A Misstatement of Minnesota Products Liability Law: Why Minnesota Should Reject the Requirement that a Plaintiff Prove a Reasonable Alternative Design

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A MISSTATEMENT OF MINNESOTA PRODUCTS LIABILITY LAW: WHY MINNESOTA SHOULD REJECT THE REQUIREMENT THAT A PLAINTIFF PROVE A REASONABLE ALTERNATIVE DESIGN

Michael V. Ciresi and Gary L. Wilson†

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I. Introduction

In 1963, when William Prosser undertook the drafting of section 402A of the Restatement (Second) of Torts ("Restatement Second"), he was on the edge of a new era of tort litigation.¹ The subsequent ascendance of section 402A was based, no doubt, on its adoption of strict products liability and the recognition by courts and commentators that strict liability promotes investment in product safety, fairly allocates the costs of accidents, and reduces litigation transaction costs.² Despite the fact that Restatement Second has achieved the status of “sacred

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². See generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (Tentative Draft No. 2, 1995) [hereinafter Tentative Draft No. 2].

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scripture,” the American Law Institute (“ALI”) has undertaken its wholesale revision.3

The most monumental change in ALI’s proposed revision is its new definition of design defect. Section 2(b) of the Restatement (Third) of Torts: Products Liability, Tentative Draft (“Tentative Draft”) makes the existence of a reasonable alternative design the very essence of design defect:

[A] product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design 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.4

This definition places upon an injured consumer the burden of proving that there was a “reasonable alternative design” available to the defendant that would have prevented, or significantly lessened, his or her injuries.5

The Reporters concede that the purpose of this proposed change is to abolish strict liability for design defects. The new standard is described in Comment c to Section 2(b) as that “also used in administering the traditional reasonableness standard in negligence.”6 Thus, Tentative Draft No. 2 strives to bring product liability design cases back to a rule of reasonableness. It seeks to give the factfinder a framework within which to understand and accept the exigencies of the process of designing, developing, and taking a product to market.

The Minnesota Supreme Court is years ahead of the ALI. In Holm v. Sponco Manufacturing,7 the court recognized that Minnesota’s design defect standard embodies a reasonable care balancing test, which focuses on the conduct of the manufacturer in choosing a particular design.8 Thus, the negligence-based standard championed by ALI’s revision already reigns in Minnesota.

4. Tentative Draft No. 2, supra note 2, § 2(b) (emphasis added).
5. Id. cmt. c.
6. Id.
7. 324 N.W.2d 207 (Minn. 1982).
Minnesota has, however, adopted a more practical, flexible negligence-based design defect theory. In *Kallio v. Ford Motor Co.*, the court rejected the very requirement now promoted by the new Restatement — that plaintiff show, in order to establish a prima facie case of design defect, that there was a feasible practical alternative design available.

Minnesota courts should remain faithful to *Kallio*. The proposed Restatement's focus on the single element—whether a reasonable alternative design has been shown by the plaintiff—is not a "restatement" of a generally agreed upon legal rule. More importantly, the reasonable alternative design test imposes an unfair burden of evidentiary production on injured consumers and shifts the focus of any product liability lawsuit from reality to speculation. The ultimate result of the proposed Restatement, if it is adopted, will be to make it impossible for some truly deserving plaintiffs to obtain compensation for injuries caused by products. By barring such recoveries, the proposed Restatement undercuts all of the policies that elevated the Restatement Second to "sacred scripture" of products liability law.

II. What Does the New Restatement Restate?

The proposed Restatement bears the internal inconsistencies of a work product that attempts to accommodate irreconcilable interests. For example, the Tentative Draft appears at odds with itself over the issue of whether manufacturers are liable, without a showing of reasonable alternative design, for products that are so dangerous as compared to their utility that they never should have been marketed. Comment c to Section 2 opines that absent proof of a reasonable alternative design, courts should not impose liability based upon a conclusion that an entire product category should not have been distributed in the first

9. 407 N.W.2d 92 (Minn. 1987).
11. As shown below, there is real suspicion among some members of the bar that the Restatement (Third) is not a "restatement," but is substantive tort reform under the guise of "restating" the law. See Bruce S. Kaufman, *Attorneys Spar Over Restatement (Third) of Torts; ATLA to Mobilize Opposition Project*, 22 PROD. SAFETY & LIAB. REP. (BNA) 436, 439 (Apr. 22, 1994); Larry S. Stewart, *The ALI and Products Liability: "Restatement" or "Reform"?*, TRIAL, Sept. 1994, at 28, 30-31.
instance. The Comment points to alcohol and tobacco as examples of such products. According to the Comment, control of these products should be left to the legislatures and administrative agencies. However, the following Comment goes on to suggest there can be liability absent the showing required by Section 2(b) if a product poses an "extremely high degree of danger . . . [that] so substantially outweighs its negligible utility that no rational adult . . . would choose to use or consume the product." The ironic example of such a product given in Illustration No. 5—remembering that real cigarettes are not to be considered such a product—is a prank exploding cigar.

There is also confusion concerning the reasonable alternative design standard. Is the sufficiency of plaintiff's proof a matter to be decided by a court on a motion for summary judgment or one for the jury? On one hand, Comment e advises that "the rule is one addressed initially to the courts." This suggests that the court decides, on a dispositive pretrial motion, whether an injured consumer has met its burden sufficiently to allow the jury to examine the issue. Illustrations 8 and 9 suggest that a directed verdict should be entered if there is no showing of alternative design. Comment e also notes, however, that "the requirements in Section 2(b) relate to what the plaintiff must prove in order to prevail at trial." On the other hand, however, the Comment then explains that the ALI takes no position regarding the implications of these requirements for purposes of judging the adequacy of pleadings or pretrial demonstration of general issues of fact. This language suggests that the proposed Restatement sets no rule as to whether a defendant can obtain summary judgment for a plaintiff's failure to present evidence of a reasonable alternative.

12. Tentative Draft No. 2, supra note 2, § 2 cmt. c.
13. Id.
14. Id.
15. Id. cmt. d.
16. Id. § 2 cmt. c, illus. 5. Minnesota law clearly allows liability without evidence of an alternative design for products that "should be removed from the market rather than be redesigned." Kallio, 407 N.W.2d at 97 n.8.
17. Tentative Draft No. 2, supra note 2, § 2 cmt. e.
18. Id. illus. 8-9.
19. Id. § 2 cmt. e.
20. Id.
design. Indeed, the Comment states that the issue is left "to local law." 21

The Minnesota Supreme Court has established that "local law." In *Kallio*, the court resoundingly rejected a manufacturer's argument that establishing a reasonable alternative design was a pretrial hurdle blocking plaintiff's path to the jury. 22 The court found that requiring plaintiffs to prove an alternative design "tends to elevate proof of the existence of a feasible alternative safer design from a factor properly for jury consideration to an element of the plaintiff's claim." 23

*Kallio* is correct in this holding. As Comment e points out, the question of whether a proposed design is a reasonable alternative is laden with fact issues. 24 Among these are the magnitude of foreseeable harm of the alternative design, any potential warnings that could accompany it, consumer expectations, the effects of the design on the cost of production, product longevity, aesthetics, and marketability. 25 In Minnesota, these factual issues are for the jury; courts decide the questions of law. 26 Consequently, though the proposed *Restatement* is confused about the role of summary judgement in the reasonable alternative design issue, Minnesota realizes that whether a proposed design constitutes a "reasonable alternative design" is a jury question.

### III. Risk/Utility: Been There, Done That

The goal of the ALI's redefinition of design defect is to amplify in the law a risk/utility standard. The perceived enemy of the risk/utility standard is the "consumer expectation test," under which a product is deemed defective if it fails to perform as safely as an ordinary consumer would expect. 27 Under that standard, the plaintiff can recover "by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault." 28 As Professors Henderson and

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21. *Id.*
23. *Id.* at 97.
25. *Id.*
Twerski point out in their prescient article in the *Cornell Law Review*, risk/utility and consumer expectations are the competing equations to decide whether a product is defectively designed.\(^{29}\) Henderson and Twerski make clear their distaste for the consumer expectation test, describing it as "so open-ended and unstructured that it provides almost no guidance to the jury in determining whether a defect existed" and "leaves manufacturers uncertain of the law's demands regarding product design."\(^{30}\)

Minnesota already has a risk/utility test for defective design. Since 1977, Minnesota law has demanded that plaintiffs prove not only that a product is defective, but that it is also "unreasonably dangerous" before it will be considered defectively designed.\(^{31}\) In *Bilotta v. Kelley Co.*,\(^ {32}\) the Minnesota Supreme Court agreed that the jury must consider the conscious design decision made by a manufacturer and can find that a design is defective only if "the risk/utility balance struck by the manufacturer was ... not reasonable."\(^ {33}\) According to *Bilotta*, the determination of whether the manufacturer struck a reasonable balance must be flexible: "What constitutes 'reasonable care' will, of course, vary with the surrounding circumstances and will involve 'a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm.'\(^ {34}\)

Based on broad-brush legal reasoning, the proposed *Restatement* adopts a much more rigid approach.\(^ {35}\) It collapses

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\(^{29}\) Henderson & Twerski, *supra* note 3 at 1534. The professors describe how, while they were working on an article proposing revisions of section 402A, they learned that the ALI had itself decided to revise the products liability sections. The professors were then appointed Reporters for the revision.

\(^{30}\) *Id.*

\(^{31}\) *See* O'Laughlin v. Minnesota Natural Gas Co., 253 N.W.2d 826, 832 (Minn. 1977).

\(^{32}\) 346 N.W.2d 616 (Minn. 1984).

\(^{33}\) *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984).

\(^{34}\) *Id.* at 621 (citing Holm v. Sponco Mfg., 324 N.W.2d 207, 212 (Minn. 1982)).

\(^{35}\) The Reporters' conclusion that the risk/utility analysis always requires the proof of a reasonable alternative design is based on five categories of cases, including some cases that draw exceptions to the requirement of a reasonable alternative design, some that allow proof of design defect by *res ipso loquitur* inferences rather than proof of an alternative design, and some that do not "explicitly" require proof of an alternative design. Tentative Draft No. 2, *supra* note 2, § 2 Reporters' Note, to cmt. c. The Reporters do not confront the fact that some cases in these categories, including *Kallio*, explicitly reject the rule that proof of an alternative design is a prima facie
the risk/utility test into a single factor: Was there a reasonable and safer alternative design at the time of the manufacture of the product? 36

Minnesota’s approach is better. Requiring that a plaintiff prove a reasonable alternative design as the only method of establishing that a product is defectively designed throws courts and juries into the realm of the hypothetical, places information requirements on the party who can least efficiently satisfy them and, as shown below, simply conflicts with other well-established veins of Minnesota law. There is also a fairness concern. The new formulation would obviously reduce the number of plaintiffs who prevail in their design defect actions. In doing so, not only would injured persons be left without compensation, but the policies of product liability litigation would be left unfulfilled.

IV. Proving the Impossible: Welcome to Hypothetical Litigation

Under Section 2(b), in order to establish that a reasonable alternative design exists, plaintiff must prove a litany of facts about what may well be a hypothetical design. Comment e suggests that a plaintiff does not actually have to produce a prototype design. 37 Thus, Section 2(b) anticipates that plaintiffs will introduce expert testimony about a design envisioned by that expert, but not actually in existence. Comment e also describes the numerous issues upon which the plaintiff must offer testimony:

- the instructions and warnings which might accompany that design;
- how that design will satisfy consumer expectations;
- the cost of producing that alternative design;
- the effect of that design on product function;
- the effect of the design on product longevity;
- the aesthetics of that proposed design; and
- the marketability of that design. 38

In addition, the plaintiff must prove that the hypothetical alternative design would have eliminated or reduced the harm

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36. Id.
37. Tentative Draft, supra note 2, § 2 cmt. e.
38. Id.
suffered by the plaintiff.\footnote{Id.} Placing the burden of production of this information on the plaintiff makes no sense. It is the manufacturer who has access to this information. In fact, product manufacturers are obligated, under Minnesota law, to keep informed about scientific knowledge and discoveries in the field of their product.\footnote{Omnetics v. Radiant Technology Corp., 440 N.W.2d 177, 181 (Minn. Ct. App. 1989).}

The Minnesota Supreme Court recognized long ago that the manufacturer "stands in a superior position" to recognize and cure defects.\footnote{Holm v. Sponco Mfg., 324 N.W.2d 207, 212 (Minn. 1982); see also Pietrone v. American Honda Motor Co., 235 Cal. Rptr. 137, 142 (Cal. App. 1987) ("[T]he feasibility and cost of alternative designs ... involve[s] technical matters peculiarly within the knowledge of the manufacturer."), review denied (Cal. May 21, 1987).} Forcing the plaintiff to collect and present the evidence likely already in the hands of the manufacturer threatens to turn discovery into a game of cat and mouse.\footnote{This imbalance in the availability of information has led many courts to hold that, where a feasible alternative design is at issue, it is the defendant's burden to show that its chosen design was the best feasible alternative. See, e.g., Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 885-86 (Alaska 1979); Barker v. Lull Eng'g Co., 573 P.2d 443, 445 (Cal. 1978).} Moreover, nothing could be further from the goals underlying product liability litigation of reducing transaction costs in the litigation of products cases.\footnote{See, e.g., G. CALABRESI, THE COSTS OF ACCIDENTS 68-75 (1970).}

The proposed Restatement presents an academic view of this evidentiary burden that is out of touch with the realities of complex product liability litigation. In order to offer proof of the factors listed above, plaintiffs would have to employ numerous experts. A design expert, for example, would have to testify concerning the feasibility of a design, a marketing expert would have to testify concerning its marketability, and an economist would be needed to opine on the cost of production.

This testimony, if it were available, would simply overwhelm the trial. The other facts needed to recover for a design defect, that the plaintiff was using the product and was injured by it, are straightforward and relatively simple to prove. Once the plaintiff's case turns to proving the characteristics of a hypothetical design, however, the trial would be plunged into hypothetical minutiae.
The Eighth Circuit, applying Minnesota law, has soundly rejected such forays into the hypothetical. In Mitchell v. Volkswagenwerk, A.G., the court discussed the doctrine asserted in crashworthiness cases that a plaintiff must prove the injuries that would have resulted absent a vehicle defect. This requirement is nearly identical to Section 2(b)’s proposal that plaintiff prove that, if a manufacturer had used a different design, the injuries would have been less or nonexistent. Discussing the requirement, Judge Lay noted:

The primary difficulty we have with this analysis is that it forces not only the parties but the jury as well to try a hypothetical case. Liability and damage questions are difficult enough within orthodox principles of tort law without extending consideration to a case of a hypothetical victim. More realistically, the parties and juries should direct their attentions to what actually happened rather than what might have happened.45

Mitchell also expressed an institutional concern. Forcing the plaintiff to prove a negative fact (i.e., no injuries with a different design) threatens the integrity of legal process:

A rule of law which requires a plaintiff to prove . . . what might have happened in lieu of what did happen requires obvious speculation and proof of the impossible. This approach converts the common law rules governing principles of legal causation into a morass of confusion and uncertainty.46

V. Admissibility of Reasonable Alternative Design Evidence

Manufacturers may want it both ways by requiring plaintiffs to prove reasonable alternative design and then asserting that the information required to show the hypothetical is not even admissible. The admissibility of expert testimony in federal court is governed by the Supreme Court’s decision in Daubert v. Merrell Dow Pharmaceuticals.47 Daubert requires that any scientific evidence ultimately admitted be “not only relevant, but reliable.”48 An expert’s testimony must be based on scientific

44. 669 F.2d 1199 (8th Cir. 1982).
46. Id. at 1205 (emphasis added).
47. 113 S. Ct. 2786 (1993).
knowledge and must connote "more than subjective belief or unsupported speculation." 49

In Stanczyk v. Black & Decker, Inc., 50 the court translated what it viewed as the Daubert requirements into the context of an expert's testimony about a hypothetical alternative design. 51 In Stanczyk, the plaintiff was injured by a miter saw. 52 Plaintiff's expert testified that a design was possible that tightened the gap through which the plaintiff's hand had slipped into the blade. 53 While the expert testified that he had done enough engineering analysis to determine that the design was feasible, he conceded that the construction of an actual prototype would actually require "several hundred hours of engineering work." 54 The court found, however, that Daubert required that the expert offer a "testable" design and ruled the expert's testimony inadmissible. 55 Additionally, the court suggested a requirement in Daubert of peer review, and found essentially that under any peer review requirement, all alternative designs except those used in "industry practice" were inadmissible. 56

Minnesota courts have recognized — but refused to impose upon a plaintiff — the burden created by any requirement that a proposed alternative design be fully tested. The court of appeals' opinion in Kallio describes how plaintiff's expert, in order to test his alternative design for a truck transmission, needed to test the design on up to 30 million vehicles in order to meet statistical significance. 57 It was with this fact in mind that the court of appeals found that proof of a reasonable

49. Id.
52. Id.
53. Id. at 567.
54. Id.
55. Id. This aspect of Stanczyk, if adopted by other courts, would nullify the ALI's position that "section 2(b) does not require the plaintiff to actually produce a prototype." Tentative Draft No. 2, supra note 2, § 2 cmt. e.
alternative design was not necessary, a holding affirmed by the supreme court.\textsuperscript{58}

Obviously, the ALI did not fully consider the potential evidentiary burdens when it urged that "[f]or justice to be achieved, § 2(b) should not be construed to create artificial and reasonable barriers to recover."\textsuperscript{59} Rather, the proposed standard places injured consumers between the proverbial rock and a hard place by requiring proof that may not even be admissible.

VI. The Resurrection of the Standard of the Industry Defense

The Reporters take great pains to claim that manufacturers cannot defeat a finding of defective design by showing that their design is the industry standard.\textsuperscript{60} There is a subtext to the Comments, however, that recognizes both that a plaintiff will not prevail if a manufacturer shows its design is the industry standard, and that existing practices of a manufacturers' industry will be the sole source of any alternative design evidence that a plaintiff can muster. Illustration 3, for example, describes a plaintiff's expert presenting a technological and economically feasible alternative design that is "utilized in similar machinery."\textsuperscript{61} Illustration 7 provides an example where manufacturers in one state use a reasonable alternative design that is not used by a manufacturer from another state.\textsuperscript{62}

The fate of the majority of plaintiffs under the proposed Restatement will be that they can show, either for cost reasons or under the prevailing evidentiary rules, only a feasible alternative design that is already in use by a competing manufacturer. These costs and evidentiary considerations will be reinforced by the tendency of courts to hesitate indicting any existing design which approximates the "standard" of an industry. In Elliott v. Brunswick Corp.,\textsuperscript{63} for example, the court was asked to accept what seems to be common sense: It is feasible to ask manufacturers of outboard motors to place a metal guard around the

\textsuperscript{58} Id. at 861, aff'd, 407 N.W.2d at 97.
\textsuperscript{59} Tentative Draft No. 2, supra note 3, § 2 cmt. e.
\textsuperscript{60} Id. cmt. c.
\textsuperscript{61} Id. cmt. d, illus. 3.
\textsuperscript{62} Id. illus. 7.
\textsuperscript{63} 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991).
motor's exposed blade. After noting that neither industry custom or existing regulations required such a guard, the court found itself incompetent to dictate a new design on the industry: "We agree with Mercury that courts cannot burden companies with an immediate duty to revolutionize their industry." Even after noting that, in some uses, guards were placed on outboard motor blades, the court observed that "[a]s a general rule, courts endeavor not to scapegoat manufacturers where challenged designs are 'in a state of flux' at the time of manufacture."

The Elliott court's hesitancy to dictate designs to manufacturers is echoed in Minnesota decisions, even where black letter law allows, or may require, them to do so. In Buzzell v. Bliss, the plaintiff sought recovery after her fingers were amputated in a punch press. The court refused the plaintiff's request to present evidence of a safer design actually used in England, in part because "[i]t was agreed by all experts at trial that the standard in the industry in the United States is that the manufacturer leaves any point-of-operation protection to the user."

Similarly, in Gross ex rel. Gross v. Running, a consumer sought recovery after a towing hook ripped through a truck frame rail and hit plaintiff in the head, causing severe brain injury. The plaintiff proffered, as evidence of a feasible alternative design, that the manufacturer could have created a second hole on the vehicle's frame to allow safer attachment of a tow hook. The court of appeals affirmed the trial court's motion for judgment notwithstanding the verdict, cancelling a jury verdict in favor of plaintiff, because "no standard-sized tow hook exists."

65. Id. at 1508.
66. Id. at n.2.
67. Id. at 1509 (citing Fincher v. Ford Motor Co., 399 F. Supp. 106, 114 (S.D. Miss. 1975), aff'd, 535 F.2d 657 (5th Cir. 1976)).
70. Id.
71. 403 N.W.2d 243 (Minn. Ct. App. 1987), review denied (Minn. May 20, 1987).
73. Id. at 247.
74. Id.; see also Westbrock v. Marshalltown Mfg., 473 N.W.2d 352, 358 (Minn. Ct. App. 1991) (recognizing a "safety device defense" where a multiple purpose product
These court actions have forced a practical tendency for plaintiffs to attempt to prove a reasonable alternative design by recourse to existing standard designs. This tendency may create a "safe harbor" for manufacturers that has long been discredited. Minnesota courts have held that a product may still be defective even if it is an imitation of other manufacturers' products. 75 Indeed, Judge Learned Hand, the sage of economic analysis of tort law, long ago warned against adoption of industry-wide practices as a standard of care: "[A] whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own test, however, persuasive be its usages. Courts must in the end say what is required . . . ." 76

This hallowed rule of law may be surreptitiously repudiated by the adoption of Section 2(b) of the proposed Restatement. An injured consumer's ability to prove design defect by showing that the prevailing designs within an industry are inadequate, simply loses its force when, for reasons of costs, evidentiary burden, and institutional caution by the courts, consumers may be limited to introducing designs prevalent within an industry. Thus, without fully thinking it through, the proposed design defect test may be resurrecting a long-rejected rule of law.

VII. It's Not Going to Make the World A Safer Place

The proposed Restatement's strict definition of design defect also conflicts with Rule 407 of the Minnesota Rules of Evidence, which deals with subsequent remedial efforts. 77 Indeed, using the existence of a safer design as the test for defectiveness actually creates an incentive for manufacturers to forgo developing a safer design. Rule 407 prevents the admission, to prove negligence, of safety measures taken after an injurious event. 78 In Kallio, the Minnesota Supreme Court held that subsequent
remedial measures are sometimes not admissible to prove defect in design defect cases. The well recognized basis for this rule is that the public is better protected by encouraging manufacturers to correct design flaws. As Kallio points out, manufacturers are more likely to do this if the change in the product does not constitute an admission that the original product was defective.

Subsequent remedial efforts are admissible to show the existence of a feasible alternative design, unless the manufacturer concedes of the alternative. If no such concession is made, remedial design changes are normally admissible to show the feasibility of that design. Kallio makes it clear, however, that to protect the policy of creating incentives to improve defective designs, the jury must be given a limiting instruction that the change in design is not a concession of defect.

Section 2(b) of the proposed Restatement simply destroys Kallio's careful balance. It is unlikely that manufacturers will make concessions that a reasonable alternative design was feasible because such concessions would mean, by definition, that the design actually used was defective. Once evidence of a feasible design known to the manufacturer is introduced, there would be no place for Kallio's cautionary instruction because under Section 2(b), evidence of feasibility of the alternative design is the precise definition of design defect.

The result can only be a lack of incentive on manufacturers to redesign a product they learn has design problems. Since changing the design will be a concession of defectiveness, the incentive placed upon manufacturers by Section 2(b) is to ride out the storm that may arise over any questionable design.

79. Id. at 98.
80. Id. (reasoning that the public is afforded better protection by encouraging manufacturers to correct perceived design flaws without risk of having those changes used by a plaintiff as an admission of the product's defects).
81. Id.
82. Id.
83. Id.
84. Id.
85. Tentative Draft No. 2, supra note 2, § 2(b).
VIII. It Just Isn’t Fair

The Reporters concede that “fairness values” favor increasing the ability of plaintiffs to recover for injuries caused by products. 86 Minnesota courts have long embraced the fairness rationale, holding that enlarging a manufacturer’s liability to those injured by its products “more adequately meets public policy demands to protect consumers from the inevitable risks of bodily harm . . . .”87 The manufacturer is simply in the better position to bear the cost of injuries and to redistribute them via the cost of its product.88

The allocation of a burden of proof or production is not a legal technicality; it goes to the heart of the question of whether a particular injury should be compensated. In Mathew v. Mills,89 the Minnesota Supreme Court held that a plaintiff could recover even though she could not identify which of two defendants caused her injury. The court reasoned as follows:

[The] placement of the burden of proof is justified by considerations of fairness. If we were to impose upon an injured party the necessity of proving which impact in a chain collision did which harm, we would actually be expressing a judicial policy that it is better that a plaintiff, injured through no fault of his own, take nothing. . . . [I]n other words, the rule is a result of a choice as to where a loss due to failure of proof shall fall—on an innocent plaintiff or on defendants who are clearly proved to have been at fault.90

Obviously, in placing the burden of proving a reasonable alternative design on the plaintiff, the ALI has determined, in many cases, where the loss shall fall.

The rationale the Reporters give for placing this burden on the victim is both contrary to Minnesota law and at odds with today’s society. Citing an earlier article written by themselves, Professors Henderson and Twerski support the Tentative Draft’s

86. Id. § 2 cmt. a.
88. See Holm v. Sponco Mfg., 324 N.W.2d 207, 213 (Minn. 1982).
89. 288 Minn. 16, 178 N.W.2d 841 (1970).
proposed evidentiary burden by arguing that consumers "are more often better risk minimizers than are product sellers with respect to generic risks involving the inherent design of products."\(^{91}\) As an example, the Reporters state that the user of a knife, rather than its manufacturer, is in a better position to avoid harm caused by a knife's sharp edge. This example is disingenuously simply. Long ago, Minnesota courts realized that in an age of increasingly mechanized and mass produced goods, it is the manufacturer who is "better able to appreciate and minimize the risk of injury through the production of safer goods."\(^{92}\) As the court held in *McCormack v. Hankscraft Co.*\(^ {93}\) in light of the "inevitable risks" posed by mass production of products and complex marketing conditions, the cost of injuries should be placed upon the manufacturer instead of the consumer "who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences."\(^ {94}\)

Nothing has changed since *McCormack* was decided in 1967 to suggest that consumers have gained a greater ability to discern the potential risks of increasingly complex products. Only by ignoring the manufacturer's place as the best minimizer of risk can ALI justify its heavy evidentiary burden which, in many cases, will leave injured victims in what the Eighth Circuit in *Mitchell v. Volkswagenwerk*\(^ {95}\) called "an almost hopeless state of never being able to succeed against a defective designer."\(^ {96}\) In such instances, "[t]he public interest is little served."\(^ {97}\)

IX. What's Really Going On?

There is considerable skepticism among sections of the practicing bar that the proposed *Restatement* of product liability

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91. Tentative Draft No. 2, *supra* note 2, § 2 Reporters' Notes, cmt. a. The thinking behind this concept is that consumers, knowing that it will be more difficult to recover if they are injured, will be more careful. It is difficult to ascribe that strategic thinking to many plaintiffs, for example, the three-year-old child whose severe burns led to the action described in *McCormack*.

92. *Holm*, 324 N.W.2d at 213 (citations omitted).

93. 278 Minn. 322, 154 N.W.2d 488 (1967).


95. 669 F.2d 1199 (8th Cir. 1982).


97. *Id.*
does not reflect a consensus of product liability decisions throughout the country, but rather today’s climate of tort reform. This skepticism is fueled, and perhaps even justified, by the fact that Reporters for the proposed Restatement, Professors Henderson and Twerski, have reportedly testified before Congress in support of federal product liability bills that restricted consumer rights.99

With the proposed Restatement, the ALI appears to move beyond its perceived role as the chronicler of accepted legal rules. The Reporters arguably have failed to live up to their self-imposed assignment to construct a revision that reflects “a broad consensus view” without “paper[ing] over real differences.”100 There is no consensus holding that a plaintiff, to prove design defect, must prove that a reasonable alternative design exists. The cases go both ways, reflecting “real differences.”101

It is easy to quibble over the precise holding in any reported decision. It is clear, however, that the Reporters have either misread or misstated the meaning of Kallo to support their position. The Reporters state that “[a] fair reading of Minnesota law is that for the majority of design defect cases, proof of a reasonable alternative is necessary.”102 The Reporters also cite Kallo for the proposition that it is the burden of the plaintiff to prove a reasonable alternative design.103 The Reporters suggest that the only exception to the requirement in Minnesota is those “rare cases” where the product is so unreasonably dangerous it should be removed from the market rather than redesigned—the Reporters’ exploding cigar.104

98. See Stewart, supra note 11 at 29.
100. Henderson & Twerski, supra note 3 at 1529.
101. See View That Plaintiff Has Burden of Proving Existence of Safer Alternative Design—Generally 78 A.L.R. 4th 154 (1990). This annotation identifies eight states that do not require a plaintiff to prove feasible alternative design to establish product defect. Id. at 158-59. Only six states plus the District of Columbia are identified as requiring proof of an alternative safe design as a prima facie element of design defect. Three states hold that it is the burden of the manufacturer to prove that there is no alternative safe design. Id.
102. Tentative Draft No. 2, supra note 2, § 2 Reporters’ Note, cmt. c.
103. Id. cmt. d.
104. The Reporters cite Kallo v. Ford Motor Co., 407 N.W.2d 92, 97 n.8 (Minn. 1987) for this proposition.
suggestion is that, in all but a few cases, Minnesota requires plaintiff to show a reasonable alternative to design as a prima facie element of its case and is subject to summary judgment for the failure to do so.

In fact, *Kallio* rejected the very legal principle that the Reporters suggest it represents. *Kallio* is an automobile defect case, not one involving an exploding cigar. Defendants in that case requested an instruction akin to Section 2(b), requiring the plaintiff to prove an alternative design. The supreme court rejected that instruction, holding that the showing of a reasonable alternative design is *never* a prima facie element to a design defect case: “Such evidence is relevant to, and certainly may be an important factor in, the determination of whether the product was unreasonably defective. However, existence of a safer, practical alternative design is not an element of an alleged defective product design prima facie case.”

*Kallio* rejected the defendant's requested jury instruction, now the standard proposed by Section 2(b), because the instruction tended “to elevate proof of the existence of a feasible alternative design from a factor properly for jury consideration to an element of the plaintiff’s claim.” Thus, contrary to the Reporters’ suggestion, *Kallio* repudiates, rather than supports, the requirement that a plaintiff prove a reasonable alternative design as an element of its design defect case.

Because of the suspicions that the ALI’s project is really tort reform in cloak, most attorneys agree that the proposed *Restatement*, including Section 2(b), will never achieve the prominence of its predecessor, section 402A of the *Restatement Second.* Indeed, Professor Henderson is reported as acknowledging that the impact of the *Restatement (Third)* will be minimized because of the great success of the *Restatement Second.*

Minnesota should heed these arguments and find that *Restatement (Third)*, especially Section 2(b) requiring that plaintiff prove that an alternative design exists, is simply not the right legal rule at the right time. The proposed *Restatement* is patently

105. *Id.* at 94.
106. *Id.* at 97.
107. *Id.*
109. *Id.* at 439.
unfair to plaintiffs and contradicts too many strands of established Minnesota law. Let’s stick with *Kallio*. 