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A CRITICAL ANALYSIS OF THE PROPOSED RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

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I. INTRODUCTION ................................................. 411
II. DISTINCTION BETWEEN MANUFACTURING DEFECTS AND
    DESIGN DEFECTS ........................................... 413
III. CHANGE IN THE ROLE OF NEGLIGENCE ................. 415
IV. ELIMINATION OF THE CONSUMER EXPECTATION TEST 416
V. REQUIREMENT OF PROOF OF A REASONABLE ALTERNATIVE
    DESIGN ..................................................... 417
VI. CONCLUSION .................................................. 419

I. Introduction

Recently, the American Law Institute ("ALI") determined that the product liability sections of the Restatement (Second) of Torts, specifically section 402A, needed revision. It appointed Professor James Henderson of Cornell University Law School and Professor Aaron Twerski of Brooklyn Law School as Reporters. The proposed revisions were submitted to the ALI’s

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membership at its meeting in May of 1994. These proposals generated considerable controversy and widespread criticism and were, accordingly, referred to its Member Consultative Group for further study.¹ These proposals remain under consideration.

The selection of Henderson and Twerski as Reporters was significant in that both are well known for their long-standing conservative philosophy regarding product liability issues, particularly in design and warning/instruction defect cases.² The Reporters have been accused of using the revision process inappropriately to accomplish tort reform.³ They have received extensive criticism because the revisions do not accurately state a consensus of existing product liability law.⁴ The revisions also

1. Larry S. Stewart, The ALI and Products Liability: 'Restatement' or 'Reform'?, TRIAL, Sept. 1994, at 28. Stewart notes that the effect of this vote was to delay action on the first eight sections of the Restatement until 1995. Id. at 31 n.3.

2. See Philip H. Corboy, The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability, 61 TENN. L. REV. 1043, 1073-74 (1994); Jerry J. Phillips, Achilles' Heel, 61 TENN. L. REV. 1265, 1265-66 (1994). Corboy notes that Professor Henderson has stated that he "has been on record for almost 20 years as opposed to expansionary trends in products liability ... [and] has testified many times in support of products liability reform before both the Congress and numerous state legislatures." Corboy, supra, at 1046 n.18 (citing Theodore Eisenberg & James A. Henderson, Jr., Inside the Quiet Revolution in Products Liability, 39 UCLA L. REV. 731, 740 n.33 (1992)).

3. See Corboy, supra note 2, at 1073-74; Bruce S. Kaufman, Attorneys Spar Over Restatement (Third) of Torts; ATLA to Mobilize Opposition to ALI Project, 22 PROD. SAFETY & LIABILITY REP. (BNA) 436, 437 (Apr. 22, 1994); Stewart, supra note 1, at 29; see also Oscar S. Gray, The Draft ALI Product Liability Proposals: Progress or Anachronism?, 61 TENN. L. REV. 1105, 1109-10 (1994) ("[T]he Reporters ... propose not only to modify section 402A, but to subordinate negligence and warranty law to these modifications as well . . . ."); Phillips, supra note 2, at 1274 ("What the proposed Restatement promises is not certainty, but a decidedly conservative approach to products liability, to the substantial detriment of the consumer.").

4. See, e.g., Roland F. Banks & Margaret O'Conner, Restating the Restatement (Second), Section 402A—Design Defect, 72 OR. L. REV. 411 (1993) (disagreeing with the Reporters' characterization of the state of the existing law); see also Howard Klemme, Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability, 61 TENN. L. REV. 1173 (1994). Professor Klemme states that the Reporters "decided to follow their own instrumentalist views rather than the dominant case law on the subject and to reintroduce 19th-century concepts of fault into modern products liability law . . . ." Id. Professor Klemme further concluded that "[f]ewer than half the cases cited in the Reporters' Note to comment c . . . support the propositions for which they are cited." Id. at 1177. Gray states that the proposals "reach far beyond" the existing Section 402A and have little authority in existing case law. Gray, supra note 3, at 1105. Professor Twerski apparently has conceded that the referral of these proposals to the Member Consultative Group was motivated by the absence of "case law backing our position." See Kaufman, supra note 3, at 436.
have been criticized as being inconsistent with basic notions of justice and repugnant to the rights of consumer victims. Finally, the revisions have been said to be "too piecemeal for meaningful consideration." The failure of the ALI to approve these proposals and their referral for further study was apparently in direct response to the storm of controversy that these proposals generated.

The major departures from existing law are as follows:

1. The apparent elimination of negligence as a basis of recovery in manufacturing defect cases and a return to negligence in design and warning defect cases;

2. The rejection of the "consumer expectation" test as a primary guideline to the determination of product defectiveness; and

3. The requirement of proof of the existence of a "reasonable alternative design" as a pre-condition to recovery in a design defect case.

II. Distinction Between Manufacturing Defects and Design Defects

The Reporters divide product defects into three categories. They are defects in (1) manufacture, (2) design, and (3) warnings/instructions. Section 2 of the revised Restatement then treats manufacturing defects differently from design and warning/instruction defects, using a "departure from design" standard for manufacturing defect cases and a "risk-utility balancing test" for design and warning/instruction defects.

Professor Henderson is reported to have stated that "the council believed we were way ahead of the case law."  

5. Stewart, supra note 1, at 30.
6. Stewart, supra note 1, at 29; see also Corboy, supra note 2, at 1086 ("The Tentative Draft, although lengthy, is not comprehensive."); Klemme, supra note 4, at 1175.
7. See Gray, supra note 3, at 1109-13.
8. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (Tentative Draft No. 2, 1995) [hereinafter Tentative Draft No. 2].
9. Corboy, supra note 2, at 1088-89.
10. Tentative Draft No. 2, supra note 8, § 2(b).
11. Tentative Draft No. 2, supra note 8, § 2. Section 2(a) states that "a product contains a manufacturing defect when [it] departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." Id. § 2(a). Section 2(b) states that "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." Id. § 2(b).
This distinction was apparently grounded in the basic premise that while correction was needed in the area of design and warnings, no change was needed with respect to pure manufacturing defects.\textsuperscript{12} Unfortunately, the Reporters provided no clear definition of a manufacturing defect, nor clarified the distinction in any meaningful way from design and warning defects.\textsuperscript{13} It is unclear whether this lack of definition is due to oversight or difficulty in crafting a workable definition.

Various commentators have expressed the view that the distinction between manufacturing and design defect is "an illusion,"\textsuperscript{14} "slippery,"\textsuperscript{15} and "no longer tenable."\textsuperscript{16} The revisions magnify the confusion by setting out a single standard for manufacturing defects which define it in terms of a "design" problem, stating that "a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."\textsuperscript{17} Accordingly, the Reporters’ definition of a manufacturing defect (as one which deviates from its intended design) differs from normal parlance and usage, in which a manufacturing defect is generally considered one which contains a flaw in materials or workmanship, irrespective of its design.

Prior to these revisions the distinction was not as important. However, the application of significantly different standards to these separate areas has now made these definitions critical, creating an issue which, if not addressed in the revisions, may potentially result in years of confusion and the need for extensive judicial clarification.\textsuperscript{18} One legal scholar has characterized this problem as the "Achilles' heel" of the revisions.\textsuperscript{19}
III. Change in the Role of Negligence

The Reporters initially sought totally to eliminate negligence-based product liability claims. The extent to which this goal was reached is unclear, and the drafts are subject to deserved criticism for their lack of clarity on this issue. It has been suggested that the revisions subordinate negligence and warranty law and may even totally eliminate negligence as an optional basis of recovery in all manufacturing defect cases. If so, this is a clear departure from existing Minnesota law, at least in the area of manufacturing defects, where it is clear that consumers now have the option of proceeding under either a strict liability or a negligence theory.

In sharp contrast, the provisions relating to design and warning defects seem to move in the opposite direction (i.e., toward negligence) by employing the risk-utility standard. This standard focuses the jury’s inquiry on the conduct of the manufacturer by defining the defect in terms of whether the manufacturer could have foreseen and reduced or avoided the harm. It is quite difficult to understand or appreciate the inconsistency of the Reporters in adopting a definition of design defect in these cases which border on negligence, yet rejecting negligence as an optional theory in manufacturing defect cases. This is especially true since there has been little, if any, criticism by the courts and scholars of well-established negligence principles and traditional warranty concepts in dealing with product liability cases. It has been suggested that the Reporters’ primary motivation was simply to adopt a standard in each area which would increase the difficulty of recovery for injured consumers.

20. Stewart, supra note 1, at 29.
22. See, e.g., Bilotta v. Kelley Co., 346 N.W.2d 616, 622 (Minn. 1984); Hauenstein v. Loctite Corp., 347 N.W.2d 272, 275 (Minn. 1984); MINNESOTA DIST. JUDGES ASS’N COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 114, in 4 MINNESOTA PRACTICE (3d ed. 1986) 1, at 75-76 [hereinafter JURY INSTRUCTION GUIDES].
24. Gray, supra note 3, at 1109.
IV. Elimination of the Consumer Expectation Test

Consumer expectations apparently have no role in the jury's determination of a product's defectiveness in these revisions. While the Reporters have stated that consumer expectations may still be considered, it is impossible to find even a scintilla of that concept in the proposed language. Instead, the focus is entirely on the manufacturer. A product's design or warnings are considered defective if, and only if, the manufacturer could have foreseen the risks and reduced or avoided them by adoption of a reasonable alternative design. The expectations of the consumer have no role in this determination.

Again, this is a departure from existing Minnesota law. With regard to manufacturing defects, Minnesota clearly embraces the consumer expectation test. In *Bilotta v. Kelley*, the court said, "The ... consumer expectation instructions, which focus only on the condition of the product, are appropriate for this type of case, since the manufacturer's conduct is irrelevant." The revisions focus exclusively on the manufacturer's conduct.

In the area of design and warnings, the revisions again differ from existing Minnesota law. Minnesota's pattern jury instruction on design defects, which presumably accurately reflects Minnesota law, adopts a "reasonable care balancing test" which fails to place exclusive emphasis on either the expectations of the manufacturer or the consumer. The Minnesota instruction focuses on the reasonable care of the manufacturer, but arguably requires the manufacturer to be mindful of the expectations of the consumer and employ reasonable care to avoid unreasonable danger "to the consumer." In contrast, the revisions seem to focus exclusively on the manufacturer's ability to foresee and avoid the risks of harm in the product.

This exclusive focus on the conduct of the manufacturer has been sharply criticized as a total rejection of basic strict

29. 346 N.W.2d 616 (Minn. 1984).
32. *Id.*
liability concepts and a blatant return to old fault-based concepts. More importantly, it is totally inconsistent with basic logic and fairness. It allows the manufacturer, who typically caters to every whim and caprice of the consumer in designing a product that is purchased based on its attractiveness to the consumer, to totally ignore the expectations of the consumer with respect to safety. In short, it allows the fox to guard the chicken coop.

V. Requirement of Proof of Reasonable Alternative Design

Perhaps the most hotly debated and most severely criticized proposal is that contained in section 2 which requires proof of a "reasonable alternative design" ("RAD") to establish that a product is defective in design. Critics view this as an increased evidentiary burden on consumers to produce, at a minimum, competent proof of a workable and feasible alternative. Others fear that some courts may even require the consumer to actually produce a workable prototype.

The absolute requirement of proof of a RAD has been criticized for its apparent limitation on recovery for defective products with regard to which there is no safe alternative. Additionally, this change seems to deviate from conventional

33. See Klemme, supra note 4, at 1173; Phillips, supra note 2, at 1273-75; Frank J. Vandall, The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement, 61 TENN. L. REV. 1407, 1428 (1994); see also Little, supra note 13, at 1189.

34. Tentative Draft No. 2, supra note 8, § 2. See Ellen Wertheimer, The Smoke Gets in their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement, 61 TENN. L. REV. 1429, 1438-39 (1994) (concluding that this requirement is outcome determination and neither "advisable or necessary"). The author also states that it "betrays the goals of 402A by exempting the most useless and dangerous products from strict products liability." Id. at 1432.

35. Several scholars have stated that the proposals are subject to interpretation that the plaintiff risks dismissal for failure to present evidence of a reasonable alternative design. See, e.g., Vandall, supra note 33, at 1407. In one extreme case, a federal district court excluded the testimony of a plaintiff's expert witness because he had not produced a complete, testable prototype model incorporating the reasonable alternative design. Stanczyk v. Black & Decker, Inc., 836 F. Supp. 565, 567 (N.D. Ill. 1993) (relying on Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993)).

36. See Little, supra note 13, at 1194; see also Wertheimer, supra note 34, at 1435. Wertheimer notes that Comment (c) of Council Draft No. 1A recognized the possibility that some product categories might be defective in the absence of a RAD. Id. at 1437. However, this recognition was buried in the comments and not reflected in the text.
philosophy even more than the rejection of the consumer expectation standard because it imposes upon the ordinary consumer an unreasonable burden of re-designing the product. This occurs, despite the fact that the basic philosophy underlying the development of the doctrine of strict liability was based on a recognition that the typical consumer has neither the economic resources nor the expertise to evaluate the safety of the many products in the marketplace and re-design those determined to be substandard. Accordingly, strict liability, as a matter of proper social and economic management, shifted the burden to the party best able to bear it, the manufacturer. This proposed shift in burden amounts to a total rejection of the basic philosophy upon which the doctrine of strict liability was based.

Further, the absolute requirement of proof of a RAD as a condition precedent to recovery will inject into products liability litigation an entirely new issue for the courts to wrestle, namely the determination of what products are alternatives to others. In short, is a $50 stepladder an alternative to a $10 flimsy ladder that is inherently unsafe? Is a four wheel all-terrain vehicle an alternative to a three wheeler? Is an oral contraceptive an alternative to an IUD? Sadly, under these revisions this determination may be outcome determinative. The revisions have been criticized in this regard as exempting from liability dangerous and useless products with no redeeming social value, while subjecting those with lesser evil to liability.

Again, the revisions, in this regard, deviate from existing Minnesota law. The Reporters incorrectly list Minnesota in the camp of those jurisdictions requiring proof of a reasonably safer design, citing Kallo v. Ford Motor Co. Instead, the court expressly stated in Kallo that “[a]lthough normally evidence of a safer alternative design will be presented initially by the

37. See Wertheimer, supra note 34, at 1432, 1449; see also Corboy, supra note 2, at 1093-96; Little, supra note 13, at 1190.
38. See Vandall, supra note 33, at 1423. Vandall concludes that this revision retreats from the cornerstone philosophy of strict liability and ignores economic realities by placing the burden on the consumer. Id.
39. Wertheimer, supra note 34, at 1437. Wertheimer characterizes this issue as that of “product categories,” noting that a narrow characterization of the product category would affect the result. Id.
40. See id.
41. 407 N.W.2d 92 (Minn. 1987).
plaintiff, it is not necessarily required in all cases." This serious misstatement of Kallio is not isolated. The Reporters have been criticized generally for their misinterpretation and mischaracterization of the state of existing law.

The existence of a RAD is not a necessary element of the risk-utility test. It has been employed by many courts without considering the availability of an alternative design as an absolute requirement or as simply one of many factors. Instead, the risk-utility test is essentially a comparative approach which can allow the jury to evaluate many different factors, including both the manufacturer's and the consumer's expectations, as well as the availability of alternative designs without being a rigid condition precedent to recovery. Accordingly, the Reporters' emphasis on only two such factors seems highly inappropriate.

VI. Conclusion

There is no need to reshape the law of products liability so radically as to retreat to pre-strict liability concepts. The ALI Reporters, after extensive study, determined that "there appears to be little or no foundation for the common diagnosis that erosion of the fault principle as the basis of tort liability has attracted surplus numbers of dubious claims into the tort system." They also determined that "there never was a true general explosion in tort litigation, or at least that any incipient trend has subsided."

A Restatement should not attempt to be a vehicle for social reform. It should attempt to define and "restate" or summarize and capulize the law, rather than to remake, reshape, and revise it. This revision misses that mark by a considerable margin. This revision is piecemeal and incomplete. It creates

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43. See Vandall, supra note 33, at 1408-09 (disputing the Reporters' statement that a majority of jurisdictions require proof of a RAD); see, e.g., Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 360 N.W.2d 2, 16-17 (Wis. 1984), reconsideration denied, (Feb. 5, 1985) (rejecting the need for proof of a RAD.)
44. See Phillips, supra note 2, at 1271.
45. Id.
46. See Little, supra note 13.
47. 1 AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, Reporter's Study at 4 (1991) (quoted in Corboy, supra note 2, at 1076).
48. Id. at 5 (quoted in Corboy, supra note 2, at 1076).
a distinction between areas which then remain totally undefined. A Restatement should clarify the law rather than confuse it. This proposal does not accomplish that result.