

Possible State Court Responses to the ALI's Proposed Restatement of Products Liability

*Report of the 1996 Forum for
State Court Judges*

Sponsored by



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Executive Summary

On July 27, 1996, eighty-five judges from thirty-two state court systems met with legal scholars and trial lawyers from around the United States to discuss possible state court responses to the American Law Institute's proposed Restatement of Products Liability.

The proposed Restatement is the product of two Reporters appointed by the ALI: Professor James A. Henderson, Jr., of Cornell Law School and Professor Aaron D. Twerski of Brooklyn Law School. At the time the Forum was held most of the Restatement's proposals (sometimes amended in the course of debate) had received tentative approval by the membership of the ALI at annual meetings held since 1994.

Several of the proposed Restatement's provisions have engendered considerable controversy among legal scholars and consumer-oriented advocates, and debate on the project has been divisive in both the legal community as a whole and within the ALI itself. The greatest controversies have surrounded: (1) the Restatement's restriction of all products liability to proven defects in manufacturing, design and warning; (2) the Reporters' desire to eliminate any role for negligence and warranty in this area of the law and their relegation of the "consumer expectation" test to one factor to be considered in a risk-utility analysis of the product; and (3) the requirement embodied in Section 2(b) that plaintiffs alleging defective design prove a reasonable alternative design (RAD) for the injury-causing product. A collateral controversy has involved the question whether the ALI's Restatement process has become more politicized than it was in the past, raising the question whether the ALI's policy statements represent well-considered pronouncements on current trends in the law or mere aspirational statements of policy resulting from lobbying by vested economic interests.

Regardless of the individual judge's views on these issues, the question remains how should courts treat the proposed Restatement after its likely adoption, with or without modification, by the membership of the ALI? Two law professors who have served as Advisers in the ALI's development process for the proposed Restatement presented papers that addressed different aspects of this question.

- Professor Marshall Shapo, of Northwestern University School of Law, critiqued the proposed Restatement's treatment of defects in products and its relegation of several tests for and bases of liability to the "back shelf." He suggested that judges considering suggestions that the new Restatement supplant earlier formulations exercise a "prudent conservatism" that would take into account its merits but also its politicized background and the weight of existing decisional law developed over a period of three decades under the current *Restatement of Torts, 2d*.
- Professor Oscar Gray, of the University of Maryland School of Law, outlined several "intermediate positions" that might be available to judges who are disinclined either to accept or reject outright the new ALI formulations: looking to the Restatement's Comments on unreasonable design and traditional negligence principles; considering circumstantial evidence of defects; utilizing the consumer expectation test when the "risk-utility" test is inconclusive; and considering whether a product may be "unmerchantable" under their jurisdiction's equivalent of the Uniform Commercial Code even if it is not strictly "defective" under the Restatement.

In six discussion groups, the judges responded to the papers and commentary and gave their views on a number of standardized questions. At the closing plenary session discussion group, moderators reported that consensus emerged from the dialogue (at least within individual groups) along the following lines:

- The American Law Institute's Restatements are rarely invoked by litigants (other than in complex or high-stakes cases). They are most often cited by courts as secondary references to lend extra support to conclusions based primarily on existing statutory or decisional law, or to decisions reached in the absence of any controlling authority.

- The proposed Restatement's "reasonable alternative design" requirement was not the law of any significant number of their states. Section 402A of the current *Restatement of Torts, 2d*, was seen as the law of the overwhelming majority of states. Adoption of the proposed new Restatement would amount to either a "repeal" of Section 402A or a serious restriction on it, with attendant problems for state courts in moving to such a new regime.
- The negligence doctrine has a legitimate continuing role in product liability law notwithstanding the proposed Restatement's elimination of it as a basis of liability. Similarly, warranty law should continue as an independent basis of liability. The "consumer expectation" test remains viable, often in conjunction with a "risk-utility" analysis of product defect.
- The more political nature of the ALI's recent Restatement development processes justified careful scrutiny of the final product.

Foreword

This is the report of the fourth Forum for State Court Judges sponsored by the Roscoe Pound Foundation to provide opportunities for state judges and legal scholars to engage in a dialogue on major issues in contemporary jurisprudence. In past years we have considered the role of state court constitutionalism in protecting individual rights (1992), the independence of the judiciary (1993), and the possible impact on state courts of the proposed Long Range Plan for the Federal Courts (1995), which would have shifted a significant portion of the federal caseload to state court benches.

One of the most refreshing aspects of this dialogue between the bench and the legal academy is the interchange that takes place between legal scholarship and theory, on one hand, and the pragmatic, down-to-earth perspective of the judges. Many of us are conscious of a troublesome gap between what is studied in our law schools and the real world, where practicing attorneys and state court judges do their work.

This kind of dialogue is not achieved very often, and that is everyone's loss. We have learned that judges and scholars, as well as the trial lawyers who serve as our discussion group moderators, find themselves challenged — and, we hope, also stretched — in the process. In our experience with the Forums perfect agreement is rare, but sometimes a consensus is reached. Readers of this Report will note that it includes examples of both consensus and disagreement emerging from frank exchange of views.

We all know that throughout our history, legal doctrine has grown from many different seeds. Theories of jurisprudence and political doctrine have had some effect on that process, but the real growth in the law comes from our common law tradition. It results from a dialogue between courts both today and across time — a dialogue that has all the elements of give and take. Products liability, the subject of the American Law Institute's proposed Restatement of Products Liability that was the focus of the 1996 Forum, belongs squarely in this tradition. Products liability law has grown from multiple roots. Through its proposed Restatement, the ALI is promulgating suggestions as to how this area of the law should change further.

The Roscoe Pound Foundation invited judges from throughout the United States to come together to consider these developments because we know state court judges will be the final arbiters of that change. The Forum's discussions considered the extent to which the proposed Restatement accurately reflects existing law and the wisdom of the changes it proposes. There are profound disagreements on the wisdom of those issues, and the controversies made for lively discussion in the best traditions of the common law.

This Report would be woefully incomplete if it failed to recognize the valuable contributions made to each of the first four Forums by the Foundation's late Executive Director, Marcia Feldman, who died in August 1996. The Forums were but one of many professional contributions Marcia made to the work of the Foundation. Pound benefited immensely from Marcia's intelligence and imagination, her sense of style, and her unalterable commitment to quality. We all miss her.

Roxanne Barton Conlin
President, The Roscoe Pound Foundation

I. Background of the American Law Institute's Proposed Restatement of Products Liability

Origins

Since its adoption in 1965, Section 402A of the American Law Institute's *Restatement of Torts, 2d*, has dominated the field of products liability law, prompting both admiration in academic and consumer quarters and criticism in the business community. In the courts, it has enjoyed remarkable support nationwide.¹ Section 402A has been cited in at least 3,000 products liability decisions, and is generally viewed as the single most frequently cited Restatement section of all time.²

The concept of revising this cornerstone of products liability law was advanced formally in the early 1990s by Professors Aaron D. Twerski of Brooklyn Law School and James A. Henderson, Jr., of Cornell.³ Their proposal was accepted by the ALI, and they were subsequently named Reporters for a new *Restatement of Products Liability*,⁴ which has since engendered controversy across the legal community and within the ALI itself.⁵ Questions raised have included the necessity of the project in the first instance, as well as specific details of the proposed Restatement that differ significantly from its predecessor Restatement. The Bureau of National Affairs' *Product Safety & Liability Reporter* has observed that the finalized Restatement "is likely to be an influential guidepost for judges and attorneys on products liability law for years to come."⁶

Several of the Restatement's most controversial proposals were discussed at the 1996 Roscoe Pound Foundation Forum for State Court Judges.

Process and Critical Contents

ALI Restatements are developed and adopted through a process that produces a succession of drafts for approval by ever-higher authorities within the organization. The final authority is the membership of the ALI, represented by those members in actual attendance at the ALI's annual meetings.⁷

The substance of each draft is divided, in descending order of authority, among: (1) numbered sections making "black letter" statements of law; (2) Comments to the black letter statements, adopted officially by the ALI membership; and (3) Reporters' Notes, providing additional argument and citations of authority, which are not voted on by ALI members. At the time of the Forum, the most complete and advanced version of the products liability project consisted of Tentative Draft No. 2 (dated March 13, 1995) and Tentative Draft No. 3 (April 4, 1996), with the latter draft superseding the former to the extent that coverage of topics overlapped. Subsequent to the 1996 Forum, a Proposed Final Draft (April 1, 1997) was presented to the ALI membership.

The subjects covered by the several drafts are indicated in the Draft Comparison Table that appears at the end of this section of the report. Discussion at the Forum focused on a small number of the most controversial subjects:⁸

Basis of Liability. The proposed Restatement generally provides that sellers and distributors of defective products are subject to liability only for harm caused by product "defects," implying the abolition of any causes of action against sellers and distributors based in negligence or warranty.

Defect Categories. The proposed Restatement would recognize only manufacturing defects, defects in design, and defects related to inadequate instructions or warnings. Manufacturing defects result

when a product departs from its intended design, despite all care taken by the manufacturer. Design defects are defined as existing when the risk of harm posed by the product might have been reduced or avoided by employing a "reasonable alternative design," and the failure to utilize that design makes the product not reasonably safe. Defects due to inadequate instructions or warnings are considered to be present when foreseeable risks of harm might have been reduced or avoided by the provision of reasonable instructions or warnings, and their omission renders the product not reasonably safe.

Circumstantial Evidence. The proposed Restatement would allow a defect to be inferred when the incident which produced harm would ordinarily occur only as a result of a product defect and the evidence suggests that a product defect in fact was the cause of the incident.

Pharmaceutical Products. The proposed Restatement would recognize liability for design defects only when the risks so far outweigh benefits that no reasonable healthcare provider would prescribe the product for any class of patients.

Used Products. The proposed Restatement would impose liability for manufacturing or inferred defects and when marketing practices would cause a reasonable buyer to expect the product to be no more dangerous than a new product.

Reaction by Bar and Academics

Professors Henderson and Twerski have generally been credited for the prodigious amount of work and time they have devoted to their project, and for the fair hearing they have given to diverse viewpoints. They assert that the process of criticism and revision since 1992 has resulted in "hundreds of changes and improvements" in their drafts.⁹ However, their Restatement proposal has also been criticized in some quarters as wrong on law and policy, and influenced by the tort "reform" movement. The ALI's process on the Restatement has been subjected to an unusual level of partisan lobbying, of uncertain effect.

At one end of the products liability spectrum, John W. Martin, Jr., general counsel of Ford Motor Company, has characterized the Reporters' work as "a very compelling, balanced Restatement of the law."¹⁰ And Sheila Birnbaum, both a law professor and products liability defense attorney, has asserted that "We aren't here [at ALI meetings] representing clients, but we do have a real philosophical debate about products liability going on."¹¹ On the other end of the spectrum, Professor Frank J. Vandall of Emory University School of Law characterizes the proposed Restatement as

a political statement. It is not a restatement of the law and does not rest on an evaluation of cases and policies. It exists merely because it has garnered sufficient votes.... The ALI has changed and so, apparently, has its mission. The ALI's mission is no longer to restate the law, but rather to issue pro-manufacturer political documents.¹²

Supporters of the Restatement project include both academics and defense attorneys.¹³ Tellingly, the Restatement has garnered no significant support from consumer advocates. Some critics, predictably, are personal injury practitioners who predominantly represent consumers, and who see the Reporters' proposals as based far too much on an academic analysis of appellate decisions in the small number of cases that pass through the appellate stage.¹⁴ A few members of the defense bar have also voiced concerns about the direction the project has taken.¹⁵

The most detailed and extensive criticisms, however, have come from academic commentators, who see the ALI proposals as reflecting too little the legitimate interests of consumers and the realities of consumer

behavior in the mass-marketing environment. They feel that only marginal changes to Section 402A of the existing *Restatement of Torts, 2d*, are justified.¹⁶

At the time of publication of this report, the most recent symposium on the Restatement project, including both supporting and critical articles, appeared in the Spring 1997 issue of the *University of Michigan Journal of Law Reform*, which conducted a moot court on the reasonable alternative design requirement based on a hypothetical case.¹⁷

Controversies

(1) The Reasonable Alternative Design Requirement

By far the most hotly debated proposal made by the Reporters is the requirement that a plaintiff's case alleging a design defect must include proof of a "reasonable alternative design." Several critics assert that the majority of jurisdictions do not require proof of a reasonable alternative design as part of the prima facie case of the plaintiff, and that, therefore, the proposed Restatement does not accurately reflect existing law.¹⁸ Consumer-oriented academics and attorneys have also argued that the proposed Restatement would make prosecution of many cases impossible because of the increased cost of providing proof of a reasonable alternative design.

A BNA reporter cited Professor Twerski's suspicion that

what some attorneys may unrealistically want is the ability to go into a case without an expert. He said he is confident the proposed text would not change present law, which already insures that "a manufacturer of a toy gun that shoots rubber pellets to take kids' eyes out would die a thousand deaths in court."¹⁹

The Reporters also point to language in their drafts that states that the reasonable alternative design requirement "should not be construed to create artificial and unreasonable barriers to recovery,"²⁰ and that their proposal "does not require the plaintiff to actually produce a prototype in order to make out a prima facie case."²¹

(2) Influence of Tort "Reform"?

Some critics also challenge the alignment of parts of the Restatement proposal with a few long-standing corporate tort "reform" goals.²² Plaintiff attorney Larry Stewart has argued that

[m]ost troubling about the statutory citations... is the appearance that the Reporters, who have testified in favor of federal products liability "reform" legislation and have parlayed their expertise into an assignment to revise Section 402A — probably the current legal requirement to which manufacturers are most opposed — may be feeling too much the gravitational pull of tort "reform."²³

In his moot court brief for the Michigan symposium, Stewart expanded his tort "reform" argument:

The [ALI] Reporters came to the project already having expressed their bias in favor of federal products liability reform. See, e.g., *Product Liability: Hearings Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science & Transp.*, 102nd Cong. 102 (1991) (statement of Aaron Twerski, Professor, Brooklyn Law School) (opining that the

Product Liability Fairness Act "ought to be passed"); *Impact of the Product Liability System on Small Business: Joint Hearing Before the Subcomm. on Exports, Tax Policy, and Special Problems of the House Comm. on Small Bus.*, 102nd Cong. 23 (1992) (statement of James A. Henderson, Jr., Professor, Cornell School of Law) (opining that Congress should play a "limited moderate role" in products liability reform). Professor Twerski suggests, "The product liability crisis has, for the first time, created a real possibility that major substantive tort law reform will take place at the federal level. The contributions of highly respected academicians to the legislative deliberations have been significant." Aaron D. Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 Hofstra L. Rev. 861, 864-65 (1983) (footnote omitted). Professor Twerski also noted that "Professor James A. Henderson, Jr... had a significant role in drafting major provisions that were ultimately incorporated into S. 44 [a 1979 bill]." *Id.* at 865, n. 10. Indeed, in introducing their concept for a section 402A revision, the ALI Reporters announced that "most reform statutes fit nicely into our revised black letter restatement of existing law." James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 Cornell L. Rev. 1512, 1529 (1992). Rather than progressive pragmatic reform, the purpose of the project, as stated in the original draft, was "to seek an appropriate balance ... between ... consumer and worker interests and ... producers of goods." *Restatement (Third) of Torts: Products Liability* at xiii (Tentative Draft No. 1, 1994).²⁴

Stewart also argues that

The Reporters have implied that they view [the problem of increased costs involved in satisfying the reasonable alternative design requirement] as an economics of law issue for plaintiff trial lawyers, the solution of which is beyond the scope of their assignment.... On the other hand, the Reporters have expressed concern in the past for the economic plight of manufacturers of products, raising the question of whether a double standard is being used. *See Impact of the Product Liability System on Small Business: Joint Hearings Before the Subcomm. on SBA, the Gen. Econ. and Minority Enter. Dev. and the Subcomm. on Exports, Tax Policy and Special Problems of the House Comm. on Small Bus.*, 102nd Cong. 81-83 (1992) (statement of James A. Henderson, Jr., Professor, Cornell School of Law).²⁵

For their parts, Professors Henderson and Twerski have taken care to point out that "a negative effect on corporate earnings or [a reduction in] employment in a given industry... do not speak to whether a product is reasonably designed."²⁶ And, at the ALI's 1995 annual meeting, Professor Twerski insisted that the Reporters had "no political agenda at all," and had simply looked at "what was really going on in the law." What the Reporters have done, Professor Twerski insisted, "is faithful to where the law is now and where it is going."²⁷

(3) Lobbying Allegations

Finally, observers of the Restatement process have pointed out that the American Law Institute, as a private legislature, is not subject to the constitutional checks on public legislatures or the due process restraints on courts.²⁸ The ALI's Restatements are adopted or rejected by unrecorded simple majority vote at its annual meetings, which in turn are attended by a minority of its approximately 3,500 members.²⁹ The meetings on products liability, while cordial, have featured vigorous dissents. At the 1994 ALI annual meeting, after a floor vote, the entire products liability project was recommitted to the Reporters for further study.³⁰ A Bureau of National Affairs correspondent referred to the 1995 annual meeting as more an out-and-out battle between the plaintiff and defense bars than a search for good products liability policy.³¹

Others who have reason to know have alleged that some corporate interests have engaged in blatant lobbying of ALI members and the Reporters in support of partisan goals. The existence of at least some external pressure on the products liability Reporters themselves was suggested by ALI Director Geoffrey Hazard in his Foreword to the Restatement project's Proposed Final Draft:

I regret to say that from time to time we received some written communications that did not meet [the standard of civil and professional debate] and that can only be described as transparent lobbying efforts.... I can confirm that lobbying communications were given no weight other than their intrinsic value, which generally was naught.³²

ALI President Charles Alan Wright also acknowledged the existence of such efforts in his "President's Letter" in the Winter 1997 issue of the *ALI Reporter*, describing a letter sent to an ALI member inviting attendance at a seminar on the products liability project:

On the cover sheet the person who was inviting him to attend had written: "... Not only will this seminar be informative, it will be an excellent opportunity to meet potential corporate clients." ... [T]hat note on the cover sheet is at war with everything I have always hoped and believed about why people become members of the American Law Institute.³³

Speaking of the ALI's 1996 floor debate on a different project on the Law Governing Lawyers, Professor Wright observed that "[c]oncerns were expressed on the floor that the Reporters should not have yielded to the intensive lobbying effort by the insurance industry."³⁴ Professor Wright went on to announce the adoption by the ALI Council in December 1996 of a first-ever *written* rule on conflict of interest that states, in pertinent part,

To maintain the Institute's reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interests at the door.... It is improper under Institute principles for a member to represent a client in Institute proceedings....³⁵

Against all of this background, Justice Shirley Abrahamson of the Wisconsin Supreme Court summarized the impact of several recent controversial ALI projects as follows:

[W]hether the individual members of the ALI can indeed remain objective is open to question. And although this quandary is not new, the increasing influence of the Institute and the controversial nature of its projects serve to compound the problem.³⁶

The Proposed Final Draft

A Proposed Final Draft (April 1, 1997) was presented to ALI members attending the 1997 ALI annual meeting in Washington, D.C., as a unified 386-page document consisting of 21 numbered sections and corresponding Comments and Reporters' Notes. As the time drew near to vote on it, Professor Wright, in his "President's Letter" published in the Spring 1997 issue of the *ALI Reporter*, made the following comments on the impending debate:

... I know that there is still considerable opposition to the requirement in §2(b) that in most cases there must be shown to be a reasonable alternative design. This issue may well come up again.... I hope we will not hear again lists of which states support the position taken in the draft and which do not. The earlier discussions, and the extensive writing in the law reviews, surely should have made it clear to all of us that *the cases are divided and that reasonable people disagree on how they count the cases*. But there is enough case law on

each side that it is The Institute's task to choose the rule that it believes a court *with no precedents of its own* but with resort to all the materials properly used by common-law judges would choose today to adopt.³⁷

The Forum

Eighty-five judges representing thirty-two states took part in the 1996 Forum. Their discussions were based on papers written specially for the occasion by Professor Marshall Shapo, of Northwestern University School of Law, and Professor Oscar Gray, of the University of Maryland School of Law. The papers were distributed to participants in advance of the meeting, and the authors also summarized their views to the audience informally. Each presentation was followed by a commentary by a distinguished appellate court judge. Responding to Professor Shapo's paper was Justice Marian P. Opala, of the Supreme Court of Oklahoma, and responding to Professor Gray's paper was Justice Stanley Mosk, of the Supreme Court of California.

After each of the presentations and commentaries, the judges separated into six smaller groups to discuss the issues raised in the paper, led by Fellows of the Roscoe Pound Foundation. Professors Shapo and Gray visited the groups to share in the discussion and respond to specific questions. The discussions were tape-recorded and transcribed by court reporters. However, under the ground rules set in advance of the discussions, comments by the judges were not made for attribution in the published report of the Forum. At the plenary session that closed the Forum, the moderators summarized the judges' views of the issues under discussion.

This report is based on the papers written and presented by Professors Shapo and Gray and on the transcripts of the plenary sessions and group discussions.

James E. Rooks, Jr.
Forum Reporter

Endnotes

- ¹ See Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 Vand. L. Rev. 636-638 (1995); Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism?*, 61 Tenn. L. Rev. 1105, 1109 (1994).
- ² See James A. Henderson, Jr., and Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 Cornell L. Rev. 1512 (1992), n. 1.
- ³ *Id.*
- ⁴ This terminology is used generally throughout this report for the sake of simplicity. The more formalized, official title of the Restatement is "Restatement (Third) of Torts: Products Liability."
- ⁵ Professors Henderson and Twerski give their own account of their project in James A. Henderson, Jr., and Aaron D. Twerski, *Arriving at Reasonable Alternative Design: The Reporters' Travelogue*, 30 U. Mich. J. L. Reform 563 (1997) (hereinafter "Travelogue").
- ⁶ See BNA Product Safety and Liability Reporter, May 26, 1995, at 563.
- ⁷ The ALI's formal description of this process, which is republished in every Restatement draft, is as follows:

The bylaws of the American Law Institute provide that "Publication of any work as representing the Institute's position requires authorization by the membership and approval by the Council." Each portion of an Institute project is submitted initially for review to the project's Consultants or Advisers as a Memorandum, Preliminary Draft, or Advisory Group

Draft. As revised, it is then submitted to the Council of the Institute in the form of a Council Draft. After review by the Council, it is submitted as a Tentative Draft, Discussion Draft, or Proposed Final Draft for consideration by the membership at the Institute's Annual Meeting. At each stage of the reviewing process, a Draft may be referred back for revision and resubmission.

Readers interested in a detailed description of the ALI's Restatement process may wish to read Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 Wis. L. Rev. 1. (Hereinafter Abrahamson.)

⁸ For the sake of simplicity, discussion of the various topics in this section of the report proceeds by subject matter rather than by reference to specific numbered sections of the Restatement. A major restructuring of the Restatement was made by the Reporters prior to the issuance of the Proposed Final Draft, with many sections renumbered. See the Draft Comparison Table that appears at the end of this section of the report. Where they occur elsewhere in the report, references to specific sections are to the earlier Tentative Drafts. Further, because of changes in language from draft to draft, no attempt has been made in this section of the report to provide final language, which had not yet been adopted by the ALI at the time of publication of this report.

Readers wishing to obtain the most recent version of the *Restatement of Products Liability* should write to the American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104-3099.

⁹ Travelogue, at 589.

¹⁰ See *New ALI Restatement on Products Liability Advances, With Substantial Dissent*, 2 Civ. Justice Dig. (Spring 1995) 1, 4. (The *Civil Justice Digest* is a publication of the Roscoe Pound Foundation.)

¹¹ *Id.*

¹² Frank J. Vandall, *Constructing a Roof Before the Foundation Is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. Mich. J. L. Reform 261, 279 (1997).

¹³ Pro-Restatement contributions to a 1994 *Tennessee Law Review* symposium on the project included M. Stuart Madden, *Products Liability, Products for Use by Adults, and Injured Children: Back to the Future*, 61 Tenn. L. Rev. 1205 (1994); and David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 Tenn. L. Rev. 1241 (1994) (Professor Owen has served as Editorial Adviser on the Restatement project).

A 1995 symposium in the *South Texas Law Review* featured a number of articles by products liability defense attorneys, most of them affiliated with the defense-oriented Product Liability Advisory Council (PLAC): William A. Worthington, *The "Citadel" Revisited: Strict Tort Liability and the Policy of Law*, 36 So. Tex. L. Rev. 227 (1995); Theodore S. Jankowski, *Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Warning Decisions*, 36 So. Tex. L. Rev. 283 (1995); Jonathan M. Hoffman, *Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 So. Tex. L. Rev. 353 (1995); Harvey M. Grossman, *Categorical Liability: Why the Gates Should Be Kept Closed*, 36 So. Tex. L. Rev. 385 (1995); Heather F. Vickles and Michael E. Oldham, *Enhanced Injury Should Not Equal Enhanced Liability*, 36 So. Tex. L. Rev. 417 (1995); and Christopher S. D'Angelo, *Effect of Compliance or Noncompliance With Applicable Governmental Product Safety Regulations on a Determination of Product Defect*, 36 So. Tex. L. Rev. 453 (1995).

¹⁴ See Larry S. Stewart, *The ALI and Products Liability: "Restatement" or "Reform"?*, 30 Trial 28 (Sept. 1994) (Mr. Stewart is a Past President of the Association of Trial Lawyers of America); 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 (1994) (Mr. Corboy is a personal injury practitioner in Chicago); and John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects — A Survey of the States Reveals a Different Weave*, 26 Univ. of Memphis L. Rev. 493 (1996) (Mr. Vargo is a law teacher and plaintiff's lawyer practicing in Indiana).

- ¹⁵ See, e.g., Roland F. Banks and Margaret O'Connor, *Restating the Restatement (Second), Section 402A — Design Defect*, 72 Ore. L. Rev. 411, 411 (1993) (arguing that the new Restatement proposal "reflects neither the evolution nor the true state of existing products liability law." 72 Ore. L. Rev. at 411).
- ¹⁶ See, e.g., Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 Vand. L. Rev. 631 (1995); Marshall S. Shapo, *Essay: Freud, Cocaine, and Products Liability*, 77 B. U. L. Rev. ____ (1997); Frank J. Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect*, 68 Temp. L. Rev. 167 (1995). The 1994 Tennessee Law Review symposium was predominantly (though not entirely) negative toward the Restatement. See Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism?* 61 Tenn. L. Rev. 1105; Mark M. Hager, *Don't Say I Didn't Warn You (Even Though I Didn't): Why the Pro-Defendant Consensus on Warning Law Is Wrong*, 61 Tenn. L. Rev. 1125; Howard C. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group*, 61 Tenn. L. Rev. 1173; Joseph W. Little, *The Place of Consumer Expectations in Product Strict Liability Actions for Defectively Designed Products*, 61 Tenn. L. Rev. 1189; Jerry J. Phillips, *Achilles' Heel*, 61 Tenn. L. Rev. 1265; Elizabeth C. Price, *Toward a Unified Theory of Products Liability: Reviving the Causative Concept of Legal Fault*, 61 Tenn. L. Rev. 1277; Teresa M. Schwartz, *Prescription Products and the Proposed Restatement (Third)*, 61 Tenn. L. Rev. 1357; Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability, Subsection 2(b): The Reasonable Alternative Design Requirement*, 61 Tenn. L. Rev. 1407; Ellen Wertheimer, *The Smoke Gets In Their Eyes: Products Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 Tenn. L. Rev. 1429. Other critical articles are cited in the papers by Professors Shapo and Gray reprinted in this report.
- ¹⁷ See Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 U. Mich. J. L. Reform 197 (1997); Marshall S. Shapo, *A New Legislation: Remarks on the Draft Restatement of Products Liability*, 30 U. Mich. J. L. Reform 215 (1997); Hon. William A. Drier, *Design Defects Under the Proposed Section 2(b) of the Restatement (Third) of Torts: Products Liability — A Judge's View*, 30 U. Mich. J. L. Reform 221 (1997); David G. Owen, *Risk-Utility Balancing in Design Defect Cases*, 30 U. Mich. J. L. Reform 239 (1997); Frank J. Vandall, *Constructing a Roof Before the Foundation Is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. Mich. J. L. Reform 261 (1997); M. Stuart Madden, *Liability of Suppliers of Natural Raw Materials and the Restatement (Third) of Torts: Products Liability — A First Step Toward Sound Public Policy*, 30 U. Mich. J. L. Reform 281 (1997); Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. Mich. J. L. Reform 309 (1997); Paul D. Rheingold and Susan B. Feinglass, *Risk-Utility Analysis in the Failure to Warn Context*, 30 U. Mich. J. L. Reform 353 (1997); Hon. Robert E. Keeton, *Warning Defect: Origins, Policies, and Directions*, 30 U. Mich. J. L. Reform 367 (1997); Teresa Moran Schwartz, *Regulatory Standards and Products Liability: Striking the Right Balance Between the Two*, 30 U. Mich. J. L. Reform 431 (1997); Michael D. Green, *Statutory Compliance and Tort Liability: Examining the Strongest Case*, 30 U. Mich. J. L. Reform 197 (1997); Larry S. Stewart [for the plaintiff], Hildy Bowbeer, and Todd A. Cavanaugh [for the defendant], *Briefs in Timmy Tumble v. Cascade Bicycle Co.: A Hypothetical Case Under the Restatement (Third) Standard for Design Defect*, 30 U. Mich. J. L. Reform 511 (1997); and James A. Henderson, Jr., and Aaron D. Twerski, *Arriving at Reasonable Alternative Design: The Reporters' Travelogue*, 30 U. Mich. J. L. Reform 563 (1997).
- ¹⁸ See John F. Vargo, *supra* n. 14, and Frank J. Vandall, *supra* n. 16.
- ¹⁹ Bruce S. Kaufman, *Attorneys Spar Over Restatement (Third) of Torts; ATLA To Mobilize Opposition to ALI Project*, BNA Product Safety and Liability Reporter, April 22, 1994, pp. 436, 437.
- ²⁰ Tent. Draft No. 2, Section 2, Comment *e* at 25.
- ²¹ Tent. Draft No. 1, Section 2, Comment *c*.
- ²² See, e.g., Frank J. Vandall, *Constructing a Roof Before the Foundation Is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. Mich. J. L. Reform 261 (1997).
- ²³ Larry S. Stewart, *The ALI and Products Liability: "Restatement" or "Reform"?*, 30 Trial 28, 30 (Sept. 1994).
- ²⁴ Stewart, *Brief for Plaintiff*, 30 U. Mich. J. L. Reform at 551–52.

²⁵ Stewart, Brief for Plaintiff, 30 U. Mich. J. L. Reform at 547.

²⁶ Tent. Draft No. 2, Comment *e* at 24.

²⁷ See *New ALI Restatement on Products Liability Advances, With Substantial Dissent*, 2 Civ. Justice Dig. (Spring 1995) 1, 4.

²⁸ See Alan Schwartz and Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595 (1995).

²⁹ Abrahamson at 3.

³⁰ See *ALI Hesitates on Lawyer Liability, Products Liability Restatement Efforts*, 62 U.S.L.W. 2734 (May 31, 1994).

³¹ *Supra* n. 6.

³² ALI Restatement of Products Liability, Proposed Final Draft, 1997, at xvi.

³³ ALI Reporter, Winter 1997.

³⁴ *Id.* See also Jonathan Groner, *Insurance Lobby Aims At Normally Staid ALI*, Legal Times, June 10, 1996, p. 1 (describing a campaign on the ALI's project on the Law Governing Lawyers).

³⁵ ALI Council Rule 9.04, Dec. 1996.

³⁶ Abrahamson at 24.

³⁷ ALI Reporter, Spring 1997 at 2 (emphases added).

Draft Comparison Table

Judges attending the Forum were provided copies of Tentative Draft No. 2 (dated March 13, 1995) and Tentative Draft No. 3 (April 5, 1996), which at that time, taken together, constituted the totality of the proposed *Restatement of Products Liability*. Those drafts have since been supplanted by the Proposed Final Draft (dated April 1, 1997 — the most recent version at the time of publication of this Report), which has cumulated all proposals to date into one volume.

Considerable renumbering, movement and addition of sections was made between drafts. To facilitate comparison, the following table compares sections of all three drafts. Sections are arranged and worded as they appear in the Proposed Final Draft. As used below, "N/A" means no section bearing the indicated number appeared in the indicated draft.

Numerous language changes were also made from draft to draft, and no attempt has been made here to indicate where differences in language occur. In this comparison, the sections are considered parallel from one draft to the next if they address the same subject matter.

Proposed Final Draft (4-1-97)		Tentative Draft 2 (3-13-95)	Tentative Draft 3 (4-5-96)
Chapter 1: <i>Liability of Commercial Product Sellers Based on Product Defects at Time of Sale</i>			
Topic 1: Liability Rules Applicable to Products Generally			
Section 1	Liability of Commercial Seller or Distributor for Harm Caused by Defective Products	1	N/A
Section 2	Categories of Product Defect	2	N/A
Section 3	Circumstantial Evidence Supporting Inference of Product Defect	3	N/A
Section 4	Noncompliance and Compliance with Product Safety Statutes or Regulations	7	N/A
Topic 2: Liability Rules Applicable to Special Products or Product Markets			
Section 5	Liability of Commercial Seller or Distributor of Product Components for Harm Caused by Products Into Which Components Are Integrated	N/A	10
Section 6	Liability of Seller or Other Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices	8	N/A
Section 7	Liability of Commercial Seller or Distributor for Harm Caused by Defective Food Products	N/A	N/A
Section 8	Liability of Commercial Seller or Distributor of Defective Used Products	9	9

Proposed Final Draft (4-1-97)		Tentative Draft 2 (3-13-95)	Tentative Draft 3 (4-5-96)
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Chapter 2:
***Liability of Commercial Product Sellers Not
Based on Product Defects at Time of Sale***

Section 9	Liability of Commercial Product Seller or Distributor for Harm Caused by Misrepresentation	N/A	17
Section 10	Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn	N/A	18
Section 11	Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Recall Product	N/A	20

Chapter 3:
***Liability of Successors and Apparent
Manufacturers***

Section 12	Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor	N/A	15
Section 13	Liability of Successor for Harm Caused by Successor's Own Post-Sale Failure to Warn	N/A	19
Section 14	Selling or Otherwise Distributing as One's Own a Product Manufactured by Another	N/A	16

Chapter 4:
Provisions of General Applicability

Topic 1: Causation

Section 15	General Rule Governing Causal Connection Between Product Defect and Harm	10	11
Section 16	Increased Harm Due to Product Defect	11	N/A

**Proposed
Final Draft
(4-1-97)**

**Tentative
Draft 2
(3-13-95)**

**Tentative
Draft 3
(4-5-96)**

Topic 2: Affirmative Defenses

Section 17 Apportionment of Responsibility
Between or Among Plaintiff,
Sellers and Distributors of
Defective Products, and Others

12

13

Section 18 Disclaimers, Limitations, Waivers
and Other Contractual Exculpations
as Defenses to Products Liability
Claims for Harm to Persons

13

14

Topic 3: Definitions

Section 19 Definition of "Product"

4

N/A

Section 20 Definition of "One Who Sells
or Otherwise Distributes"

5

N/A

Section 21 Definition of "Harm to Persons
or Property": Recovery for
Economic Loss

6

N/A

II. Papers, Oral Remarks, and Comments

ALI Legislation as a Consumer Product: Should Courts Buy the Proposed Restatement of Products Liability?

Marshall S. Shapo © 1996

Professor Shapo looks at judges in their role as "consumers" of law as well as makers of law. He suggests that judges should be wary about "purchasing" the ALI's proposed Restatement of Products Liability, at least in its present draft. Professor Shapo criticizes both the substance and the representative character of important provisions of the draft, and describes its emergence from a politicized process unmoored from the checks of representative democracy.

The essay focuses principally on the defect sections of the draft, especially those dealing with design defects. One principal criticism is that the mandatory requirement that plaintiffs prove a reasonable alternative design is at variance with present law, as well as good policy and even common sense. Professor Shapo also criticizes the Reporters for their insistence on a single, risk-utility standard for design defect, and their relegation to a "back shelf" for other tests, particularly the consumer expectations test. He declares that the Reporters' approach is "detach[ed] from the realities of how consumers choose and encounter products." Moreover, he expresses concern that the draft "may override a formidable body of jurisprudence on the definition of . . . negligence." Finally, he observes that the draft has "yet to come to terms with" the warranty-based ancestry of products liability law.

Drawing on his experience with the development of the products draft, Professor Shapo describes a political process that differs from the model that many people have of Restatements as a product of "quiet, reasoned deliberation among the high priests of the legal temple, insulated from the pressures of day-to-day politics." Professor Shapo concludes that judges should exercise a "prudent conservatism" in their decision about whether to "buy" the draft as the law of their own states. This conservative approach, he suggests, would consider the politicized background of the draft while giving full credit to the merits of the carefully wrought body of law that judges themselves have developed.

Introduction

Judges occupy a fascinating position with respect to legal rules: They are consumers as well as makers of law. The proposed *Restatement of Products Liability*, now in a controversial draft stage within the processes of the American Law Institute, provides a fine opportunity to view courts from both positions.

I. Restatements and Their Purposes

Every lawyer, indeed every first year law student, is familiar with Restatements. These documents, filled with blackletter, comments and illustrations, present themselves as authoritative summaries of the law for the guidance of bench and bar. Because of the aura that surrounds Restatements and also their sponsor, the American Law Institute, it is well to do some fresh thinking about the purposes of Restatements.

One rather mechanical view of Restatements is that they serve the purpose of an abacus — they count the decisions in a controversial area of the law and they report tallies. Another view is that they seek to distill wisdom and excellence from a case-centered examination of the precedents, emphasizing the reasoned development of the law.

A third view exhibits a frank legislative approach. An interesting embodiment of this position appears in the words of the director of the American Law Institute. In his preface to a draft of the proposed products Restatement, the director refers to the effort to strike an “appropriate balance . . . between . . . consumer and worker interests and stating reasonably viable standards . . . for producers.”¹ In this view, it would appear, the ALI becomes a kind of Platonic guardian of society’s interests as expressed through law.

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II. The Development of Strict Liability in Tort For Products

How did we come to the present controversy about the proposed products restatement? The answer lies in a body of law developed over the course of this century. Early on, courts began to develop a special “warranty” for cases involving unwholesome food.² In a parallel development, courts led by the great Benjamin Cardozo shaped a doctrine of negligence liability in favor of consumers suing sellers with whom they were not in privity. The enduring landmark is *MacPherson v. Buick Motor Company*,³ in which Cardozo imposed a duty in negligence in favor of a consumer against a remote manufacturer.

By 1960, this evolution had brought courts, and scholars, to a synthesis that rivaled Cardozo’s achievement in *MacPherson*. This new synthesis appeared almost simultaneously in the remarkable decision of the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors* in 1960,⁴ and in Prosser’s equally noteworthy article, “The Assault Upon the Citadel,” published in the same year.⁵

The message of both the decision and the article was that the “citadel” of privity had fallen with respect to strict liability claims as well as negligence actions. In *Henningsen*, the New Jersey court used the theory of implied warranty — which is actually a strict liability theory in commercial law garb — to impose a duty to consumers on the manufacturer of a motor vehicle. Dean Prosser in his article generalized the point into a tort theory of liability. His exhaustive reading of diverse cases led him to the conclusion that not only was there strict liability for product defects, but that the proper home for that liability was the mansion of tort.

As the 1960s progressed, Prosser developed this insight into what became section 402A of the Second Restatement of Torts, for which he served as Reporter. That section presented a theory of strict tort liability, without privity of contract, for products that were in a “defective condition unreasonably dangerous to the user.” Section 402A drew some fierce criticism, but it passed the only relevant acid test: the courts adopted it and proceeded to develop it in a broad spectrum of cases involving products injuries.

III. Political Stirrings

The judicial acceptance and elaboration of Section 402A stirred controversy in the political realm. The wonderfully creative scholar Leon Green had explained in the 1950s that tort law was “public law in disguise.”⁶ Now tort became a public issue, its political content evident as opponents of the judicial development of strict liability carried their opposition to legislative forums. Beginning in the late 1970s, they attacked on three fronts. A task force centered in the Department of Commerce proposed a “Model Uniform Products Liability Act,” designed for adoption by individual state legislatures. During the 1980s, several state legislatures passed a diverse group of statutes dealing with various aspects of products liability law. And, in a drama that now has spanned half a generation, opponents of the law made by state courts began in the late seventies to introduce bills in Congress that would nationalize this body of historically state jurisprudence.

IV. A Proposed New Restatement: Public Law, Undisguised

As the battles in Congress continued through the eighties and into the 1990s, the American Law Institute undertook a response of its own to the controversy over the law of products liability. The Institute appointed two reporters to draft a portion of a new Restatement Third of Torts that would focus exclusively on products liability. Following its historic practice, the Institute also appointed a committee of Advisers to counsel the reporters. It has been my honor to serve as one of those advisers.

One of the most remarkable features of this history of this project was the fact that a published full-dress prospectus preceded it. And the writers of the prospectus — who are in fact the reporters for the project — would not have disappointed the Securities and Exchange Commission. In an article preprinted and then fully published by the *Cornell Law Review*,⁷ they frankly announced their vexation with the current state of the law, and gave a fairly precise forecast of their views about how it should be shaped. As a general matter, the shape of the future they envisioned, and now have advocated as reporters, was one that narrowed the contours of liability. Indeed, with respect to the two of the most controversial issues in the current draft, the reporters' views have either stayed remarkably the same or they have hardened. This freezing of the mold has taken place in the face of research that arrives at diametrically opposite conclusions to those of the reporters.

V. Crucial Issues of Standards and Doctrine

A. The Requirement of a Reasonable Alternative Design

The first major controversy has swirled around the requirement in section 2(b) of the draft that a plaintiff in a design defect case must show the existence of a "reasonable alternative design" that would have "reduced or avoided" her injury.⁸ This mandate almost photocopies the reporters' proposal in their *Cornell* essay, in which section 2(b) of their draft statute would allow a finding of design defect "only" if the foreseeable risks of the product "could have been reduced at reasonable cost by the seller's adoption of a safer design."⁹ It also tracks their textual explanation that "[l]iability attaches only when the plaintiff proves that the defendant failed to adopt a safer, cost-effective design that would have prevented all or part of the plaintiff's harm."¹⁰

With respect, this formula not only gives away the ball game on litigation but on design itself. It places not only the business decision, but the legal decision about product risk exclusively with the manufacturer. It simply does not allow anyone to challenge a product design on the seemingly obvious ground that the design was, in the general environment in which it was offered, too dangerous.

It should be noted also that though the reporters insisted that they were presenting the majority view of American courts,¹¹ there is strong and varied countervailing evidence. Initially, Professor Frank Vandall's research yielded the conclusion that "the majority of jurisdictions do not make reasonable alternative design an element of the plaintiff's prima facie case."¹² Subsequently, a massive study by John Vargo concluded that at most three states impose an absolute requirement of a reasonable alternative design, with only two of those being states that have judicially adopted strict liability.¹³

Noting that there are prominent analysts who support the reporters' view,¹⁴ I would make two points concerning the reporters' requirement of a reasonable alternative design and the conflicting scholarship. First, in the face of strong evidence, the reporters have not varied from their *idee fixe* — their set notion that the reasonable alternative design requirement should be an unremovable component of defective design law. Second, however strongly the reporters are convinced of their own reading of the law, it would be well to reconsider the unyielding character of their blackletter in light of opposing interpretations. Some reconsideration would seem especially obligatory, since the reporters' commitment to the requirement of an alternative design provides a crucial foundation for another very controversial position.

B. *The Exclusive World of Risk-Utility*

The second major dispute in this area arises from a pronouncement that appears in the comments to section 2 rather than in its text. With some bootstrapping, the reporters assert that their blackletter on design “adopts a reasonableness (‘risk-utility’) balancing test as the standard for judging the defectiveness of product designs.”¹⁵ They deduce this test from their ipse dixit on the requirement of a reasonable alternative design: “More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design rendered the product not reasonably safe.”¹⁶

The reporters’ insistence on the primacy of risk-utility analysis represents a hardening of a previously more supple position. In their *Cornell* prospectus, they had been almost genial: “As long as risk-utility standards are part of the mix, whether courts characterize the test for defect as ‘risk-utility’ or ‘consumer expectation’ is of relatively minor importance.”¹⁷ It would appear that, forced to defend the internal logic of their creation of an alternative design citadel, the reporters found no alternative but to incorporate a set of battlements embedded in an exclusive risk-utility standard.

In adopting this standard as the sole test of defectiveness, the reporters declare victory over several important competing tests. In particular, they relegate to the back seat the consumer expectations test, and they appear to place on a back shelf of the products liability library the famous Learned Hand test for negligence.

The reporters declare that “consumer expectations do not constitute an independent standard for judging the defectiveness of product designs.”¹⁸ They linchpin this view to their insistence on the requirement of a reasonable alternative design. They say that the consumer expectations “concept does not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall product safety.”¹⁹

This is a remarkable comment, for it refuses to admit of a consumer who would, for any one of a number of reasons, expect a certain level of safety from a product that it did not turn out to provide. The consumer’s image of the product, derived from sources that include direct advertising and widespread social agreement about the capabilities of products in that general category,²⁰ does not necessarily comprehend the question of what the potential alternative designs might be, or even if an alternative design exists. That image centers on the good at issue — the product that the consumer buys or chooses to encounter.

The reporters’ detachment from the realities of how consumers choose and encounter products would be enough to give pause to judges deciding whether to purchase an exclusive focus on a risk-utility analysis. But judges looking in the reporters’ store window might also want to survey the rest of the shopping center of scholarship. If they did, they would find at least three published articles that challenge the reporters’ assertion that the risk-utility test is dominant.²¹ One of these articles declares that “[m]ore than half the cases” on which the reporters rely “fail to provide anything but the most fanciful support” for their interpretation.²² Another concludes that “a large majority of the cases which have addressed this issue have held that a design defect is to be determined by the consumer expectations test of section 402A.”²³

The most recent study, John Vargo’s vast analysis of precedents, legislation and pattern jury instructions, presents several cross-sections of the subject that challenge the reporters’ presentation. Vargo’s prose summary of the case law reveals a large spectrum of tests.²⁴ A chart indicates that 16 states apply some form of consumer expectations test and eight others use a test with consumer expectations as one element, with just seven states employing a “pure risk-utility test.”²⁵ Buttressing the chart are indexes of state tests in variously defined categories,²⁶ including an entry identifying at least 23 states that “use consumer expectations as part of any test for strict liability design defects.”²⁷

Seeking to provide an independent test for this question of legal science, I ventured a more modest analysis of my own, under conditions as stringent as I could make them. I found that out of one batch of 14 cases at issue, three decisions at most (and arguably only one) supported the reporters' interpretation.²⁸

Besides consigning the consumer expectations test to the back seat, the reporters' formulation does not take into account what may be the most cited single test devised by an American judge for the determination of negligence — that is, the "Learned Hand test." This standard, put forth most memorably by Judge Hand in the *Carroll Towing* case,²⁹ requires the court to determine whether the cost of avoiding an accident is greater than the cost of the accident multiplied by its probability. It is a "cost/cost" type analysis rather than a "risk-utility" one. By contrast with the Learned Hand test, it would appear that, under the reporters' formula, the following situation could exist: A product causes more accident costs than the expense of preventing the accident, but there is no reasonable alternative design. The court rules that because the plaintiff cannot show a reasonable alternative design, the product is not defective, even though under the Learned Hand test it was negligently made. In current slang, that result does not compute. But it would be in accord with the reporters' "functional" analysis, under which their blackletter defect test trumps traditional tort theories including negligence.³⁰

The single-minded seriousness with which the reporters approach their task is evident in section 8 of the draft, which deals with prescription drugs and medical devices. In that section, they say that a drug or device is defectively designed when its risks are great enough in relation "to its foreseeable therapeutic benefits so that no reasonable health care provider, knowing of such foreseeable risks and therapeutic benefits, would prescribe the drug or medical device for any class of patients."³¹ This seems to mean even if the overall costs inflicted on patient populations by a drug were much greater than the costs of not prescribing it, courts could not hold it defective if a reasonable doctor could prescribe it for any one group. This particularized application further illustrates the departure of the draft from the foundations of basic tort law.

C. General Doctrinal Issues

The reporters' apparent jettisoning of the Learned Hand test for negligence leads to further concerns about the invasiveness of their surgery on general tort doctrine. Because two decades ago I suggested that we consider making the law of products liability more functional,³² I must express my admiration at the reporters' efforts to do just that. At the same time, I mention my concern about how they have executed the task. It appears that they have unmoored the law of products liability from all of its doctrinal history. Because of the judicial investment in both the concepts and the terminology that are interwoven with that history, we are entitled to ask whether the surgery may be far too radical for the doctrinal problem to which it is addressed.

The reporters do indicate that they are agnostic about doctrine. They say that so long as courts meet their "functional criteria" for defect, courts "may utilize the terminology of negligence, strict liability, or the implied warranty of merchantability, or simply define liability in the terms set forth in the black letter."³³ Scrutiny of the blackletter and the comments calls into question how effectively courts will be able to apply the well-accepted terminology of their own historic doctrines under the framework of the draft. And it raises profound concerns about the reporters' fundamental conceptualizations of the law of products liability.

1. Strict Liability

As I indicated above, the proof of the section 402A pudding was in the eating. American courts almost universally adopted that forthright statement of a strict liability principle for products, and often incorporated into their elaboration of the law a version of the consumer expectations test in comment g.³⁴ They certainly did not appoint a reasonable alternative design requirement as a gatekeeper to the application of a strict liability that, in its terms, required only a finding that a product was in a "defective condition unreasonably dangerous to the user."

Section 2(b) of the draft does violence to Section 402A in at least four different ways: It relegates strict liability to a matter of mere "terminology." It rips out of the law the concept of "defective condition unreasonably dangerous." It shoves onto a remote siding the consumer expectations test, which is embedded in a comment to section 402A and is central to its application by many courts. It forces a reasonable alternative design requirement into a mold that does not accommodate it.

2. Negligence

The draft also imposes a single conception of defect upon the painfully wrought foundations of negligence doctrine. The fundamental judicial formulas of negligence include the Learned Hand test and the much cited standard of "ordinary care and skill" of the great decision by Brett, M.R., in *Heaven v. Pender*.³⁵ The generalized formula of section 282 of the Second Restatement defines negligence as "conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm."³⁶

Even if one takes a risk-utility test on the terms offered in the Second Restatement, it is not clear that the requirement of a reasonable alternative design meshes effectively with those terms — if it meshes at all. The Second Restatement's version of risk-utility appears in section 292, which defines "the utility of the actor's conduct" by a catalog of factors that includes "the social value which the law attaches to the interest which is to be advanced or protected by the conduct," as well as "the extent of the chance that this interest will be advanced or protected by the particular course of conduct" and "the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct."³⁷ The difference between the relatively supple and open framework of this risk-utility test and the iron constraints of the reporters' scheme is evident. And that is without taking into account the breadth of American case law on the negligence standard, which goes well beyond the formulas of the Second Restatement. I underline, in that connection, the fact that the comparatively flexible language of section 292 is framed by the even more general phraseology of section 282.

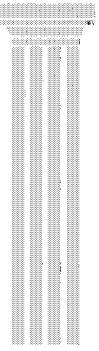
One must conclude that the draft may override a formidable body of jurisprudence on the definition of that central feature of tort law, the concept of negligence.

3. Warranty

The draft, the drafters and the American Law Institute have yet to come to terms with the complex ancestry of products liability law — specifically, its roots in warranty doctrine as well as its more recent, highly articulated basis in tort law. This part of the drama is unfolding as I write this essay. Paralleling in time the efforts of the reporters on the products project is a full-scale revision of Article 2 of the Uniform Commercial Code, the article that contains the Code's warranty sections.

Because the Article 2 revision is not yet complete, I can only try to capture my sense of recent drafts, as well as rumor about the intricate political relationships between the Uniform Commissioners on State Laws and the ALI. My present sense is that the forthcoming warranty sections of Article 2 will not weave seamlessly with the final draft of the products restatement. At the very least, I would predict that Article 2 will, in current jargon, stake out turf of its own on the question of defect. There is striking recent case law support for this outcome in the New York case of *Denny v. Ford Motor Co.*³⁸

Responding to certified questions, a majority of the New York Court of Appeals concluded in *Denny* that there could be a warranty claim for a vehicle rollover even though a jury had found that the vehicle "was not 'defective'" under a strict liability theory. Then, applying the New York court's response in rejecting Ford's effort to overturn a plaintiff's judgment, the Second Circuit lectured Ford on the fact that the state court's opinion "adopt[ed] no theories that could not have been found in caselaw or in pertinent literature." The federal court declared that "[h]aving tried the case on the theory chosen, Ford is not entitled to retry it on new theories."³⁹



D. *A Premature Monopoly*

My purpose in analyzing the relationship of the products draft to traditional legal theories is not to present a chiseled description of the law. Indeed, my point is that the law is in a state of controversy and development, and that the draft attempts to establish a premature monopoly. I simply suggest to you, as both consumers and makers of the law, that you will want to shop carefully before you buy — indeed, before you change brands.

E. *The Defective Label of a "Warnings Defect"*

Having tried to concentrate on concept and reality rather than just words, I now offer a critique of some words that have overtones for the way we actually think about things. In section 1(b) of the draft, the reporters create the concept of a product that "is defective because of inadequate instructions or warnings." They echo this idea in section 2(c), which speaks of products "defective because of inadequate instruction or warnings." I simply record my opposition to this way of describing a category of cases, and to its inevitable linguistic child, the concept of a "warnings defect." Although there is a siren attractiveness to setting up a parallel among manufacturing defects, design defects and "warnings defects," I do not think this is a good use of the English language, and I think it is confusing to the law.

The concept of defect applies to the physical characteristics of a product. The inadequacy of a warning relates to the image of the product that the consumer derives from its place in society, including the place carved out by the processes of advertising and general marketing. To equate the actual product with its image is to confuse image and reality. It is, indeed, to befog the recognition that the representational basis of products liability inheres not only in express warranties and various kinds of misrepresentations, but in the more general ways in which products are promoted to the public.⁴⁰

F. *The Broader Project*

Though engaging in this close critique of a few particular choices made in the products draft, I should emphasize that much of the rest of the draft appears to be sensible and in accord with both law and good policy. Yet the specific provisions on which I have focused carry the seeds of infection for the entire project. The positions I have criticized threaten to swamp the reporters' contributions in the rest of the draft.

VI. The Political Frame of The Products Liability Debate

The gravest concerns about this project arise from its place in the broad political universe and the relationship of that universe to the internal processes of the American Law Institute.

I have indicated that products liability law has been the subject of legislative proposals and intense political debate for over half a generation. Several state legislatures have passed laws on the subject, and this year both houses of Congress mustered majorities for a far-reaching federal bill. The President vetoed the federal legislation, amid appropriately heated volleys between him and advocates of the bill about who truly represented the consumer interest.

Perhaps less well known is the character and intensity of political pressure that bears on the ALI's deliberations on the subject. The ALI's principal written products, its Restatements, carry an aura of authoritativeness. Their image, as I received it as a law student, was that of documents born of quiet, reasoned deliberation among the high priests of the legal temple, insulated from the pressures of day-to-day politics.

Now that I have been what present day academic lingo calls a "participant observer" in this process, I can provide a somewhat richer version of reality. I adduce only a few pieces of evidence from a complex picture. The

months immediately preceding the 1995 annual meeting of the ALI featured a substantial amount of publication on the subject of products liability, with one full-dress law review issue being sponsored by a defense-oriented group, the Products Liability Advisory Council.⁴¹ Another law review issue devoted to the subject acknowledged "financial contributions" by groups and persons including the Tennessee Trial Lawyers Association and leading claimants' lawyers.⁴² Almost simultaneously with the annual meeting, the *Vanderbilt Law Review* published an issue memorializing Dean John Wade that included several articles on products liability.⁴³

In one of those articles, I expressed concern about the politicization of the ALI's processes.⁴⁴ Even when I wrote that article, however, I was unprepared for an informal report from a friend, a member of the Institute who is a partner in a corporate law firm. He indicated that he was being barraged by "get out the vote" mail directed to ALI members who work for firms with clients who have strong corporate interests in the shape of the proposed restatement.

Did that campaign affect the outcome of the Institute's semi-final vote last May on the defect sections of the products draft? Although I can make a guess, I cannot tell you. I do not know, and none of us will be able to find out.

Of course, motivations for particular votes are often complex, and even in-depth interviews of voters may not always be able to sort out those motivations. Yet it would not require sophisticated political science to match the reported votes of members of a voting body with their economic interests and to draw general conclusions.

However, the reason we cannot do that with votes of the ALI annual meeting is that we do not know who cast the votes, let alone how they voted. In this respect, the ALI is not like Congress or a state legislature. It is not even like your courts. We know how you vote, because you tell us. But in the voting processes of the American Law Institute, we do not know either the who or the how.

What we can fairly say is that the suppositions underlying the profession's acceptance of traditional Restatements may not apply to this restatement. As I have observed, those suppositions rest on a premise of solemn deliberation by knowledgeable persons on carefully distilled scholarship, screened from political processes. By contrast, this restatement, though a document drafted by scholars of high reputation and strong legal ideals, is the *result* of a political process. Having noted the outright lobbying associated with meetings on the products draft, I should also point out that throughout the process, submissions from politically interested parties were not only tolerated but invited.⁴⁵

What should be the viewpoint of judges asked to adopt as common law what amounts to a private legislative proposal, emerging from a battleground of intensely lobbied economic interests? I would suggest that you at least be aware of the political background of the proposal in considering it for the only thing that really should count: its legal merit, in the context of the law of your jurisdictions.

In emphasizing that we may have to rethink the assumptions supporting judicial acceptance of traditional Restatements, I am suggesting that you take into account that the ALI, a body in which I have proudly held membership for eighteen years, is an organization responsible only to itself. Using an analogy to judicial review of certain kinds of legislation, I would say that documents like this draft require the strictest scrutiny of their legal merits. In that connection, I respectfully add that one useful approach would embody a prudent conservatism regarding the merits of the law that you yourselves have developed. This prudent approach would consider the political environment and the avowed brokering from which this draft has emerged, as well as the historic function of courts as a balance wheel for justice.

I close on my original theme of judges as both makers and consumers of law. When you decide products liability cases, you sometimes make law. But if you are petitioned in future cases to adopt the current draft of a products liability restatement, you will be asked also to become consumers of law — in this case the infor-

mal legislation drafted by the reporters of that restatement. In identifying problems of both policy and politics that surround the draft, I have urged that you be discriminating consumers.

Endnotes

- ¹ *Restatement of the Law Torts: Products Liability*, Tent. Draft No. 1 (1994) (statement of Geoffrey Hazard).
- ² See Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 Stan. L. Rev. 713, 734-744 (1970).
- ³ 111 N.E. 1050 (N.Y. 1916).
- ⁴ *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).
- ⁵ William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1099 (1960).
- ⁶ Leon Green, *Tort Law Public Law in Disguise*, 38 Tex. L. Rev. 1 (1959) and 38 Tex. L. Rev. 257 (1960).
- ⁷ The final version is James A. Henderson, Jr., and Aaron Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 Cornell L. Rev. 1512 (1992). The preprint was dated December 20, 1991.
- ⁸ *Restatement of the Law Torts: Products Liability*, Tent. Draft No. 2, § 2(b) (1995)[hereafter, "Products Draft"].
- ⁹ 77 Cornell L. Rev. at 1514.
- ¹⁰ *Id.* at 1520.
- ¹¹ See *id.*
- ¹² Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 Tenn. L. Rev. 1407, 1409 (1994).
- ¹³ See John Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 Univ. of Memphis L. Rev. 493, 536 (1996) (summarizing results). This article exhaustively reviews the law of design defect, state by state, in categories of case law, statutes and pattern jury instructions.
- ¹⁴ Stuart Madden suggested that 28 states supported an alternative design requirement. A.L.I. Proceedings, 72nd Annual Meeting, May 18, 1995, Thursday Morning Session, *quoted in* Vargo, *supra*, at 528.
- ¹⁵ Products Draft, § 2, comment c.
- ¹⁶ *Id.*
- ¹⁷ Henderson and Twerski, 77 Cornell L. Rev. at 1533-34.
- ¹⁸ Products Draft, § 2, comment f, at 29.
- ¹⁹ *Id.*
- ²⁰ See generally Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 Va. L. Rev. 1109 (1974).
- ²¹ Roland F. Banks and Margaret O'Connor, *Restating the Restatement (Second), Section 402A—Design Defect*, 72 Or. L. Rev. 411 (1993); Howard F. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 Tenn. L. Rev. 1173 (1994); John Vargo, *supra* note 13.
- ²² Klemme, *supra*, at 1174-75.
- ²³ Banks & O'Connor, *supra*, at 415.
- ²⁴ Vargo, *supra* note 13, at 538-47.
- ²⁵ *Id.* at 551.

²⁶ See *id.* at 951–53.

²⁷ See *id.* at 951, Index 2.

²⁸ I set out my sample, and describe my methodology, in Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 Vand. L. Rev. 631, 666–67 & n. 177.

²⁹ *United States vs. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

³⁰ See Products Draft § 1, comment *a*, at 4, quoted *infra*, text accompanying note 33.

³¹ Products Draft § 8(c).

³² See Shapo, *supra* note 20, at 1369 (“it may be time for a term more comprehensive than ‘misrepresentation’ or ‘products liability,’ and more descriptive than ‘strict liability in tort’”).

³³ Products Draft, § 1, comment *a*, at 4.

³⁴ “The rule stated in this Section applies only where the product is, at the time it leaves the seller’s hands in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.” Restatement (Second) of Torts § 402(A), comment *g* (1965).

³⁵ [1883] 1 Q.B.D. 503.

³⁶ Restatement (Second) of Torts § 282 (1965).

³⁷ Restatement (Second) of Torts § 292 (1965).

³⁸ 87 N.Y.2d 248, 662 N.E.2d 730, 639 N.Y.S.2d 250 (1995).

³⁹ *Denny v. Ford Motor Co.*, 79 F.3d 12 (2d Cir. 1996).

⁴⁰ See generally Shapo, *supra* note 20.

⁴¹ 36 South Tex. L. Rev. No. 2 (1995). The PLAC specifically mentions in promotional material for a later colloquy on the subject that it “sponsored the preparation of articles in the South Texas Law Review regarding the Restatement (Third) Torts: Products Liability.” Program leaflet for “A Colloquy on Products Liability,” presented by Univ. of Michigan Journal of Law Reform, March 22–23, 1996.

⁴² 61 Tenn. L. Rev. No. 4 (1994), Acknowledgements page.

⁴³ 48 Vand. L. Rev. No. 4 (1995).

⁴⁴ See generally Shapo, *supra* note 28.

⁴⁵ The reporters for the products project reportedly invited submissions from “groups such as the American Bar Association, the Association of Trial Lawyers of America, the Defense Research Institute, and the Product Liability Advisory Council.” Kenneth Ross and Hildy Bowbeer, U.S. Product Liability Law Undergoing Revision, 22 Prod. Safety & Liab. Rep. 460 (April 29, 1994).

Additional Oral Remarks of Professor Shapo

For pleasure, as well as business, I read products liability cases. Since I began doing it systematically in the late sixties, I, by actual count, have read and briefed at least 9,000 of them. This may signal to you nothing more than that I am eminently committable, but I suppose that that is the basis for my being here.

In the process of reading those cases and many other torts cases besides, I guess I have concluded that you are the real heroes of this story because you are the people who do make the law. About all I can do for you, I think, is to try to sharpen the picture a little bit, to put what you're doing in perspective and, from my own selfish point of view, to learn from you. I will be talking some about doctrinal matters, including the overlap of strict liability with negligence and implied warranty.

My colleague, Professor Gray, whom I regard as the most learned torts scholar in America, will have more to say about that. Among other things, I will be concentrating on a subject that has come to fascinate me, which is the political frame in which the debates of the ALI take place.

Restatements and Their Purposes

It seems to me that we first want to try to clarify for ourselves what the purposes are of a Restatement. We might tend to agree that Restatements should not merely be totting up the cases as on an old-style adding machine. My own view, I suppose, accords with the idea that in some way besides counting the cases, restaters should seek wisdom and excellence in the law, but that they should draw that wisdom from a case-centered incremental process that focuses on the reasoned development of the law.

I think one thing that is striking about the current Restatement draft is that it takes a third view, and that is what I would characterize as a frank legislative approach. There appears in a preface to at least one of the current three Tentative Drafts, a preface written by the executive director of the ALI, a reference to — and I am here partially quoting — “striking an appropriate balance between consumer and worker interests and stating reasonably viable standards for producers.”

I suppose that, to an extent, this is what courts intuitively try to do anyway, but I think that the striking thing about this statement, which accounts for the title of my talk, “ALI Legislation as a Consumer Product,” is that it is so avowedly legislative that it constitutes this private body, accountable to no one politically, as a sort of independent legislative process.

The Development of Strict Liability in Tort for Products

I think as we review the history of the products liability law that has developed over the last generation that one thing we do want to keep in mind is that despite all the criticism of it, by your own decisions Section 402A essentially is the gold standard. It has met the acid test of adoption, development, and elaboration.

Section 402A goes back to 1965, when it was published in final form, but even at the time it was published, it began to come into focus that where products liability is concerned, in particular, the insight of my great teacher Leon Green is a very powerful one. And that is, as Green phrased it in a couple of important articles in the fifties, tort law is “public law in disguise.”¹

Political Stirrings

This became especially evident by the late seventies and certainly by the eighties when there came to be proposals for legislative change of products liability, first in a proposal made by an interagency task force that was centered in the Department of Commerce in the late seventies, which proposed a model uniform products liability act, then in a series of bills introduced in Congress in the eighties, culminating in the passage of one of those bills this year, and finally a Presidential veto. Also, as you know, there are various pieces of legislation on products liability in the states.

There has been a lot of concern lately about lawyer jokes. In fact, Roger Cramton, a very distinguished academic, has a piece about lawyer jokes and what they symbolize in the current publication of the Cornell Law School.

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But I have to say that I am reminded of a story recently written to me by my Tallahassee correspondent about the lawyer who is sitting, late at night, with his head in his hands, downcast, and a smiling devilish figure walks in the door and says, "Do not be desolate. I can guarantee you lifelong contentment, untold riches, and admiring sexual partners."

The lawyer says, his eyes narrowing, "What's the price?"

"I'll have your soul. I'll have the souls of your mother and father. I'll have the souls of your children, and I'll have the souls of their children unto the seventh generation."

The lawyer's eyes narrow still further, "Yeah, but what's the catch?"

Public Law, Undisguised

I'm going to tell you what the price is and what the catch is. The proposed Restatement is remarkable in several ways. One is that, to my knowledge, it is the only Restatement that comes from a particular prospectus written by academics *for that purpose*. And that prospectus is an article that was written by my old friends, Jim Henderson and Aaron Twerski in the *Cornell Law Review* and published, I believe, in 1992.²

One especially interesting thing about this prospectus, this article in the *Cornell Law Review*, is that it originated with a preprint. I think what you have in your packet is a reprint, which is the kind of thing that academics circulate to one another, of my article in the *Vanderbilt Law Review*.³ Scientists often exchange preprints of articles on discoveries in the physical and biological sciences. Legal academics practically never do it. But Henderson and Twerski, I believe in late 1991, circulated a preprint of this article, which turns out literally to be a prospectus for employment as Reporters of a *Restatement of Products Liability*.

Crucial Issues of Standards and Doctrine

And what is really remarkable, as you look through the drafts that I guess were circulated at the beginning of the session, is how little over a four-year period the Reporters have changed their views on the most controversial basics of their proposals. I focus here very briefly on two of these:

The "reasonable alternative design" requirement. One is the requirement that plaintiffs in a design products case prove the existence of a reasonable alternative design. The other is the virtually exclusive focus on the risk-utility standard as the basic standard for a design defect case.

I note briefly with respect to the reasonable alternative design requirement that the basic idea appears in the Cornell article. It really has changed very little, if at all.

And I also note for you that, to say the least, there is controversy on the support for this requirement in the case law, controversy that was first manifested in Professor Frank Vandall's article on that subject, which I think I have cited in my manuscript.⁴

Risk-utility and the consumer expectation test. Secondly, as to the Reporters' focus on a risk-utility standard and their relegation to the back burner of the consumer expectations idea: If anything, their commentary to Section 2 in the Tentative Draft hardens their position in their Cornell prospectus. Their views on this matter are under challenge now, I think, from at least three sources, all articles that are cited in my paper, including one absolute opus of approximately 400 pages that was published early this year by John Vargo.⁵ And if you want to include my research there would be a fourth source, for which I display my methodology on pages 666–67 of the *Vanderbilt Law Review* article.⁶ I think it is fair to say that, at the very least, the Reporters' conclusions on risk-utility versus consumer expectations are very much in dispute.

Policies, Politics and Personalities

But I do not focus here really on the law as a matter of counting. What I basically want to do is to frame the debate that is taking place in the ALI against a background of policies, politics, and personalities. I will be a little bit anecdotal to try to convey to you the flavor of what is going on in the ALI over this matter. Some years ago the ALI held its annual meeting in Chicago, and one of the great controversies at the time concerned its project on corporate governance.

At the same time, the institute was preparing a project relating to personal injuries, which became known as the Enterprise Liability Project. And I recall standing in the atrium of the Northwestern Law School at a cocktail party — the ALI meeting that year was in Chicago — and speaking with the then-president of the ALI in the company of two or three other lawyers. There had been considerable controversy about the project on corporate governance. And I remember one of these other lawyers saying to the president of the ALI, "You think corporate governance was a problem? You take on tort liability, and corporate governance is going to look like children in a sandbox."

One remarkable thing about my research concerning the political frame of the debates on the products Restatement came to me because of an accidental conversation I had with a colleague who told me about a piece of research that I didn't know anything about even though it had been published. And that was a piece by Elson and Shakman on the corporate governance project,⁷ which, if you lay it side by side with my later published Vanderbilt article, says very much the same thing about the processes of the ALI, and that is that they have become the subject of avowed political lobbying, of electioneering, and that this is actually taking place against a background of politics intruding into academic discussions themselves. For me maybe the signal event is the publication of a very substantial issue of the *South Texas Law Review* that was sent to every member of the ALI, as far as I know, before one of the recent annual meetings and that was, so far as I can tell, fully subsidized by an outfit called the Products Liability Advisory Council, which essentially is an industry body in the exercise of its First Amendment rights.

The first time that this really came home to me was about a week before the 1995 annual meeting, when one of my colleagues, who has an affiliation with a corporate firm, described to me the mail barrage that he was getting from people who wanted him to go to the meeting and vote in favor of the Reporters' Draft.

The Mission of the American Law Institute

There is a great deal to be said, and I expect that much will be said by Professor Gray and in our breakout sessions, about the emerging doctrinal issues, but something that represents a discovery for me — a discovery that was truly unexpected because I hadn't thought about it until it came up and slapped me in the face — is the increasing "politicization" of this process. And it seems to me that all of this poses a question about what the mission of the ALI is.

One distinguished member of the Institute has been quoted as saying, when the point was made to him that the Reporters' views are really not supported by the case law, something to the effect of, "After all, case law is a matter of Rorschach blots: it really just depends who's interpreting them."

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You can believe that. There's a substantial body of academic opinion, I suppose, that supports that view. But it does raise questions about the mission of the Institute and about how we view Restatements.

I was reminiscing briefly with Justice Mosk before this session began about one of the great educational experiences of my life. Shortly after I began teaching at the University of Virginia Law School, I had the great good fortune to have as a visiting colleague, in residence for a semester, Roger Traynor.

I learned a good deal from him in informal conversations and in listening to lectures he gave around the school about the inner politics of courts. And I certainly don't have any illusions that would deny that there is such a thing. It seems to me that we share a common understanding that law — all law, including judge-made law — is in some sense politics in the sense that it tends to represent the general conscience, understanding, and even the will of the community. But it does seem to me, and perhaps you can enlighten me in the breakout sessions if I am wrong, that we also share a commitment to the idea that somehow law is more than politics; that somehow it is a reaching for principles that are derived from incremental, field-tested, reasoned development.

The problem with the ALI's approach to these matters is a problem of perception about what a Restatement means. When I was a law student in the early sixties, I think I had the image that Restatements were basically the product of insulated deliberation among the high priests of the temple. That is not the model that is now presented to us, at least in the products Restatement, and there is no hiding of that ball. It is quite out front that this Restatement is intended as a legislative balancing of interests. But there is a difference, it seems to me, between the ALI legislation that we confront here in these drafts and the product of any legislature.

Suppose that you were a social scientist, a political scientist, and you wanted to find out what the interest groups were that were passing certain kinds of legislation. It wouldn't be hard. All you would have to do is get the names of Senators and Representatives and match them up with their economic interests and compare those with their votes on the floor. You cannot do that in the ALI. The reason you cannot do it is that we do not know who cast the votes, let alone how they voted. As I point out in my paper, in that respect the ALI is not like Congress or a state legislature. It is not even like your courts, because we know how you vote. You tell us how you vote. In the voting processes of the American Law Institute, we do not know either the who or the how.

A "Strict Scrutiny" Analysis

I am going to close by suggesting that what I have said may at least present some suggestions for an approach to judging when you are confronted, if you should be, with a finally passed *Restatement of Products*

Liability. Basically, what I am going to suggest is an analogy to judicial review of certain kinds of legislation, and it is, after all, only an analogy and a phrase. The phrase is that, given what the processes of the American Law Institute have become, I should think that you would want to subject a document like this to especially "strict scrutiny."

This is my suggestion to you as judges who not only make law but, in a certain sense, consume law — law in the form of, for example, Restatements — and who in this case would be asked to adopt as common law a private legislative proposal that is born of a frank political process.

I don't expect that there will be unanimity about what I have said, but for an academic, that is all grist for the mill, and I thank you for your attention.

Endnotes

¹ See Shapo paper, n. 6.

² See Shapo paper, n. 7.

³ See Shapo paper, n. 28.

⁴ See Shapo paper, n. 12.

⁵ See Shapo paper, n. 21.

⁶ 48 Vanderbilt L. Rev. at 666–67, n. 177.

⁷ Alex Elson and Michael L. Shakman, *The ALI Principles of Corporate Governance: A Tainted Process and a Flawed Product*, 49 Bus. Law. 1761 (1994).

Comments by Justice Marian P. Opala, Supreme Court of Oklahoma

I bear the burden of carrying two disabilities before this august body. I am a long-time member of the ALI, and my membership extends probably for as long as that by Professor Shapo. But I am also an Oklahoma Commissioner, as Phil mentioned, on the Uniform State Laws, and I would like to begin by explaining to you what these two bodies are.

I know you are far more sophisticated than the lawyers and judges in my state, but I must confess to you that in my home state, neither law students nor licensed lawyers and judges know too much about these two organizations, and I know you have been wanting to ask about them but were afraid to do so.

So let me attempt a kind of brief explanation of what these people do, why they are different. They reflect the dichotomy of our law with which you work daily as appellate judges. Our law is still divided into that which is written and that which is unwritten.

The written law consists of our constitutions and our statutes, and the unwritten law, we refer to it as the common law but seldom pause to ask ourselves where do we get the authority to be lawmakers, as Marshall Shapo says.

The Judge's License to Craft the Common Law

Our lawmaking authority stems from the legislature. You didn't know it, probably, but that is where it came from. Every state of the Union has what we call an adoption statute, or reception if you want to be fancy or are from Louisiana. That statute is a legislative license for people like us, whether we sit on the intermediate or last-resort courts, to craft the common law. We have a license given to us by the state in which we sit.

That is the difference between the ALI and the Commissioners on Uniform State Law. ALI came into existence in 1923 because we had so many common law jurisdictions, and scholars felt there was a need to extract the best of the common law in existence, the unwritten law.

It came in as a very elitist, aristocratic, scholarly organization, and it remained so with a limited membership until very recently, and during my membership there, the total number of members came to be increased from 500 to 3,500.

Only the very lily white, only those that graduated from prestigious law schools could get into the ALI until recently, and women had a minimal membership in it. But the organization has made an attempt and has fulfilled it by opening its ranks to all lawyers.

There are two kinds of memberships, ex officio and elected. I am an elected member, and I have every reason to believe that Marshall Shapo is also an elected member.

The Politicization of Products Liability Law

Until recently, ALI was able to project the image of an organization totally free from political influences, and today that is no longer possible, but not because the ALI is uniquely politicized but more so because products

liability has come to be politicized. There are different economic and political forces in action today than those which existed in the 1960s, when Section 402A came to be adopted.

We are in a global society, and those who dump their products on us don't like the increased liability to which they are subjected or their products are subjected in the United States. Can you imagine what voice, if any, the Japanese had in 1964 and 1965 when they were attempting to build, to craft their market in the United States and were still uneasy about their reputation here, and today, when they are a major financial and economic player in the globe?

So the realism of products liability has to be adapted to the difference in global conditions and to the general politicization of everything.

There is no project possible before the ALI — or the other organization which I will describe in a moment, the National Conference of Commissioners on Uniform State Laws — that is not subjected to intense political forces. Time was when I came to the ALI and the National Conference when we hardly had observers or advisers or lobbies from any outside organization. There is not a single drafting project before the uniform commissioners today that does not draw intense lobbying activity from some organization.

I am presently chairman of the so-called drafting committee on the Uniform Child Custody Jurisdiction and Enforcement Act, and we have four, if not indeed five, different private lobbying groups that are sitting with us, monitoring our drafts as they change, and the same is occurring in the ALI, not only in tort projects.

Tort has become a very political subject, and our trading partners in the world are totally unwilling to accept tort law as public law because their legal systems do not accommodate the private law of delicts with the public law of safety regulation or manufacturing and industrial regulations. They keep those fields apart.

So from now on, those of you who have a far longer life expectancy than I have, please do remember that for the rest of your professional lifespan, you will have politicization in the process of restating the common law as well as in the process of crafting that uniform statutory law, which should be identical in all the states. That is what the other group does (the commissioners), much older than the ALI.

The National Conference of Commissioners on Uniform State Laws

The group that is called the National Conference of Commissioners on Uniform State Laws has a membership of only about 400 commissioners from the 50 states and the United States territories. These commissioners work on the written law, on law that has no underpinnings in the Anglo-American unwritten law system.

There is one field in which both organizations (the ALI and the NCCUSL) meet because of the nature of the field that draws from both the written and unwritten sources, and that is the commercial law.

Carl Llewellyn and Soia Mentschikoff, the two-person team that crafted the original Uniform Commercial Code (UCC), convinced everyone that the commercial law in the Anglo-American world should draw not only from the customary law of England, the unwritten common law, but needs also massive infusion from legislative law. That is why, to this day, the project on the UCC before the National Conference of Uniform Law Commissioners is a joint ALI and NCCUSL project.

So I submit to you, and especially beaming at those judges and Foundation members and ATLA representatives with a much longer professional lifespan than my own, there will be no facet of the uniform law activity or the

so-called scholarly ALI activity that will not be subjected to intense politicization and lobbying. The days of quiet concern are over. The days of quiet acceptance of torts as "public law in disguise" are over.

Future Effect of the Proposed Restatement

Lastly, I would like to say something about the future. I agree with Professor Gray that the future of this proposed *Restatement of Products Liability* is somewhat uncertain. By that I mean that even if the forces of the right¹ succeed — and I believe they probably will, because the great political forces are behind them — that does not mean that the makers of the law, the common law, who are still the judges of the intermediate and last-resort courts, will become instant "consumers" of the product, as Professor Shapo put it.

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To prove my point, let me say it took years to adopt Section 402A, and to the shock of those who don't know it, there are still states in the Union who to this day reject Section 402A, and one of those states is your host state of Massachusetts. Section 402A is not the law in this state.

So it took years. In my own state, that is by tradition fairly conservative, it took a bold step by a very courageous judge on the court I sit on, now deceased, who by a split vote on a nine-person court of 5 to 4 got Section 402A doctrine adopted as Oklahoma's common law not too many years ago.

Don't despair because you don't like the political forces. It doesn't mean that they will succeed instantly or that their call will be accepted. Assuming that there is no legislation embodying their innovations, assuming that there is no congressional act that will write it into national law, there is very great likelihood that the concept will not sell in every jurisdiction or even in the majority of jurisdictions because, by nature, appellate judges are not very inclined to changing things without a clear necessity and merit for the change.

Endnote

¹ In my view, there is no other way to refer to the *Restatement of Products Liability*. It is guided by the great forces from the right that would like to see the liability for products defects somewhat restricted and made somewhat less different from the liability that governs the world with which we trade. There is a lot of foreign influence in that movement.

Potential Intermediate Positions Under the Proposed Products Liability Restatement

Oscar S. Gray

Professor Gray acknowledges that the American Law Institute is likely to adopt the proposed Restatement of Products Liability, and that, following its publication, judges may accept or reject the Restatement's approach. However, he suggests several "intermediate positions" that do not require outright acceptance or rejection and which may facilitate the future development of products liability law.

Among the possible responses to the proposed requirement of proof of a "reasonable alternative design" are reliance on the "manifestly unreasonable design" doctrine embodied in Comment d to Section 2; consideration of circumstantial evidence of defects under Section 3; and spreading the cost of expert testimony between plaintiffs and defendants according to the burden of proof. Similarly, there may be an intermediate position available with regard to the consumer expectation test, under which it could be used if the risk-utility test adopted by the Restatement's Reporters is inconclusive.

With regard to the continued viability of negligence and warranty law, courts may utilize Comment m to Section 2 of the proposed Restatement to justify imposing liability under traditional negligence principles where the product would not be considered "defective" under the proposed Restatement's black letter rule. They may also hold a product to be unmerchantable (although not proved to meet the proposed Restatement of Products Liability definition of "defective" for purposes of tort liability) under UCC Section 2-314, as was done recently by the New York State Court of Appeals.

The American Law Institute appears likely to adopt the proposed Restatement Third on Products Liability, including the principal changes advanced by the Reporters, and criticized by Professor Shapo: the requirement that "foreseeable risks of harm could have been reduced by . . . a reasonable alternative design" (in the absence of a manufacturing or warning "defect"), and the de-emphasis of consumer expectations as an indicator of the measure of safety required of a product.

I agree almost entirely with Professor Shapo's criticisms.¹ No doubt some, perhaps many, judges will also agree, in whole or in substantial part. Those who do not share the Reporters' viewpoints can, of course, adjudicate as they think best. Courts are free to reject the new proposals outright, if they wish to do so. Some judges may, however, have institutional preferences to present their positions as consistent with those of the Institute, rather than as rejections of the ALI's views.

This paper is addressed to certain aspects of the new Restatement that may lend themselves to the development of intermediate positions. Such positions might soften the impact of change from established doctrine. They might, alternatively, facilitate the orderly continuation and evolution of existing products liability doctrine as it has become established since the promulgation of the Second Restatement, without overtly repudiating the new Restatement.

These alternatives have come about in part because of the phenomenon to which Professor Shapo has alluded: the quasi-legislative nature of the process by which the Restatement has evolved to its present position. In the course of the debates among the Advisers and the membership, for instance, the Reporters have accepted as partial compromises a few qualifications in the comments that may have considerable practical utility.

"Manifestly Unreasonable Design"

First, the so-called "Habush" amendment, now reflected in Comment *d* to Section 2,² recognizes the possibility of a "manifestly unreasonable design": in the case of products with "low social utility and high degree of danger . . . liability should attach even absent proof of a reasonable alternative design." While this language in the comment is not supported by anything in the black letter to which the comment refers, this language is an obvious indication that the Institute does not intend the black letter requirement for an alternative design to be as absolute as it might purport to be if the black letter were statutory.

Similar possibilities for avoiding the "reasonable alternative design" requirement for products that are clearly unreasonably dangerous appear under Section 3 ("Circumstantial Evidence Supporting Inference of Product Defect"). This provision is modeled on the negligence doctrine of *res ipsa loquitur*, and could support either very narrow or very broad readings. A narrow reading, potentially destructive of virtually any utility for the section, is invited by the text of the section, which requires for its application "evidence . . . that more probably than not . . . the cause of the harm was a product defect rather than other possible causes" This could be read together with the definitions of "defect" in Section 2, so as to make the inference unavailable unless it were clear that the harm was probably caused by a design feature for which there could have been a reasonable alternative design — in the absence of a manufacturing or warning "defect." This comes very close to requiring that the possibility of such an alternative design be established as a pre-requisite to the inference — which would because of its circularity virtually negate the value³ of the inference.

On the other hand there has been a tendency among the Reporters and Advisers to refer to Section 3 as if it applied generally to products that are "obviously no good." It would not be surprising, I think, to find that at least some courts will allow a fair degree of liberality in the application of the Section 3 inference, as some do in the application of *res ipsa* itself.

Burdens of Proof

In addition, it may be noted that the Institute has assumed the existence of certain state procedural prerogatives on which it considers it ordinarily unnecessary for the ALI to speak. One of them has to do with burdens of proof. It would not, for instance, be inconsistent with the new Restatement for a state to spread the costs of expert witnesses on the "reasonable alternative design" issue by assigning to the defendant the burden of establishing the unreasonableness of an alternative proposed by plaintiff, rather than requiring the plaintiff to engineer and justify the alternative in detail. Arguments to the contrary could be made. There are, for instance, loose references in some of the comments to what a plaintiff must prove,⁴ but these are not rigid in defining how courts may permit the requisite proof to be presented or inferred. They are also balanced by comments disclaiming an intention to burden plaintiffs with the detailed engineering or economic evaluation of alternative designs.⁵

A further point, on consumer expectations.

The positions of those who oppose the de-emphasis on "consumer expectations" reflected in the proposed Restatement, and those who advocate the change, may not be as different as they have been understood to be. There are, for instance, several critical points on which the two groups either agree, or are not far apart.

For instance, both groups would object to two propositions that a few courts have derived from the "consumer expectations" language that is used in the comments to Restatement (Second) Section 402A: the automatic rejection, by a few courts, of liability for "patent" dangers, and the notion, held by a few, that bystanders cannot be protected under the "consumer expectations" test because, as non-buyers, they had no such expectations. Neither of these positions would be endorsed by either the ALI Reporters or their opponents. The Reporters, furthermore, have made concessions, some of which are cited above, to meet their opponents'

principal fear: that, under a risk-utility test, plaintiffs would be put to inordinate expert witness expense to re-design defendant's product and to justify the engineering and economic practicality of their alternative. Courts can go a long way under the proposed Restatement — and, of course, beyond the Restatement's proposals — to require, by discovery and regulation of requirements of proof, that the burden on plaintiffs be kept within sensible limits, if at least a threshold showing is made of the possibility of a reasonable alternative design (or, of course, that a design is "manifestly unreasonable").

Relevance of Consumer Expectations to Reasonableness of Design

If it is to be assumed that the Reporters' principal objective in de-emphasizing consumer expectations was not to burden plaintiffs in the manner that they fear — and the Reporters, of course, strenuously deny any such purpose — I suppose that at least one of their principal objections to "consumer expectations" as a basis for liability is a criticism that has been popular in the academic community: that, theoretically, the consumer-expectations test must logically collapse into a reasonableness test, and accordingly cannot be viewed as an independent test. The reasoning goes something like this: Since there are many individual consumers, the test cannot be that of the personal expectations of each of them, but must instead depend on the "reasonable" consumer (otherwise known as the market). But the "reasonable" consumer would not expect the unreasonable, so the "reasonable" expectations must be consistent with the "reasonableness" analysis for which the "risk-utility" test stands. Accordingly "consumer expectations" may be a way of understanding what the risk-utility test seeks to demonstrate, but does not supplant it.

This much the Reporters come close to conceding in Comment *f* to Section 2:

[C]onsumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm, both of which are relevant under Section 2(b). . . . Furthermore, products liability law derives from the law of warranty where consumer expectations have special significance. Thus, although consumer expectations are not determinative of whether a product is defectively designed, they constitute an important factor in determining the necessity for, or the adequacy of, a proposed alternative design.

Presumably a court could find that they serve the same function concerning the adequacy of the malfunctioning product's design, and a jury could be instructed accordingly, all within the framework of the proposed Restatement Third.

It seems to me that this comes very close to recognizing the validity of jury instructions that would permit juries, in at least most cases, to find defectiveness by reference to whether a product meets consumer expectations of safety. The Reporters would consider it wrong for this to be *determinative* where the benefits of a product outweigh its risks. I am not sure, however, that their opponents would seriously disagree. As a practical matter the problem for plaintiffs is not that benefits of the product can be shown to outweigh its risks in cases where the consumer expectations analysis would readily show the unreasonableness of the danger. The problem is that, given the normal burdens of proof in a products liability action, a risk-utility analysis may be inconclusive, because of difficulties in the quantification of intangible, non-market costs, to establish the opposite.⁶

I can accordingly imagine courts adopting a variety of intermediate positions on products liability, without overtly rejecting the new Restatement. For instance, I can imagine a court permitting juries to determine defectiveness on the basis of a finding either that the risks of a product outweigh its benefits (or the costs of reducing the risks), or that the product does not meet consumer expectations of safety, with the proviso that the latter determination should not be made if the defendant establishes by a preponderance that the benefits of the

product outweigh its risks and that the costs of measures proposed by the plaintiff to reduce the risk would outweigh the risk reduction that could be attained by such measures. The consumer expectations test could accordingly be an alternative where the risk-utility test is inconclusive, but secondary to the risk-utility test where the latter affirmatively establishes non-defectiveness.

Continuing Relevance of Negligence and Warranty Law

There have been important retreats, as well, in the proposed effect of the Restatement on the overall architecture of the law of products liability. Under present law in most jurisdictions Section 402A of the Second Restatement supplements both negligence and warranty law. The Reporters have proposed that their new definition of "defect" in Section 2 control liability under negligence law and sales law as well,⁷ but their ultimate success on this proposal is uncertain. At the ALI's 1995 general meeting, for instance, the Reporters accepted an amendment (known as the "Keeton-Frank" amendment) to comment *m* to Section 2 which makes it clear that this Restatement applies only to "defective" products, and that accordingly sellers of products that do not meet the Section 2 definition of "defect" may still be subject to negligence law liability, under other traditional principles of the Second Restatement of Torts, for unreasonably unsafe conduct.⁸

On the warranty side, the Drafting Committee on the Revision of Article 2 presented to the 1996 Annual Meeting of the National Conference of Commissioners on Uniform State Laws (July 12-19, 1996) a proposed Section 2-319 that would state, in pertinent part:

[(b) This [article] applies to a claim for injury to person or property resulting from any breach of warranty to the extent that the goods are not defective under other applicable law.]

On the other hand, a draft note to proposed Section 2-314, as submitted to the Commissioners, would state: "Suppose . . . that [in case of injury to person or property] the goods are not defective under tort law. Does that mean they must be merchantable under Section 2-314? In most cases the answer will be yes. For example, goods that do not contain a manufacturing defect will, in all probability, be fit for the ordinary purposes for which goods of that description are used. The policy question is whether defect in tort and merchantability in warranty should be coterminous. If the answer is yes, then proposed Section 2-319 or a Comment to Section 2-314 should implement this decision."

Nevertheless, a Reporter's Note to Section 2-319, as submitted to the NCCUSL 1996 meeting, indicates his⁹ apparent belief that merchantability for purposes of Article 2 should not necessarily be governed by the definitions of "defect," particularly for design, specified in the new torts Restatement.¹⁰

It is evident that such a Section 2-319 could provide a coordinating function in a jurisdiction that adopted the new Restatement, with its attendant emphasis on "defect" as the touchstone to liability, with one important proviso: that the word *defect* in Section 2-319 be understood to mean technically what *defect* means in Section 2 of the Restatement, and not otherwise, e.g., in the looser, colloquial sense of "substandard" or "inadequate." The coordination would result in the personal injury claim being treated solely under the Restatement, if the Section 2 "defect" requirement were met, and otherwise under the UCC, if its standards were met. What the effect of such a new Section 2-319 might be in other jurisdictions (e.g., where "defectiveness" is defined in terms of unreasonable danger, or unsuitability for intended purpose), if such jurisdictions do not adopt the new "defect" requirements of the Third Restatement, is less obvious.

Directions for Growth

In any event, historical echoes intrude. It is commonplace to note that the history of 20th Century American products liability law has involved an alternation between the influence of tort and of warranty law (conceived as an application of commercial law).¹¹ Back and forth the pendulum has swung: from *MacPherson*¹² (and the extension of negligence law beyond the privity limits of *Winterbottom*¹³) to *Henningsen*¹⁴ and its reflection in the implied warranty provisions of the UCC, to *Greenman*¹⁵ and the extension of its strict liability tort doctrine to Section 402A of the Second Restatement. Behind the precipitation of each such swing lay the genius of a common law judge — Cardozo and Francis and Traynor — and of scholars like Prosser and his advisers, who understood the direction in which the law wanted to grow. Radical changes were in each case undertaken on the basis of very little precedential authority. These changes were all validated by subsequent judicial consensus, all over the country. Perhaps the changes proposed by the ALI Reporters will prove to have been similarly prescient, however uncertain the precedential authority which the authors invoke. In such case the common law will evolve as they recommend.

If, however, the Reporters' sense of the spirit of contemporary law, and the ALI's, is less inspired than that of their predecessors, we may face another swing of the common-law pendulum — this time away from a primary emphasis on Restatement products liability law, back to common law negligence on the one hand, and to UCC warranty law on the other. It may be in these directions that products liability will continue to grow, if growth in its adaptation to social needs remains a guiding principle of the common law.

Endnotes

¹ My only quibble with Professor Shapo concerns his criticism of the Reporters' treatment of prescription drugs, which I find more defensible than he does. I think the Reporters were concerned with the problem of the medicine that is unacceptably dangerous for many people, but beneficial for a few. Thalidomide, for instance, is supposed to be good for leprosy, although it causes birth defects if taken by pregnant women, to whom it was once marketed abroad as a sedative. If qualified doctors want to prescribe the drug for certain patients, e.g., male lepers, for a use that is permitted by the FDA, and if the manufacturer correctly labels the packages and advises the doctors about the uses that should foreseeably be avoided, I do not think that the medicine should be regarded as "defective" merely because a "risk-benefit" calculation would show that more patients (or the children they bear) would be seriously harmed than helped if the drug were prescribed indiscriminately. It should be the responsibility of the physicians to protect those for whom the drug is not suitable (and their offspring), by not prescribing it to them, rather than the responsibility of the pharmaceutical company to protect them by keeping the drug off the market, for fear of liability for "defective" products. Accordingly the draft Restatement proposes, in §8(c), that a drug is not defective *in design* if a properly informed reasonable health care provider would prescribe it for "any class of patients." I do not consider this inconsistent with ordinary tort principles, or in any other way objectionable.

Otherwise, I have suggested elsewhere that the proposed Restatement, particularly in its original form, "moves in precisely the wrong direction from the *Restatement (Second)* [in the case of harm caused by non-pharmaceutical products]. . . . The proposals harden the requirement for 'defect' by purporting to make it dominate negligence cases, and give up strict liability except for manufacturing errors. It would make more sense, from the standpoint of encouraging safety, to give up the 'defect' requirement, except for manufacturing errors, and to keep strict liability for all unreasonably dangerous products." Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism?*, 61 Tenn. L. Rev. 1105, 1121 (1994).

² All references to the proposed Restatement in this paper are to *Restatement (Third) of Torts: Products Liability* (Tent. Draft. No. 2, 1995).

³ Some residual value to the §3 inference might remain in that the section would make it clear that plaintiff need not establish which type of defect caused the harm, provided it were established that one or another of the types of defect was probably the cause.

⁴ See, e.g., §2, comment *c*, sixth paragraph: "The requirement that plaintiff show a reasonable alternative design . . ."; §2, comment *e*, third paragraph: "[T]he requirements in §2(b) relate to what the plaintiff must prove in order to prevail at trial."

Cf. also Reporters' Note to §2, comment *e*, at 100: "As a practical matter, of course, once the plaintiff introduces evidence of a technologically feasible design, the defendant will address the risk-utility issues by justifying its design and demonstrating why the alternative design is not reasonable. Technically, though, the burdens of production and persuasion are on the plaintiff." (Note that Reporters' Notes are in ALI practice the product of the Reporters only, not of the Institute. They are not voted on by the membership of the Institute and do not purport to represent the views of the Institute.)

⁵ Cf., e.g., §2, comment *e*, third and following paragraphs:

"This Restatement . . . does . . . assume that plaintiff will have the opportunity to conduct reasonable discovery so as to ascertain whether an alternative design is practical.

"A test that considers such a broad range of factors in deciding whether the omission of an alternative design renders a product not reasonably safe requires a *fair allocation of proof* between the parties. To establish a *prima facie* case of defect, plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm. *Given the relative limitations on the plaintiff's access to relevant data, the plaintiff is not required to establish in detail the costs and benefits associated with adoption of the suggested alternative design.*

" . . . For justice to be achieved, §2(b) should not be construed to create artificial and unreasonable barriers to recovery.

"The necessity of proving a reasonable alternative design as a predicate for establishing design defect is addressed initially to the courts. Sufficient evidence must be presented so that *reasonable persons could conclude that a reasonable alternative could have been practically adopted.* Assuming that a court concludes that sufficient evidence on this issue has been presented, the issue is then for the trier of fact. *This Restatement takes no position regarding the specifics of how a jury should be instructed.* So long as jury instructions are generally consistent with the rule of law set forth in §2(b), their specific form and content are matters of local law."

(Emphases added.)

⁶ In the *Denny* case, for instance, where the New York Court of Appeals treats unmerchantability (based on consumer expectations) as logically distinguishable from defectiveness as established by risk-utility analysis, the jury had not, in fact, found that the benefits of the product outweighed the risks. It had merely answered "No" to the question whether it found "from a preponderance of the evidence that the Bronco II was defective as that term has been described to you by the court." *Denny v. Ford Motor Co.*, 42 F.3d 106, 109 (2d Cir. 1994). The court's explanation of defectiveness called for a "conclusion . . . [to] be reached after balancing the risks involved in using the product against the product's usefulness and its costs against the risks, usefulness and costs of the alternative design as compared to the product defendant did market." *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 732 (N.Y. 1995).

⁷ See §2, comment *m*, at 40: "The rules in this Section are stated functionally rather than in terms of the classic common law categorizations. Claims based on product defect at time of sale or other distribution must meet the requisites set forth in §2(a), §2(b), or §2(c) [defining requirements for proof of manufacturing defect, design defect, or defective warnings]. As long as these requisites are met, the traditional doctrinal categories of negligence, strict liability, or implied warranty of merchantability may be utilized in doctrinally characterizing the claim."

Reporters' Note on comment *m*, at 122-123: "Comment *m* takes the position that as long as the plaintiff establishes defect under §2(a), §2(b), or §2(c), courts are free to utilize the concepts of negligence, strict liability, or implied warranty of merchantability as theories of liability. *Conversely, failure to meet the requisites of §2(a), §2(b), or §2(c) will defeat a cause of action under either negligence, strict liability, or the implied warranty of merchantability.*" (Emphasis added.) Cf. Gray, note 1 *supra*.

⁸ The amendment, drafted by Judge Robert E. Keeton of the United States District Court for the District of Massachusetts, provides: "Product related claims not based on defects at time of sale or distribution are beyond the scope of this Section and §1. This Restatement covers several such topics, including liability based on misrepresentation (see §16) and post-sale breach of duty (see §§17, 18 and 19). Claims based on allegations of negligent marketing of nondefective products are addressed by provisions of the Restatement of Torts, Second. See, e.g., §291 (negligence generally) and §390 (negligent entrustment of products to incompetent persons)." ALI, Proceedings of 1995 Annual Meeting 215-216.

⁹ The Reporter for the Article 2 Revision is Professor Richard E. Speidel of Northwestern University.

¹⁰ The Note provides, in part:

"There is disagreement over whether goods that are not defective can also be unmerchantable. The position of the American Law Institute is that the answer is no and that this should be stated in Article 2 in either the text or comment. . . . Clearly this will be the result in most cases. There is, however, some case law to the contrary. See *Denny v. Ford Motor Company*, [87 N.Y.2d 248, 639 N.Y.S.2d 250, 662 N.E.2d 730 (1995)]...(vehicle properly designed for off the road use was unmerchantable when used on the road). Moreover, the relevant factors defining merchantability in Section 2-314(b) are broader than those defining defect in tort. Accordingly, subsection (c) [of §2-314] gives the plaintiff an opportunity to plead that *non-defective goods are still unmerchantable under §2-314(b)* as well as that the seller has made and breached an implied warranty of fitness or an express warranty." (Emphases added.)

Presumably this Note contemplates, by the phrase "defect in tort," comparison with the requirements of §2 of the proposed new Restatement, rather than other tort definitions of "defective," which sometimes encompass unsuitability for foreseeable use. Cf., e.g., *McJunkin v. Kaufman & Broad Home Systems*, 229 Mont. 432, 445, 748 P.2d 910, 918 (1987) ("The proper test of a defective product is whether the product was unreasonably unsuitable for its intended or foreseeable use. If a product fails this test, it will be deemed defective.") (discussing product deemed neither defective nor unreasonably dangerous).

¹¹ As compared with warranties arising from tort law. Cf. *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 466, 150 P.2d 436, 443 (1944) (per Traynor, J., concurring).

¹² *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

¹³ *Winterbottom v. Wright*, 10 M.&W. 109, 152 Eng. Rep. 402 (Ex. 1842).

¹⁴ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

¹⁵ *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

Additional Oral Remarks of Professor Gray

I think what I would like to do is to start with some fundamentals and walk you through the background to the problems and then make certain suggestions which I have in mind as possible compromises to help bridge the gap concerning these controversies.

I will refer, for your convenience, to two documents. You may have before you the proposed *Restatement of Products Liability*, Tentative Draft No. 2, or you may have before you the copy of my prepared remarks. I will try to give you page references to steer you.

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Let's start from the current situation. The topography on product liability in most jurisdictions today is that there are three sources of applicable law to deal with injuries caused by product accidents. One is normal negligence law, another is normal warranty law under the Uniform Commercial Code, and the third is the law that developed in response to Section 402A of the *Restatement of Torts, 2d*.

The proposed *Restatement of Products Liability* might be thought to be an attempt to replace Section 402A, but it takes a somewhat different approach from the approach reflected in Section 402A. That is, it not only says different things but it views itself as being more of a primer on product liability law in general than Section 402A did, because Section 402A was directed simply to the narrow question of a new doctrine of strict liability.

To orient yourselves on the new Restatement, you may recall that Section 402A provides for strict liability for products that are "in a defective condition unreasonably dangerous...."¹ Some states have treated that as two requirements — defective condition and unreasonably dangerous. Some have treated them as one requirement, one of those terms being defined in terms of the other. A few states have rejected one or the other of the two elements but the Restatement itself talks about defective condition, unreasonably dangerous.

If you will turn with me to Tentative Draft No. 2 of the proposed *Restatement of Products Liability*, you will see that the key concept that has been adopted here is for the "defective product."²

Under the Restatement 2d, Section 402A, and under negligence law you will recall, it became common to discuss the negligence of suppliers, or defects, in terms of either manufacturing activities or design or warning defect, so it became common to see discussions of manufacturing defect, design defect or a warning defect. It seems to me that those terms were never really clearly defined terms of art. Rather, it seemed to me merely that they referred to different ways in which one could view the dangerousness of products and the defectiveness of products. But you will see from Section 1(b) of the new proposal that a very tightly defined term of art is established in that defectiveness is defined in terms of whether the product contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.

And those three separate kinds of defects are defined in Section 2,³ which is the heart of the new Restatement and is the heart of the controversies that have been generated, that Professor Shapo talked about this morning.

If you look at Section 2, you will see that subparagraph (a) deals with manufacturing defects, and it deals with them in a way very similar, essentially the same as the way *Restatement 2d* would deal with manufacturing defects.

But the treatment of defective design in Section 2(b) and defects of warning in Section 2(c) vary from at least the language of Section 402A in at least two respects. One respect is that under the language of Section 402A, which did not distinguish between manufacturing, design, or warning defects, the strict liability that was provided by Section 402A would theoretically be available for a design defect or a warning defect just as it would be available for a manufacturing defect.

As you know, the law in many states has developed in a way inconsistent with that — that is, in many states the law has developed that while strict liability is recognized for manufacturing defects, it has not for design or warning defects and they are treated more like negligence than like strict liability. Not all states do that but some do. That choice has been made here in both 2(b) and 2(c).

That aspect, the adoption of negligence law here, rather than strict liability for design and warning defects, is one that I am not going to dwell on this afternoon. If anybody cares, it is a change I personally do not consider to be a good one, but it is less controversial than the other changes I shall mention, in several respects. One is that there is at least a very substantial body of case law in many states along these lines. There are, however, two further problems in the proposed Restatement that are at the heart of a very divisive controversy within the ALI and a controversy that I think will be divisive throughout the country if this is adopted.

Two Divisive Problems

“Reasonable alternative design.” The first is a very strange (to me) notion in Section 2(b) that for design defect there must be proof of a “reasonable alternative design.” That is to say, what Section 2 provides is that, in the absence of a manufacturing defect or a warning defect, the seller of a dangerous product that injures people is given a safe haven unless the plaintiff can establish a reasonable alternative design.

I don’t know if you all think that that is the law at present in your jurisdiction. It would have been my own judgment that that is not generally the law. The Reporters seem to think that there is a fair amount of authority for that, and I invite you to explore the Reporters’ Notes that are contained in the draft⁴ to understand their reasons for saying that, but if it is your feeling that that is not the law in your jurisdiction now, one of the questions that you will have to face if this is adopted, is whether you think it ought to become the law in your jurisdiction on the basis of the American Law Institute’s recommendations.

Risk-utility versus the consumer expectation test. The second controversial and divisive problem that is raised is this, and it is raised more in the comments than in the black letter. It has to do with the question of how you decide whether a product is unreasonably dangerous. In most jurisdictions today, I think there are two different approaches to the problem that are acceptable. Either is acceptable. Two alternate triggers can be used, described often as the “risk-utility” test and the “consumer expectation” test.

For a lot of reasons, I don’t particularly like those words. I don’t like the words “risk-utility” and I don’t like the words “consumer expectation,” but the ideas behind them are ideas that will be familiar to you.

Roughly speaking, they reflect the confluence of two different lines of doctrine that flow together into Section 402A — the tradition from negligence law which gives rise to notions of unreasonableness which are at the root of discussions of risk-utility and notions of unmerchantability derived from warranty law that give rise to the question of consumer expectations.

Burdens of Proof

The Reporters are evidently recommending very strongly that the use of the consumer expectations test be diminished and that the principal reliance should be on a risk-utility test. Why is this of importance for present purposes? It is obvious that plaintiffs’ lawyers would prefer not to make these changes. That itself is not a self-evident reason for either rejecting or adopting the changes. But there is an associated idea that is very troublesome. Plaintiffs’ lawyers are urging strenuously that the adoption of these two changes will impose on them really seriously unfair burdens in the ways in which they can prove their cases.

That is to say, they are concerned that, under the rejection of the consumer expectation test, what they are going to have to do is to establish risk-utility analyses that in many ways are extremely difficult to formulate except through perhaps very, very expensive expert witnesses of an economic and engineering type.

Consider the case of a product that could be made safer by an alteration — by a safeguard — which will, however, diminish its convenience somewhat. The question is whether the sacrifice in convenience outweighs the advantage in additional safety or not. That is what the risk-utility test gets you into.

If what you are talking about is comparing qualities that are non-market values for which there are no readily available quantitative equivalents, how do you go about proving such a comparison and how do you go about making it for a jury unless you get very abstruse economic expertise, that sort of thing.

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“Why is it you should have to do that,” the plaintiffs’ lawyers would argue, “if what has happened is that the wheels have fallen off the automobile. Why isn’t it just sufficient to appeal to the common sense of ordinary jurors for the proposition that these products are just not as safe as people have a right to expect from their normal expectations?”

It’s similar on the question of the need to prove reasonable alternative design. Very often (perhaps most often) plaintiffs’ lawyers in design cases will *want* to try to prove the availability of an alternative design in order to demonstrate the unreasonableness of the present design. That is the most vivid way of making that demonstration for a jury and a plaintiffs’ lawyer will ordinarily *want* to do it.

But it seems to me that there may well be cases where a product is just unreasonably dangerous and that is all there is to it, and you shouldn’t have to be able to redesign the product to say that that product should have been kept off the market because it was unreasonably dangerous — if necessary, not have the product at all rather than put such a hazard on the market.

The reasonable alternative design requirements suggested in this Restatement on their face seem to preclude that. They seem to say that unless you can point to the alternative design, you’re out of luck and therefore, clearly, then, does that mean the plaintiff has to engineer a very complex new product and prove the economics of it?

That can be an extremely burdensome chore which again invites the question whether you think that is the law in your jurisdiction now. If not, do you think that you ought to be making a change? I have suggested in my paper that, notwithstanding everything I have just said, I think there are some possibilities under the proposed Restatement for courts to continue to permit the use of the consumer expectation test in many circumstances as an alternative to the risk-utility test, and that courts can do that without necessarily rejecting the proposed Restatement.

Relevance of Consumer Expectations to Reasonableness of Design

I am not addressing these suggestions to a court that has decided that it wishes simply to reject the new ideas. You can just go ahead and do that. You are the judges. Nor, of course, am I addressing this to judges who think that they want to accept those proposals because, of course, you can go ahead and do that.

But I expect that there may well be some judges who feel that they want to move cautiously, not do anything precipitous in changing the practices in their jurisdiction today — and, on the other hand, not rushing to reject the proposed Restatement, but to see where it is possible step by step to continue doing what they have been doing without having to face the question of whether they are absolutely rejecting the proposed Restatement or not.

Judges who find themselves in that position I think can find some authority in the comments that I have cited to the effect that what the proposed Restatement is really saying is not that you don't use the consumer expectations test at all, but rather it has some uses but it shouldn't be determinative.

The alternative argument, as I suggested in my paper, depends on a false paradox, but it has led a number of scholars to say that we should have only a risk-utility test and not a consumer expectations test.⁵ The reason I think that that apparent paradox is a false paradox is made evident by the *Denny* case⁶ that I cite and I think Marshall has cited and a number of you may have run into.

Continuing Relevance of Negligence and Warranty Law

Denny is a New York State Court of Appeals opinion late last year that had to do with a Ford Bronco, a sports utility car, and the danger that was involved with it was that it was very tippy. It has a high center of gravity because it sits up high off the road and it is a narrow vehicle, so that it has less stability than a normal automobile. What happened was people were driving it on the road, they made a maneuver that was a fairly normal maneuver, they alleged, but the vehicle rolled over in circumstances where an automobile would not. So that was a defect that they were arguing about and Ford came up with a big argument to the effect that they had designed it this way to be able to drive it off the road in country paths. It sits high off the road in order to have clearance, and it is narrow so it can go in narrow places and that gives it a higher center of gravity but it is good for its off-road use.

The jury was asked whether the vehicle was defective, and was also asked whether it met consumer expectations of safety and the jury said, "No, it is not defective but it doesn't meet consumer expectations of safety." The question that went to the New York Court of Appeals was, is this an inconsistent verdict? Can you have something that is not defective but unmerchantable? Can you have liability in this case under the Uniform Commercial Code when you don't have liability in tort law?

The New York Court of Appeals said, "Yes, you can" — that logically the two ideas are distinguishable and therefore they are not necessarily inconsistent.

But the really interesting thing about *Denny* is that the question as it was presented to the New York Court of Appeals is a kind of false question because it sounds as if the jury had decided that the product passed a risk-utility test. It didn't.

What the jury was asked was what the jury would normally be asked in most of your jurisdictions, which is, "Are you persuaded by a preponderance of proof that the product is defective based on risk-utility factors?" That is a long laundry list of factors that make you sort of dizzy when you look at them. To say that a jury has not been persuaded that a product fails the risk-utility test is not the same thing as to say that a jury has been affirmatively persuaded that the benefits of the product really outweigh the detriments of the product.

Because that question of burden of proof really hasn't been looked at very carefully, I believe, up until now, it seems to me that it is possible to formulate a compromise position that would meet the objectives of the Reporters of the proposed Restatement in large part, and at the same time permit the consumer expectation test to be used normally. That compromise would be the possibility of permitting the consumer expectation test to be used as an alternative to the risk-utility test unless there is an affirmative showing that the benefits outweigh the detriment, or that a safety improvement would be feasible and cost-effective.

In my paper I have also given some examples of material in the proposed Restatement that I think permit the avoidance of the requirement to prove an alternative design in cases where something like a *res ipsa* case can be made, cases where there is a manifestly unreasonable design, and there are materials in the comments that I have drawn to your attention.

Restatement versus UCC?

One final point: the Reporters started off trying to make this a primer of product liability that would be exclusive of any other law on product liability. They started off wanting Section 2 to replace not only Section 402A but also negligence law and warranty law. That is, they wanted to make the Section 2 limitations binding on determinations of unmerchantability under Article 2 of the Uniform Commercial Code as well as in tort.

That was a position that I felt very strongly went beyond any existing law and my *Tennessee Law Review* piece,⁷ which is set out in the materials that you have, expands on that view somewhat.

There have been two developments of some interest here. One is the so-called Keeton-Frank Amendment that I cite in my paper (which the Reporters have adopted, under strong pressure from Judge Robert E. Keeton of the U.S. District Court for the District of Massachusetts and John P. Frank of the Arizona bar),⁸ which underscores the point that what the proposed Restatement deals with is *products that are defective*. "Defect," of course, is defined in Section 2. If you have a product that does not meet the Section 2 definition of defectiveness, you have a product that is not governed by this proposed Restatement, and therefore normal negligence law applies. Therefore, if somebody has marketed a product that is unreasonably dangerous but as to which there is no reasonable alternative design, this proposed Restatement does not prevent a negligence action for the negligence of the unreasonable conduct of selling that product. In other words, "That is not a defective product, therefore the harm was not from a defective product, therefore it is not covered by this proposed Restatement."

A question arose as to whether the commercial lawyers could be persuaded to accept the Section 2 definitions as binding on the definition of merchantability. It became fairly clear that the Commissioners on Uniform State Laws had no interest in adopting any changes in Article 2 that would mandate such interpretations. Instead, an alternative attempt was made to provide that if a claim was made under the Uniform Commercial Code for a personal injury, such a claim should be handled only under tort law if the product was defective within the meaning of the proposed Restatement; otherwise, one would look to the Code.

That proposal, I am told, was debated by the Commissioners at their annual meeting last week, and the Commissioners evidently decided that they didn't want to decide anything on that issue. That is, they didn't want to decide anything on the issue that is raised by the *Denny* opinion — the question of whether a product can be unmerchantable under the UCC if it is not defective under tort law.

Instead, what I believe they have decided to do is leave it to you. I think they have decided that the material they will put in the revision of the UCC that they are presently working on will simply describe the problem of whether the non-defective product could be unmerchantable, will point to the difference of opinion that exists on the subject, will point to cases such as *Denny*, which suggest that you can still have unmerchantability even if you don't have defectiveness, and then leave it to state court judges to decide what the rule should be.

It may well be that the promulgation of the proposed Restatement will lead to a renewed emphasis on normal negligence law on the one hand or on Article 2 of the Uniform Commercial Code on the other hand for the treatment of personal injuries from dangerous products, with the *Restatement of Torts* having a less prominent role in such litigation in the future than it has had in the past. But only the future can tell.

Endnotes

¹ *Restatement of Torts, 2d*, Section 402A, subsection (1).

² Proposed *Restatement of Products Liability*, Tent. Draft No. 2 (1995), Section 1.

³ *Id.*, Section 2.

⁴ See Proposed *Restatement of Products Liability*, Tent. Draft No. 2, Reporters' Note on comment *c* to Section 2(b) at 50-87.

⁵ See Proposed *Restatement of Products Liability*, Tent. Draft No. 2, Reporters' Note on comment *c* to Section 2(b) at 83-87.

⁶ *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995).

⁷ Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism?*, 61 Tenn. L. Rev. 1105 (1994).

⁸ Judge Keeton, when a professor at Harvard Law School, was an Adviser to the ALI on the *Restatement of Torts, 2d*, at the time of the adoption of Section 402A. He is also an Adviser on the proposed *Restatement of Products Liability*.

Comments by Justice Stanley Mosk, Supreme Court of California

My colleague Justice Baxter of the California Supreme Court is here and he will remember the occasion a couple years ago. A small community in our state adopted an ordinance that prohibited fortune-telling. Didn't license it, didn't regulate it. It was a prohibition of fortune-telling.

As you can see, there are some real First Amendment problems there. After all, every sports page forecasts how sporting events are going to turn out. Every minister on Sunday forecasts what the hereafter is going to be like, but nevertheless fortune-telling was prohibited.

A fortune-teller by the name of Fatima Stevens brought a suit to enjoin enforcement of the ordinance. She lost everywhere along the way, and we granted a hearing. As the lawyer for the fortune-teller got up to argue, our Chief Justice, Justice Lucas, said, "Counsel, you have us at a disadvantage." The lawyer asked, "Why, your honor?" The Chief Justice replied, "Well, hasn't your client told you how this case is going to turn out?"

I am sure all of you here can forecast how these events are going to turn out.

Approaches to Restatements

I first want to express my personal doubt about the total value of ALI Restatements. My theory is that a Restatement is valuable and worth citing if it agrees with a position that you are otherwise taking. If it doesn't, you either omit it or you distinguish it. I take that as sort of a pragmatic approach.

That is not totally unprecedented. In the Republic of California, we have on several occasions "stated" that we are not going to follow a Restatement. The Supreme Court of California, as long ago as 1939, said that, "While [the declaration made in this case] is contrary to the rule of the Restatement [of Contracts], it is, by reason of the express statutory provision, the settled law of this jurisdiction."¹

I found cases in many other jurisdictions that said, "Hey, we are not going to follow the Restatement because it conflicts with what we think is decisional law." I have read cases in Texas, Mississippi, Idaho, Wyoming, Ohio, Colorado, New York, Iowa, Missouri, and there are probably others that I haven't found.

So a Restatement is not necessarily the last word on any subject.

Of course, California's Supreme Court sort of claims credit for creating the doctrine of strict liability in a case many years ago written by Chief Justice Traynor.² But we have also recently made some distinctions in products liability. What product are we talking about in a particular case? After all, all of us don't use various machines, we don't buy lawn mowers every day, we don't buy boats very often, but we do use pharmaceutical products every single day and therefore, how this affects pharmaceutical products, drug products, is extremely important and therein lies the problem that we have, and the distinctions that we should make between strict liability and negligence. I think there is a very significant difference.

Failure to Warn

Failure to warn in strict liability differs markedly from failure to warn in the negligence concept. Negligence law on failure to warn requires a plaintiff to prove that a manufacturer or a distributor failed to warn of a particular risk for reasons which fall below the acceptable standard of care — that is, what a reasonably prudent manufacturer would have known and warned about.

Strict liability is not concerned with the standard of due care or the reasonableness of the manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known to him or her or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture. Thus, in strict liability as opposed to negligence, the *reasonableness* of defendant's failure to warn is immaterial and that can be very significant.

Pharmaceutical Warnings in Popular Media

The point frequently made by a defendant is that the benefits of its product outweigh the detriment to persons or to a particular plaintiff. In my view, that is not crucial, particularly not crucial in pharmaceutical products. If a drug affects only a small percentage of persons, is the manufacturer still required to warn of the dangers? Suppose a product affects only 5 percent of the persons. If it's good for 95 percent, but 5 percent are adversely affected or even 1 percent are adversely affected, is there liability? The answer is yes, if the manufacturer knows that it is going to affect them and fails to issue appropriate warnings.

I was thumbing through a couple of popular magazines the other day and here was an ad in the July issue of *Reader's Digest* for a medical product. I never heard of it, and I don't know what it does but here are its harmful effects. In the ad telling about all the good things this product does, the drug company goes on and says adverse experiences reported are the following: in 5 percent of the cases, it causes fatigue. In 2 percent of the cases, it causes diarrhea.

Here is another ad. This one for estrogen, a product commonly used by many women but nevertheless it warns that there is a danger of abnormal bleeding, there is a danger of loss of hair, there is a danger in a number of other factors, altogether about 10 different factors.

Here is another ad, also in *Reader's Digest*, for another product. Admittedly it will cause drowsiness in 3 percent of the people, diarrhea in 2 percent.

Here is an ad from *Time* magazine for another medical product. It has a lot of benefits but it may cause nausea in 5 percent of the cases, it may cause fatigue in 2.8 percent, fever in 2.5 percent, malaise in 1 percent and a rash in 2 percent and so on.

So most legitimate drug manufacturers do not find it difficult or impossible to warn of dangers that may occur. How do I know whether I am one of that 2 percent that may be affected if I take this product? The answer is the warning is made *primarily to physicians*, and it is my physician who will tell me about this before he prescribes or if he is going to prescribe this drug for my benefit.

It is clear that the difficulty in warning of even a small percentage of adverse effects from drugs is not at all a serious problem but if they fail to warn and it is scientifically, reasonably scientifically knowable that it will cause that effect, and it does, then I think there is a cause of action against the drug manufacturer.

Professor Gray offered some "intermediate positions," as he described them, that might help solve the impending conflict. Consumer expectations is one, and that, frankly, doesn't trouble me. But the requirement that a plaintiff show a reasonable alternative design is, I think, unreasonable. How on earth can a plaintiff show that the gas tank placed in a dangerous position in a car ought to be placed in some other position? Can he possibly hire the experts to prepare an alternative product to show that that is better than the one that had been used? I don't think it is possible for any plaintiffs to do that. If they could do that, then they ought to go in the business of manufacturing that alternative product because it would be very successful. So I don't see that that is a practical alternative in any respects.

My bottom line is that in the general area of product liability, a manufacturer of a product should be liable for damages caused by a product that is dangerous in any respect, if he knew that it was dangerous and failed to give warning or if there was reasonable, scientific information available that he ignored, or failed to take cognizance of, and to issue a warning.

Endnotes

¹ See *Long Beach Drug Co. v. United Drug Co.*, 13 Cal.2d 158, 168, 88 P.2d 698, 703 (Cal. 1939), *rehearing denied* 89 P.2d 386 (Cal. 1939).

² *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (1963).

III. The Judges' Responses

Each of the six discussion groups was invited to consider a number of standardized questions related to the papers and oral remarks. Judges' responses to the questions are excerpted below, edited for clarity and to remove references to names and states, and summarized in the *italicized* sections. The excerpts are individual remarks, not statements of consensus. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but all of the viewpoints expressed in the groups are represented in the discussion excerpts.

1. Are ALI Restatements cited often in briefs addressed to your court? In citing ALI, do lawyers characterize Restatements as black letter law or as discussion of policy? How do judges themselves in your jurisdiction use the Restatement of Torts, especially Section 402A? Do they view it as authoritative?

In some states the ALI Restatements were hardly ever cited. In others they commanded significant respect, particularly in a number of states in which Section 402A had been adopted by the courts.

Discussion Excerpts

We regard Restatements as secondary authority. We would be much happier to see principal authority by way of precedent used. When the Restatement is particularly clear in explaining the problem, it comes into use in an opinion. But it is not the first place we look when we want authority. We would much rather look at the cases.

I am a trial court judge from a state which surprises me all the time with not having answers enunciated for the questions raised. So the Restatement can be helpful when someone is suggesting what I ought to do about a particular motion or piece of evidence. Sometimes it is persuasive, but it is not the last word; it is just a helpful tool.

Our court in our southwestern state adopts an independent view. Where we are, some people are very suspicious of any doctrines proposed by large bodies.

The Restatement is cited a lot to our court. It has always had a certain aura with me, going back to my law school days, like a high priest in the temple. I think that's the attitude I had.

The Restatement has been particularly attractive to small states, like our New England state, that tend not to get the volume of litigation in an area that would permit it to address the whole concept. So we use it as a keyhole look to the problem. It is cited and recited in opinions frequently and adopted almost without exception, so it has been a very influential piece of law.

The lawyers in our state cite the Restatement surprisingly infrequently. You will see one of the provisions pop up more often in an opinion than you will from the litigants themselves. A lot of the time it's used as a confirmation of a direction that a particular panel or court wants to go, and they can find some confirmation in the Restatement and say: "Aha! This gives us some legitimacy for what we want to do." But I have been surprised, being on the bench now for 12 years, how infrequently it is cited.

In our southern state, we don't have much reference to ALI writings in general. Being a member of ALI, I don't like that at all. I wish we would pay more attention to it. We are very state-oriented, which is bad. We don't look at what other states are doing. We have a very short deadline for writing our decisions, so we keep going with what we've got without time for exploring.

We're a Section 402A state by opinion of the supreme court. In most areas, lawyers do brief the Restatements. Four members of our court, including myself, are ALI members. I would say that we follow the Restatement when we agree with it and don't follow it when we don't. There's one benefit: the Restatement provides wonderful research and resources because it does collect cases around the country and we look at everything. We do a 50-state search, we want to know what everybody thinks, and it certainly goes into the mix, but we sometimes depart from the Restatement.

We mostly get Restatement matters addressed in briefs in the contracts and torts areas. Out of roughly 800 cases a year, maybe a dozen might quote from Restatements.

We rely on Restatements. We look forward to cites of them, we use them in our opinions, and cite them.

We in our southwestern state basically do look to the Restatement as authority. If we adopt a particular section, then that becomes the law in the state.

I see Restatement citations a lot. I'm on an advisory committee for ALI Restatements. Until I was put on that committee, I always saw the ALI and the Restatement in the sense that this is the top people telling what the optimal legal principle should be.

I suspect the number of times the Restatement gets cited by lawyers is a product of how much respect it gets in the court. Our court is very deferential to the Restatement. We cite it often. We were one of the earlier courts to adopt strict liability.

We sort of decided that it's black letter *policy* rather than black letter *law*, not just academic suppositions or streams of consciousness. It's cited as black letter policy.

The only time you find it cited is when there's no case law on a point. In our southern state there was no developed body of case law in the products area and that's probably why the Restatement was relied on so heavily there.

Our legislature tends to adopt the Restatement in many areas and enact it, and our courts will abide by it.

My court is a trial court, so Restatements are cited as black letter law. It is a good, concise, simplified statement of what the law is and gives you some basis to work from. Our supreme court has utilized the Restatements in a lot of their opinions. We have statutes patterned after the Restatements.

It carries a lot of authority before a group of legislators, who are becoming more and more non-lawyer legislators.

It is not the law. It is not the Gospel. It is just a secondary source of authority like a law review article or anything else, and it has some merit.

We frequently cite to the Restatement but have come to the decision before we cite it. It is just additional.

It is a valuable source, like a well-done law review article by a noteworthy professor. Now, that is not law. That is not an authority you are bound to follow. But it may be a well-reasoned and wise statement that you want to consider in adopting a holding in a particular case. So, with a sense of skepticism, we look at it as a very authoritative law review article that proposes a particular point of law.

I don't think it is used just because it is a Restatement. If it supports the position that your research has taken you to in your own jurisdiction, then you add it in as another cite that is persuasive.

Years ago I used to see it offered a lot more frequently than I do now. I don't think I have seen it in a post-trial motion more than once or twice a year in the last six years.

It would hold about the same amount of weight as our law revision commission holds, and especially would hold a lot of weight if it was enacted as part of a statute.

Our court has specifically stated that the Restatement is not the law of the state. We look at it, we may follow it if we find it persuasive, but it is not the law.

2. What has been your understanding of the Restatement development process?

Many judges believed politics always played a part in ALI proceedings. Others, however, said they had regarded ALI Restatements as more objective, and above political considerations.

Discussion Excerpts

I don't know why we're worrying about how wholesome the process is by which ALI came to its Restatement position. That doesn't bother me. The Restatement has to stand the tests of logic and experience and time. If it has good ideas, the ideas will stand up no matter how they came about. If it's a bad idea, it doesn't matter where it came from.

A retired member of our supreme court is a major scholar in this field and has been a member of the ALI for many years. He left a culture among our state judges that the product of the ALI is, and has been for a generation or more, the result of a lot of politicking. Section 402A, itself, was not a "Restatement" of the then-existing law; it was a promotion of a concept that law professors and judges felt was the direction in which tort law *should* go. There is no naivete on our part that for a generation or more the ALI has been promoting its Restatement as a direction in which the law should go. And it has always been taken with a grain of salt.

I think that at least in the past, the ALI has had a tremendous reputation for being a place where lawyers from all over the country come in and park their clients at the door and really do their best work in terms of what they think the law ought to be. I think the process has become a little bit contaminated recently.

When I was in law school, I always looked at the Restatement as a very scholarly, academic, reasoned view on either what the law *is* or what the law *should be* as a matter of sound social policy. And, indeed, if you read the founding papers of the Restatement, this is exactly what it is supposed to be. "Leave your clients at the door" is what they say at every meeting. But I have come to the realization that that's not what happens, and especially that is not what happened in this particular project. This is a unique project in which a viewpoint was established before there was any debate whatsoever, and that viewpoint has persisted all the way through, notwithstanding the debate.

When you talk about the ALI trying to develop sound policy, don't they have to find that policy in the case law somewhere? This may be horribly naive, but I have always thought that this is what they were trying to do with the Restatement, trying to distill wisdom and excellence from a case-centered examination of the precedents. It doesn't have to necessarily be the majority view, but it does have to be out there in the case law.

I chaired and referenced our state's products liability legislation of 1981; I chaired the legislative committee that brought that to fruition. To have someone tell me that the law of products liability is political, what an insight! Surprise! What news! The law of products liability is indeed political, has been ever since I can remember. If there is politicking done in the ALI about the law of products liability, that's no surprise to me.

Any decision-making process is subject to politics.

Sure it's political. Everything we do is political. The question from a societal standpoint becomes, "Which is the best for our jurisdiction?" That's what we decide if the legislature doesn't take the decision away from us. So what's the big deal about it being political?

The biggest problem we have as judges, particularly as appellate judges, is to separate ourselves from the noise, because the common law, after all, is developed over a reasonably long period of time and in quiet reflection. When you have noise neither one of those is possible. One of the worst things that can happen is that you develop the law based upon noisy myths. A lot of that is happening nowadays and it's kind of frightening.

I've been a member of ALI since the seventies, so I've seen enormous changes. It's somewhat disturbing that it is as confused as it is right now as to who it is and what it is doing and what is its place. It allows one area where we as judges can participate in thinking with the academics, the idea being to crystallize what the law of the United States is. But it's left that. I think it's a misnomer to call this a Restatement. These are statements. They're not Restatements of what is. They are much more — more ideas of what ought to be.

I wish there were an organization that just restated what the law was and told me what is the majority and minority view in the United States. I don't think ALI is doing that anymore, but it's as close as we can come without having a law clerk sit down and go through all the states and figure it out.

There is such controversy and so many political forces involved in a Restatement (which is clearly not the law as it is but the law as someone wants it to be), that a response would be that the courts will stay with what they've got and allow the legislature to intervene if they really think that the representative process is where these battles should be fought, not in the courts.

I think that the Reporters, if they were giving their side, would say, "Products liability law is not uniform across the United States. We are necessarily picking and choosing from what is in the mix, picking and choosing the ones that we think are best suited."

I still think most judges and lawyers look on the Restatement as a dispassionate statement made by the best scholars, and it's not. I think if that is communicated, it will lose its authority, which it probably should.

I think it has been political from day one. It is nothing new, it is just a question of whether you like it or not. It is political if you do not like it. It is great material if you do like it.

It *should be* political, because it does take into account changing circumstances in our society and what may have been good 20 years ago perhaps is outdated and should not be the Restatement rule today.

Aren't conservatives simply doing what liberals have been doing for two decades in trying to get courts to adopt a more defense-oriented view of products liability? I am reminded of the policeman, Claude Rains, in *Casablanca*, who walked into the gambling establishment and said to Humphrey Bogart: "I'm shocked that there is gambling going on in this establishment." Nobody who wasn't born yesterday is shocked about any of this. It is just politics as usual.

The plaintiff bar has never really been that well organized. All of a sudden, they see their whole world crashing around them. You better be a mouth and get in here and do something. They are taking away your contingent fee arrangements. The insurance company is destroying the relationship between patient and doctor. Caps on non-economic damages, just a whole bunch of things.

There are really two issues here. The substance of this proposed change is one of them. When we look at a principle in the Restatement, if it has got some merit, we will adopt it. Irrespective of that, I still want to know whether the ALI has become so politicized that it is going to affect the way that they do their work. That is a long-range issue.

We can do what the psychiatric and psychological profession does when they get together and adopt their diagnostic and statistical manual. They dream up a mental disorder and then they get together and have a little vote. And there are interest groups that come in, and there is a change in the vote. I think the judiciary goes along with that, perhaps because they haven't thought the thing through and they don't understand what the basic influences are. I don't see anything wrong with people lobbying for their point of view, but it has to be understood that that is what it is.

My view of the Restatement has been and still is that it is essentially the intellectual's view of what the law ought to be rather than what it is. Having served in the legislature, I have always thought that was a pretty well-balanced way to make public policy, rather than just have five or seven or nine justices, many of whom are not even elected, who do not get an opportunity to hear both sides. What they hear are a couple of appellate lawyers making an argument why what happened in the court below is right or wrong, and then they determine what the policy is.

I think this is kind of a one-sided broadside. I think what you are saying is be careful about this stuff. Well, I am going to be careful about it anyway because that is my job.

What it comes down to is, what use do we as judges make of the work product of the ALI? There is not much of a tendency to snipe at icons and so the real question for me is, are the Restatements icons or aren't they? If in fact what they are putting out is material produced by a quasi-legislature accountable to no one, the problem is not that they are ivory-tower eggheads. The difficulty is that these are positions taken for political reasons, or self-interested reasons by majority vote and without accountability and therefore this is not the work product of the icon that we thought it was.

The whole goal of all of this is to make it more difficult for plaintiffs to recover and to protect the interests of manufacturers, and that is politics.

3. Does the proposed requirement of proof of a "reasonable alternative design" in Section 2(b) of the proposed Restatement on products liability accurately reflect the current state of the law in your state?

Most judges stated that no reasonable alternative design requirement existed under their state law, and several predicted that its imposition would make it more difficult for a plaintiff to present a products liability case.

Discussion Excerpts

Our state has a statutory scheme of products liability. Because the reasonable alternative design point is not in our present statute, there has not been any invitation for judicial creativity on the question.

I am convinced a better way to handle liability is to make powerful incentives for manufacturers to design safe products. And the more you undercut that by shifting liability away from manufacturers, the fewer safe products you will have on the market.

It seems to me that this is a huge departure. If a plaintiff desires to show a reasonable alternative design for purposes of illustration, to help a jury understand what could have been done, that seems a sensible way of doing things. But to conceptually require a plaintiff to prove what a defendant could have done is just a gross departure.

I think it's even worse if we read into this Restatement that you can't get to the jury. You've got to get to the judge first and if you have not established your reasonable alternative design, you don't have to worry about persuading a jury. The case is dead in the water.

The judicial problems that something like the reasonable alternative design requirement would create are just overwhelming. Assuming that the plaintiff has the burden to establish that sort of thing, how does the plaintiff ever win? The average plaintiff can't afford to go out and redesign a major product. It's just not possible. So what is the burden of proof? It strikes me as almost incomprehensible.

It's going to make medical malpractice litigation seem cheap by comparison. If you have to go out and start hiring engineers and designers to come up with alternative concepts for building products, it's mind-boggling to me.

If the plaintiff bears the burden of showing that a safer alternative design is possible as a precondition to recovery, you're going to see a drastic reduction in the number of these cases. I don't know whether that's good or bad. I guess we judges are always happy when somebody reduces our workload, and this will sure do that.

I think the reasonable alternative design is a discovery nightmare and in itself an impediment to litigation. No plaintiff, unless the plaintiff has a multimillionaire lawyer willing to carry him financially to the tune of several million dollars, would be able to afford the engineering talent and the discovery talent that will have to go into prosecuting a claim based on those parameters.

How does risk-utility work from a proponent's standpoint? If an item is of low utility — let's say it's a hula hoop and it's defective and injures somebody, or lawn darts — does the plaintiff still have to come in and show that you could design a lawn dart that would be safe, or does it only apply to items that are of great utility?

The jurisdiction of the fight will just change to the legislature, I assume. Our southern state uses the common law approach to products liability, and I assume defendants will wait until there is a case in which there was no alternative design presented. I think you will then see some attempt to make that an issue. They will pick the right case.

If you were to take an average product and show that the user used it in the way that it was intended and still got injured, under common law the burden shifts to the defendant to show there was nothing wrong with the product. Then the burden would shift back to the plaintiff to show that something actually was wrong with the product that caused the injury. When you have this introduction of reasonable alternative design, it becomes an initial claim and offer of proof by the plaintiff. That changes the whole equation very substantially.

In our Pacific state, if the plaintiff can demonstrate that every single time this product is used — whether it is lawn darts or the generator inside the turbine inside the 747 engine — it has failed and somebody wound up getting hurt, you get to the jury. The product is defective, not because there is an aspect of proof available to show that they could have done it differently, but because of the product.

The courts are going to have to determine how much evidence qualifies as having proved an alternative reasonable design. Do you have to have an engineer who has taken this product through the test stage and through the use stage? When is a reasonable alternative design sufficiently tested to put it into evidence? That could be expanded so dramatically it would be ridiculous.

We are talking about what constitutes a defective product. A reasonable alternative design doesn't go toward whether or not a product was defective, but whether or not it could have been manufactured differently, so that they have failed to do what their legal duty requires of them. I agree, "If it ain't broke, you don't have to fix it."

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Wouldn't this proposal change the playing field? If you put the obligation on the part of the claimant not only to prove that you have been injured by a product that you claim to be defective, but also have to go to the expense and time and effort to find people to testify, "If I had made this thing, I would have made it better or differently," it doesn't seem to me to be a reasonable approach to a rather straightforward question.

The reasonable alternative design proposal sounds to me to be, in functional terms, another hurdle to get to a jury.

We adopted Section 402A by statute, and since then it has been interpreted judicially to kind of go the way the proposed Restatement is now. We balance the utility against the risk imposed by the product. One of the judicial factors to consider is the thing that is causing the big controversy here: is there a reasonable alternative? Can you put something in to insulate against conduction of electricity in aluminum ladders, things of that nature? What is unreasonably dangerous, and the utility of it, has been read in by the court. You consider whether there is a reasonable alternative because if there isn't you destroy the utility completely. Some things can be dangerous and you have to use them anyhow.

Alternative design has been an evidentiary matter that could be considered in determining whether or not the risks outweigh the utility, but I just found out during lunch that our state statutorily adopted the alternative design requirement since 1993. The burden is now on the claimant to prove that there was a safer alternative design. I didn't know that. In my court we have had a number of products liability cases since 1993, and I don't recall the issue ever having been presented to us as a statutory requirement.

You are changing the focus now. You are no longer focusing on the condition of a product, and whether it is unreasonably dangerous. You begin, under this treatise, to focus on the behavior of the defendant, what the defendant did or did not do. That is not strict products liability in a design setting. That is negligence law.

Why do we need this change? I don't see it happening in our state at all. I see it as being anti-consumer.

4. Would you view the adoption of the proposed new Restatement as analogous to a proposal to repeal Section 402A? Do you foresee specific problems in your state with a shift from Section 402A to the regime proposed by the Reporters? What problems?

Judges who spoke to this question generally thought adoption of the proposed Restatement would constitute a major change, but several thought adoption was unlikely.

Discussion Excerpts

This is a new test, different from Section 402A. It wipes out consumer expectations totally, regardless of what you think they are or shouldn't be. That would be out the window under this test.

In our state, the whole law has been developed by "add-age." Another plaintiff's lawyer comes along with a better theory and you add it in. We had a recent study done. We had 15 or 20 different theories of products liability floating around in our state that were all viable. The court would approve it or not approve it. What I hear is that this is trying to force all of that into a little grid. The fear is that some of what has been developed isn't going to make it through that grid if the state were to adopt this thing wholeheartedly.

To me, the most important question here is the reason for the policy shift. Is there anything changed now about the way products are manufactured that makes it unfair, or somehow the wrong social policy, to hold manufacturers strictly liable? I just haven't seen it in the cases that have come before me so far, which aren't that many in our New England state. I haven't seen a reason to make a policy shift.

Our current statute, which adopts Section 402A-style standards, is going to be the law until the legislature tells us differently. We are not about to evolve a specialized common law of design defect law in accord with this Restatement draft so long as the present statute that governs the field is in place.

If most states already have a statute based on Section 402A, won't this almost be worthless? Courts are always going to look to the statutory scheme.

After it is adopted you will hear people saying, "Wait for cases in which this can be raised, look for a test case." This is how they are going to go about it. It will take some years to bubble up through the system.

The question is, as I read this redraft, is it an effort on the part of the Institute to eliminate what we know as strict products liability and send us right back to negligence law, where we began in 1964? As I read this, it is a subtle way to eliminate strict products liability law. It is gone. We are back to negligence. We might as well just scrap all our notions of unreasonably dangerous products.

Even if this Restatement were to be adopted, that wouldn't be the law in our southwestern state. We adopted Section 402A as previously enacted. But we would look at it and, if it makes no sense to adopt it, we wouldn't. I'm not going to sit here and tell you how I would rule in a particular case. But I think, generally speaking, when I look at a Restatement in principle and I don't think it makes any sense and the rationale is weak, I would not adopt it as law in our state.

5. Should there be a continuing role for negligence in products liability law?

Several judges commented that they felt there is a legitimate role for negligence doctrine in products liability litigation, and that the elimination of that role would be a major change.

Discussion Excerpts

Sure, negligence should have a continuing role. Let's say the manufacturer, when it is doing some step along the way in putting a gun together, screws up the trigger mechanism. Leaving aside the question of whether it is unreasonably dangerous, you have a gun which the manufacturer has carelessly manufactured. That is negligence within products liability.

One of the reasons I think the Restatement has been cited as authoritative has been the confidence people have reposed in the product. If they really mean to eliminate negligence, then I think they really take a risk there — that the courts will just basically ignore or repudiate the Restatement.

We had a case recently where there was an action against a hospital for a procedure that involved the use of a product, which I can't recall. The hospital was sued. We held that a hospital is not a supplier in the stream of commerce. But then the complaint alleged that it could be held liable for negligence. The plaintiff filed a motion for an amended complaint that alleged specifically negligence. We held that there was enough there to allege there was negligence. On the question of public policy we balanced the equities and felt that it would not be a good thing to have a law making the hospital a supplier, on the grounds of public policy. But they could be held liable for negligence.

The Restatement does eliminate negligence as we know it. The question I have is, is that a good idea? I think that was the intent. It is not very apologetic about it and I think they realize it is a deviation.

It is one thing to say they are adding an additional requirement for a plaintiff to prove, to have a burden, to come forward to show that an alternative design was available that would have prevented a dangerous product. It is another thing to say not only do we require that, but that it is somehow affecting the field of negligence as we know it. When the question was posed whether this will affect the negligence law in our states, I think most of us in our minds felt that it shouldn't. We felt that the negligence law would stay intact.

I think one of the questions that is raised by the Restatement is, should there be a continuing role for negligence or should it all be strict liability? The Reporters seem to believe that defectiveness of a product should be the be-all and end-all, and it is either defective in manufacture, defective in design or defective in its instructions and warnings, and they de-emphasize considerably the role for negligence. Yet every state, so far as I am aware, has negligence as part of its law.

Is it the theory that negligence just has no part to play in an action under the new Restatement's Sections 1 and 2, or is it really the idea that there is no more negligence action at all? That is going a far piece. I don't know that the courts are going to find that.

6. In your state may a product be held to be "unmerchantable" in a UCC-based count but "not defective" in a products liability-based count in the same case, as appears to be the situation in New York State under the *Denny* decision?

Many judges had not encountered a situation like this, and there was uncertainty as to how their courts would approach it.

Discussion Excerpts

One of the purposes for drafting the Restatement was to obtain nationwide uniformity as an aspect of common law. That is pretty much on the sidetrack because a number of states have adopted legislatively their version of what they would like to see. In our western state we have a statute that deals with strict liability, warranty and negligence for all products cases — all in one statute. So the matter has really been taken off the common law agenda.

I guess it depends on how closely you define consumer expectations and implied warranty. If they are fairly close I can see where you would have a product which doesn't meet a consumer expectation, for example, that wouldn't meet the implied warranty of fitness but wouldn't hurt anybody.

My guess is the real question is whether anyone comes from a jurisdiction that has ruled it out. To my knowledge our jurisdiction has not ruled out the assertion of both claims for relief.

7. To what extent do your state courts consider consumer expectations in determining product defectiveness?

A number of judges came from jurisdictions in which the consumer expectation test is used, sometimes in conjunction with a risk-utility analysis.

Discussion Excerpts

Our supreme court adopted the risk-utility test some time ago. We have rejected the consumer expectation test.

In our southern state the key in the jury instruction is whether the product is defective, and it may be defective either if it fails to satisfy ordinary consumer expectations or if the risk is such that it outweighs the reasonable benefits that the product has to offer. That charge has been in effect for nearly 20 years.

Our cases tend to mix the warning with the design aspect. If a product — take the Bronco example — is designed for a particular use off the road, thereby making it less safe on the highway, the case would probably be submitted to the jury as, "Well, if you think of it as utility, was the consumer made aware of its dangerousness on the open highway so the consumer would be forewarned that you do not go over a certain speed or use it in certain ways?" It would be a combination. I tend to get annoyed at the fact that we just talk about these issues in pigeonholes and not look at the big picture.

It seems to me that your jury tells you what the consumer expectation is, every time it answers any one of these questions. So, why does it have to be some separate kind of test? The jury are the reasonable consumers, aren't they?

I think consumer expectation does play a role in assessing whether or not the design was defective in light of what the consumer purchased it and used it for. I think that does remain a relevant point of proof in the trial and I just haven't been persuaded yet that it is irrelevant to the determination of whether a defective design is proven.

I can't imagine that what an ordinary consumer would expect, when the product is used as intended or in a manner reasonably foreseeable by the manufacturer, isn't relevant to whether a product is defective.

Our southern state just goes on what the definition for an unreasonable dangerous product is. If it is a failure to warn situation, what the elements of that would be. There is no consumer expectation concept in the jurisprudence at all.

In our Pacific state, consumer expectation is a factor in terms of the use of the product, what is to be expected of the product and how it works and that type of thing. So, it is a factor.

Frankly, I don't think it is a good test. We had one case in which we applied it, and I didn't think it worked well. A smoker dropped a cigarette on a sofa that was set on fire and the smoker was injured. He sued the manufacturer on the theory of strict liability for failure to use fire retarding chemicals in the fabric or cover the fabric of the sofa with fire retarding chemicals that would have allegedly prevented that cigarette he dropped from igniting the sofa. We applied the standard of a reasonable expectation, but I thought to myself that it was not a very good standard, that we should have found a better way to affirm the summary judgment for the manufacturer.

The consumer expectation test, I think, would apply in the *res ipsa loquitur* situation. For example, the wheels fly off the car when you are driving at 55 miles an hour. Obviously you would not expect that to happen. In one case I recall, we based it on the type of incident that occurred.

Isn't one of the primary purposes of advertising to *raise* expectations, and won't they be fulfilled by purchasing the product? So, if we eliminate the consumer expectation test, aren't we in essence providing the consumer with less than a full array of shields and protections?

IV. Points of Agreement

In the discussion groups, the group moderators were asked to seek out consensus — where it was achieved — on the issues raised by the standardized questions, and to reduce their conclusions to a few sentences, to be announced at the Closing Plenary Session. The questions and the moderators' statements of their groups' conclusions follow, edited for clarity.

1. Are ALI Restatements cited often in briefs addressed to your court? In citing ALI, do lawyers characterize Restatements as black letter law or as discussion of policy? How do *judges themselves* in your jurisdiction use the Restatement of Torts, especially Section 402A? Do they view it as authoritative?

- Restatements are cited very rarely, not often. As to what weight they gave it when it was cited, some comments were, "it is not the black letter law," "it is never primary," and "it is not controlling."
- The Restatement was not frequently cited by lawyers. It was more often seen in court opinions and in briefs. When used in court opinions, it was used to support a decision already reached or to confirm a decision already reached instead of as a source of primary authority. There appeared to be more reliance on Restatements in smaller jurisdictions that did not have the variety or volume of cases than in the larger jurisdictions. All of the jurisdictions followed Section 402A. No jurisdiction reported following reasonable alternative design.
- In our group the judges see it in more complicated cases. The Restatement is useful but was not necessarily the last word when considering products issues in their jurisdictions. Section 402A in fact was the law of the overwhelming majority of the states represented.
- The Restatement is cited more, as you would expect, in cases wherein there is no statutory or case authority in that particular jurisdiction. We discussed the distinction between it and state jurisprudence articles or Am.Jur. It depended on the topic, but most of the judges in our group like the state jurisprudence articles the best because they at least relied upon cases. But that is not to say there were not areas where the Restatement was given precedence.

2. What has been your understanding of the Restatement development process?

- The judges in our groups were a little surprised at some of the evidence that was presented. They were a little surprised as to the way the process was politicized and that they didn't realize to what extent it has been politicized.
- In our morning group it would be fair to say that most were unaware of the process or the workings of the ALI and based upon what they learned here, they would give the use of the Restatement more scrutiny.
- There was a mixed view — one of a loss of innocence over the politicizing of the process and some of the political realities of the process, but also a view by some who just frankly were not quite aware as to where along the line we were in that political evolution.
- Many of the judges thought politics played a lesser role in the Restatement. However, there were many, also, who recognized and had recognized for some time that politics were involved, and I think the message from some of them was clear that, knowing that politics is involved, if the other side puts more players on the floor than the plaintiff side, the plaintiffs better not cry about it, they better just get more players on the floor.

3. Does the proposed requirement of proof of a "reasonable alternative design" in Section 2(b) of the proposed Restatement on products liability accurately reflect the current state of the law in your state?

- With the exception of four individuals, between this morning and this afternoon, there was no form of reasonable alternative design involved in their states.
- None of the judges in our two groups came from a state that required that, but I think we all know it is good trial tactics to try to demonstrate a reasonable alternative design.

4. Would you view the adoption of the proposed new Restatement as analogous to a proposal to repeal Section 402A? Do you foresee specific problems in your state with a shift from Section 402A to the regime proposed by the Reporters? What problems?

- The adoption of the proposed draft would seriously restrict Section 402A. It would not necessarily completely repeal it, but it would restrict its use. Both groups agreed that the reasonable alternative design requirement would have a material effect on the way a case is tried procedurally. Some of them said it would be a trial within a trial. It would raise the issue as to the qualifications of your expert that you would have to present under the *Frye* test. [*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).]
- Most felt that Section 402A and Section 2(b) of the proposed Restatement were not compatible, that there would be no Section 402A. It would be a significant modification and many were not ready to make what they saw to be a large step.
- Everyone thought it would be a serious modification.
- Everybody seemed to agree that the imposition of a reasonable alternative design requirement would be a decided change in the law and would create problems in shifting over.

5. Should there be a continuing role for negligence in products liability law?

- On the question whether negligence should continue to be a standard, the response was, more or less, "Why shouldn't it be?"
- Under the proposals of the ALI, it was felt that there would be little room for negligence. Section 2(b) of the proposed Restatement would greatly modify the common law of negligence of most of the states.
- There was a lot of concern in our groups over a substantial change to the negligence doctrine. The tremendous factor, though, is the intellectual independence of the participants in the groups that I moderated. They are not willing to make large overhauls of the state common law, ALI notwithstanding, without more rationale and without using a high scrutiny standard.
- The people in this afternoon's group believed negligence should continue as a theory in products cases.

6. In your state may a product be held to be "unmerchantable" in a UCC-based count but "not defective" in a products liability-based count in the same case, as appears to be the situation in New York State under the *Denny* decision?

- The response, again, was "Why shouldn't it be?"
- None of the states represented in this afternoon's group have that situation. We learned that California had an interesting twist in that they would select, depending upon the kind of case, in some instances whether it would be strict liability. In another case they might use negligence. For another issue they might use UCC concepts.

7. To what extent do your state courts consider consumer expectations in determining product defectiveness?

- Most of the judges in both groups said that they used consumer expectations together with the risk-utility test.
- The consumer expectation test was still viable in all the states that were involved this afternoon.
- Our group felt that, if a manufacturer, by promotional or marketing activities, creates an expectation of safety in a product that even the manufacturer couldn't achieve, or that no reasonable alternative design could achieve, even in the absence of a reasonable alternative design, there should still be liability for those promotional or marketing activities. That led to the concluding question of the afternoon which was, "What is the perceived wrong that needs to be corrected that requires a rewriting of the law of products liability?"



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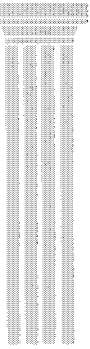
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Report of the first Forum for State Court Judges in which more than 100 judges of the state supreme and intermediate appellate courts, lawyers, and academics discussed the renewal of state constitutionalism on the issues of privacy, search and seizure, and freedom of speech, among others. Also discussed was the role of the trial bar and academics in this renewal. (08R) \$35

Justice Denied: Underfunding of the Courts *moderated by Chief Justice Rosemary Barkett, Florida Supreme Court*

Report on 1993 Roundtable. The report examines the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. (10R) \$20

Safety of the Blood Supply *written by Robert E. Stein*

Report on Spring, 1991 Roundtable. The report covers topics such as testing for the presence of HIV, and litigation involving blood products and blood banks. (06R) \$20

Injury Prevention in America *written by Anne Grant*

Report on 1990 Roundtables. Topics: "Farm Safety in America," "Industrial Safety: Preventing Injuries in the Workplace," and "Industrial Diseases in America." (05R) \$20

Health Care and the Law *written by Michael E. Carbine*

Topics: "Hospitals and AIDS: The Legal Issues," "Medicine, Liability and the Law: Expanding the Dialogue," "Developing Flexible Dispute Resolution Mechanisms for the Health Care Field." (37B) \$20

Health Care and the Law II *written by John Guinther*

The forum, "Patients, Doctors, Lawyers and Juries," was held at ATLA's Annual Convention in Kansas City, and was moderated by Professor Arthur Miller. (35B) \$20

Health Care and the Law III *written by Michael E. Carbine*

Topics: "Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue," "Health Care Providers and the New Questions of Life and Death," "Medical Providers and the New Era of Assessment and Accountability." (02R) \$20

Demystifying Punitive Damages in Products Liability Cases *written by Professor Michael Rustad*

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