Beaumont 1977, no writ) (noting trial court entered judgment for the plaintiff and the Court of Civil Appeals reversed and ordered that the plaintiff take nothing).

154. *See* Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 366 (1995)

there may be circumstances where a plaintiff would like to submit to the jury both a specific defect case and an indeterminate defect case.

There is no policy reason addressing why plaintiffs should not be able to proceed upon an indeterminate defect claim even though evidence is available to prove a specific defect case. If the product is available, the defendant is in a better position to defend the case than when the evidence is not available. In such a situation, the defendant is in a better position than the plaintiff as far as proof is concerned. If the plaintiff chooses to place himself in such a situation, the court should not prohibit him. As Comment b of the Restatement explains:

> [W]hen the incident . . . is one that ordinarily occurs as a result of product defect, and evidence in the particular case establishes that the harm was not solely the result of causes other than product defect existing at the time of sale, it should not be necessary for the plaintiff to incur the cost of proving whether the failure resulted from a manufacturing defect or from a defect in the design of the product.[155]

Furthermore, there is no reason not to allow submission of both a specific defect theory and an indeterminate defect claim. They are not mutually exclusive.[156] Like its *res ipsa* cousin, an indeterminate defect claim is not a theory of liability; rather, it is an evidentiary rule that governs the adequacy of evidence in some product liability cases.[157] It is a method of circumstantially proving the existence of a product defect at the time it left the manufac-

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(giving an example of a plaintiff foregoing the use of modern forensic science to prove a defect).

155. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 cmt. b (1998).

156. *See* Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 254 (1974) (stating that an indeterminate defect case can co-exist with a specific defect case). With respect to the *res ipsa* doctrine, the court states that "[p]roof of specific acts of negligence does not necessarily make the Res Ispa doctrine inapplicable since proof of specific acts is not necessarily inconsistent with inferences of other facts." *Id. But see* Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 381-82 (1995) (stating that once a plaintiff comes forward with evidence of a specific defect claim, he no longer has an indeterminate defect claim because by definition the claim is no longer indeterminate).

157. *See* DeWitt v. Eveready Battery Co., 565 S.E.2d 140, 149 (N.C. 2002) (stating when proceeding on an indeterminate defect theory the plaintiff may "present a case-in-chief evidencing the occurrence of a malfunction and eliminating abnormal use or reasonable, secondary causes for the malfunction").

turer's control that renders the product unreasonably dangerous.[158] And like its *res ipsa* cousin, there is no reason not to allow the submission to a jury of an indeterminate defect claim and a charge under a specific defect claim.[159]

IV. CONCLUSION

An indeterminate defect claim is not an independent theory of liability separate and apart from strict products liability. Rather, it is a rule of logic that delineates when circumstantial evidence is sufficient to raise an inference of products liability. It does not compel an inference, it does not raise a presumption of liability, and it does not require the defendant to rebut the evidence. An indeterminate defect claim simply sets forth the minimum evidence required before a plaintiff may submit its case to a jury. The American Law Institute has delineated the necessary elements of an indeterminate defect claim in the Third Restatement of Torts, Products Liability, Section 3.[160]

Texas law allows the use of circumstantial evidence to prove products liability even when the defect is indeterminate.[161] Although the court in *Ridgway* fails to provide any insight as to when and how an indeterminate defect claim will be appropriate, it is likely that Texas will eventually adopt Section 3 of the Third Restatement of Torts, Products Liability. In particular, when the product fails to perform in its manifestly intended manner creating a danger that is beyond the expectation of the ordinary consumer and the evidence negates the possibility that the incident was solely

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158. *See* Riley v. De'Longhi Corp., 2000 U.S. App. LEXIS 27082, at *2 (4th Cir. 2000) (allowing plaintiff to prove a defect with circumstantial evidence with which an inference of defect may be drawn).

159. *See Bell*, 517 S.W.2d at 254 (discussing that proof of specific acts of negligence does not make the *res ipsa* doctrine inapplicable, since proof of specific acts is not necessarily inconsistent with inferences of other facts).

160. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998) (listing the elements of indeterminate defect).

161. *See* Gen. Motors Corp. v. Hopkins, 548 S.W.2d 344, 349-50 (Tex. 1977), *rev'd on other grounds*, Turner v. Gen. Motors Corp., 584 S.W.2d 844, 851 (Tex. 1979) (stating "[i]f the plaintiff has no evidence of a specific defect in the design or manufacture of the product, he may offer evidence of its malfunction as circumstantial proof of the product's defect"); Sipes v. Gen. Motors Corp., 946 S.W.2d 143, 155 (Tex. App.—Texarkana 1997, writ denied) (stating that when a product fails to function as designed and no evidence exists that any person has tampered with the product after it left the manufacturer, circumstantial evidence may be used).

the result of causes other than the defect existing at the time of sale or distribution, then the evidence may circumstantially prove a defect. Although such an evidentiary rule will likely only be used when the evidence to prove a specific defect is lacking, completely lacking evidence is not a prerequisite. Likewise, a plaintiff can proceed on a specific defect claim and upon an indeterminate defect claim as an alternative theory.