Constructing a Roof Before the Foundation Is Prepared: The Restatement (Third) of Torts: Products Liability, Section 2(b) Design Defect

Frank J. Vandall
Emory University School of Law

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Consumer Protection Law Commons, Legal Remedies Commons, and the Torts Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol30/iss2/6

This Symposium Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
CONSTRUCTING A ROOF BEFORE THE FOUNDATION IS PREPARED: THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY SECTION 2(b) DESIGN DEFECT

Frank J. Vandall*

The Restatement (Third) of Torts: Products Liability section 2(b) is a wish list from manufacturing America. It returns products liability law to something more restrictive than negligence. What is new from the Reporters is that their proposal is written on a clean sheet of paper. Messy and awkward concepts such as precedent, policy, and case accuracy have been brushed aside for the purpose of tort reform. There has been almost no attempt to evaluate strict liability precedent or the policies underlying previous cases and the Restatement (Second) section 402A. Section 2b (the roof) has been drafted with little consideration of the policies underlying section 402A (the foundation) or the cases favoring the consumer (the support beams) decided over the last thirty years. The Restatement (Third) of Torts: Products Liability implies that legal analysis is farcical. Avoiding legal analysis is certain to cause section 2(b) to lose convincing power among those searching for solutions to tough cases involving injuries caused by defective products.

As I look out of my office window, I am able to see the construction of a new building. First, the contractors excavate a hole. Then they put in a steel rod and concrete foundation. The floor, walls, and roof come after the foundation.

Over the last day and a half, something has been missing from our discussion of the proposed Restatement (Third) of Torts: Products Liability section 2(b)—the foundation. The discussion has been comparable to deciding the size of the roof to put on the completed building outside my window. It presumes that a foundation has been laid. It has not. To lay a foundation for a Restatement there has to be a discussion and critique of the policies underlying contemporary products liability law. But the scholars at the Ann Arbor conference have simply assumed that we need to replace current products liability law (as expressed in cases and in the Restatement

* Professor of Law, Emory University School of Law. B.A. 1964, Washington and Jefferson College; J.D. 1967, Vanderbilt University School of Law; LL.M. 1968, S.J.D. 1979, University of Wisconsin Law School. I appreciate the research assistance of Arlin B. Kachalia. Mistakes, however, are mine.
(Second) of Torts section 402A) because of the underlying flaws in the policies (the foundation) on which it rests. This proposition is not self-evident. Before we replace the old law and old policies with the new, we must first debate their continued vitality. We have omitted this fundamental discussion. In its place we have a new building—the Restatement (Third) of Torts: Products Liability—that we may not even need. It is as though the Reporters decided that an evaluation of fundamental policies would be too messy and time-consuming, so they just skipped to step two, drafting a radically new definition of design defect. As a result, they have failed in their attempt to produce what might be called a Restatement.

Section 2 of the proposed Restatement has three key provisions. Liability may rest on a manufacturing defect (the product is not like all the others on the assembly line),\(^1\) a design defect (the product in question is identical to all the other products on the assembly line),\(^2\) or a flawed warning.\(^3\) The thrust of the new Restatement is to limit strict liability to manufacturing defects and to announce a new concept for design defect cases—"radical negligence.” Radical negligence means that to win a design defect case, a plaintiff must prove that there is a "reasonable alternative design" to the design selected by the defendant manufacturer and that the manufacturer failed to exercise reasonable care. I call the new standard "radical negligence" because it did not exist in more than three jurisdictions before this draft Restatement\(^4\) and because it differs significantly from "old fashioned" negligence. "Old fashioned" negligence is the cause of action we all studied in law school. It rests on the idea that a person may be negligent if he or she fails to exercise reasonable care.

I have several observations regarding the draft section 2(b). The proposed section does not represent progress. First, it neither relies on nor furthers traditional products liability policies; second, it does not accurately reflect the practice of courts today; and finally, it does not benefit consumers.

---

2. See id. § 2(b).
3. See id. § 2(c).
I. THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY SECTION 2(B) IGNORES TRADITIONAL PRODUCTS LIABILITY POLICIES

A. WHAT IS A RESTATEMENT?

The traditional role of the American Law Institute (ALI or Institute) Restatements, of course, is to restate the common law. The Institute founders were both critical of the legislative process and admiring of the common law. The first director, William Draper Lewis, stated that the goal of the ALI was to parse "out of the mass of case authority and legal literature . . . clear statements of the rules of the common law today operative . . . expressed as simply as the character of our complex civilization admits." Historians may argue that the Restatement (Second) of Torts section 402A did not provide a true restatement of the common law because it did not rest on case analysis, but that argument is superficial. In fact, section 402A rests on well-established reasoning. Professor Malone argues that historically all of tort law rests on strict liability. The first reported case to adopt strict liability was decided in England in 1466. This decision was later followed by the famous decision of Rylands v. Fletcher in 1868. Rylands involved the escape of water from a reservoir and held that one who brings a non-natural substance onto his land is strictly liable for damages when it escapes.

5. See Grundberg v. Upjohn Co., 813 P.2d 89, 95 (Utah 1991) (noting that the "restatements are drafted by legal scholars who attempt to summarize the state of the law in a given area, predict how the law is changing, and suggest the direction the law should take" and that the "restatement serves an appropriate advisory role to courts in approaching unsettled areas of law"); cf. Frank J. Vandall, The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect, 68 TEMP. L. REV. 167, 196 (1995) (defending section 402A as accurately reflecting current law and policy).
6. See Vandall, supra note 5, at 174 n.41.
8. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (stating that a seller of "any product in a defective condition unreasonably dangerous to the user . . . is subject to liability for physical harm" suffered by the consumer).
11. 3 L.R. 330 (Ex. Ch. 1868).
12. See id. at 332, 340.
1944 in *Escola v. Coca Cola Bottling Co.*, Justice Traynor argued that strict liability should apply to the manufacturer of an exploding soda bottle. Justice Traynor's concurring opinion in *Escola* rested on well-established legal concepts: negligence and warranty law. Traynor's opinion in *Escola* expressly sought to avoid the continuation of the problems associated with res ipsa loquitur and warranty. *Escola* reflected the law of the time—strict liability for food—while also discussing the available implied warranty action.

Traynor's opinion also clearly explained the policies underlying strict liability. His opinion stated that the manufacturer should bear liability because it is the party best able to evaluate the product, anticipate hazards, and make the necessary changes or improvements. Traynor also noted that the consumer may lack insurance while the manufacturer can easily obtain insurance to cover the risk of injury. Finally, he argued that the manufacturer can spread the loss among the public, "as a cost of doing business."

Most importantly, Traynor took account of modern world realities—that the consumer knows little about the design and construction of the product and relies on the manufacturer to ensure a product's safety. For example, compare the consumer buying a station wagon today to a consumer buying a covered wagon in 1850. When the consumer bought a covered wagon, he might have helped the manufacturer build the wagon. But when

---

14. See id.
15. See id. at 441–43 (Traynor, J., concurring). Indeed, *Escola* can be seen as an extension of the 1916 case, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), which developed the theory that a plaintiff could sue in negligence and recover from a product manufacturer without showing privity. See id. at 1054.
16. Cf. *Daly v. General Motors Corp.*, 575 P.2d 1162, 1166 (Cal. 1978) ("[Strict] liability was created . . . because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies.").
17. See *Escola*, 150 P.2d at 441.
18. See id. at 442.
19. See id. at 440–41.
20. See id. at 441.
21. Id.
22. See id. at 443 (writing that the "consumer no longer has means or skill enough to investigate for himself the soundness of a product" and that the consumer "has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks"). Traynor also made clear that often the design and production process is secret. See id. This holds true today.
the modern consumer buys a station wagon, she knows very little about the design and construction of the product.

Traynor's concurring opinion was adopted as the majority position in Greenman v. Yuba Power Products, Inc.,23 when the California Supreme Court held that strict liability applied to a defective lathe. It is often said that Greenman formed the foundation of section 402A.24

Another case, Spence v. Three Rivers Builders & Mason Supply, Inc.,25 though not a personal injury case, significantly influenced the development and scope of section 402A. The case involved cinder blocks that deteriorated in a lakeside cottage.26 The court held that an implied warranty extended to the consumer without a showing of privity.27 Prior to Spence, Dean Prosser, the drafter of section 402A, thought that strict liability would have very limited application.28 Through Spence Dean Prosser foresaw that strict liability would apply inevitably to all products.29 Accordingly, he drafted section 402A to apply to all products.30

It came as a surprise then, to see over five hundred years of tort cases put into the paper shredder at the suggestion of the Restatement (Third) of Torts: Products Liability section 2(b). And this decision came without any discussion of the purpose, policies or success of these cases.

B. The Tripartite Structure of Section 2: Magic Boxes

1. The Structure of Section 2—The proposed Restatement (Third) of Torts: Products Liability section 231 divides all

---

24. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 reporters' note cmt. b (Tentative Draft No. 1, 1994) [hereinafter Tentative Draft No. 1.]; see also Vandall, supra note 5, at 188, 193.
26. See id. at 874.
27. See id. at 878-81.
29. This is the author's recollection from lectures presented by Professors Prosser and Wade at Vanderbilt Law School from 1964-1967.
31. See Tentative Draft No. 2, supra note 1, § 2.
products cases into three categories: warning defect,\textsuperscript{32} manufacturing defect,\textsuperscript{33} and design defect.\textsuperscript{34} A warning defect exists if the warning on the product is inadequate.\textsuperscript{35} A manufacturing defect arises when a product is flawed as the other products on the assembly line are not.\textsuperscript{36} By contrast, products containing design defects are precisely as the seller intended.\textsuperscript{37} The product with a design defect is the same as every other product on the line.\textsuperscript{38}

The Reporters developed separate subsections of section 2 to limit strict liability’s application to manufacturing defects.\textsuperscript{39} They placed strict liability on the ice floe that is section 2(a) and set it adrift.\textsuperscript{40} In the process, they drafted a section 2(b) that creates requirements more restrictive than negligence. To prove a design defect under section 2(b) a plaintiff must show “radical negligence."\textsuperscript{41} I call this standard “radical negligence” because

\textsuperscript{32} See id. § 2(c). According to section 2(c):

\begin{quote}
a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.
\end{quote}

\textit{Id.}

\textsuperscript{33} See id. § 2(a). According to section 2(a): “a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.” \textit{Id.}

\textsuperscript{34} See id. § 2(b). According to section 2(b):

\begin{quote}
a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.
\end{quote}

\textit{Id.}

\textsuperscript{35} See id. § 2 cmt. h (explaining that “sellers down the chain are liable if the instructions and warnings provided by predecessors in the chain are inadequate”).

\textsuperscript{36} See id. § 2 cmt. b.

\textsuperscript{37} See id. § 2 cmt. c (“[A] product asserted to have a defective design meets the manufacturer’s specifications but raises the question whether the specifications themselves create unreasonable risk.”).

\textsuperscript{38} See Vandall, supra note 5, at 176.

\textsuperscript{39} See Tentative Draft No. 2, supra note 1, § 2 cmt. a; see also Vandall, supra note 5, at 176.

\textsuperscript{40} See Tentative Draft No. 2, supra note 1, § 2 (applying strict liability only to manufacturing defects). Manufacturing defects are rare and theoretically not very important. See Vandall, supra note 5, at 176 n.52.

\textsuperscript{41} At least one jurisdiction has rejected the reasonable alternative design requirement in negligence cases. See Rahmig v. Mosley Mach. Co., 412 N.W.2d 56 (Neb. 1987). The Reporters are pushing for an approach that will encourage the production of more
the plaintiff must prove more than negligence. He must prove that a reasonable alternative design (RAD) was available at the time of the sale of the product.

The broad language of section 2(b) may have subsumed "old fashioned" negligence. Early drafts of section 2(b) strongly implied that the cause of action for traditional negligence had been eliminated—that only section 2(b) was available as a cause of action for defective design. At the University of Michigan symposium, I asked Jim Henderson, from the floor, whether an amendment to make certain that traditional negligence remained available outside section 2 would be considered later in the year. Professor Henderson stated that this amendment would not be considered at the May 1996 meeting of the ALI.

2. Section 2: The Practice—Assuming that "old fashioned" negligence is dead, plaintiffs harmed by defective products must fit their claims within one of section 2's three magic boxes: the manufacturing defect box, the design defect box, or the warning defect box.

Separating defective products that belong in the manufacturing defect box from those that belong in the design defect box will not be simple. In *Pouncey v. Ford Motor Co.*, the plaintiff was working under the hood of his car with the motor running, when a blade spun off of the car's radiator fan and hit the plaintiff in the head. An examination of the fan blade disclosed an excessive number of non-metallic impurities in the steel, defective products, while the President is urging that at least one product, airplanes, should be safer. The President, accepting the White House Commission on Aviation Safety and Security Final Report, said: "We will also change the way we inspect older aircraft, to include an examination of wiring and hydraulic systems, all to ensure that every plane carrying passengers, regardless of its age, is as safe as it can be." *CNN Special Event* (CNN television broadcast, Feb. 12, 1997), available in LEXIS, News Library, CNN File.

42. "Old fashioned" negligence places on the plaintiff the burden of proving an absence of due care, but does not require her to prove that a reasonable alternative design was available as a condition precedent to suit.

43. See Tentative Draft No. 1, *supra* note 24, at 30 ("The rules in this Section exclusively define the bases of tort liability for harms caused by product defects . . . ").

44. See Frank J. Vandall, Remarks at the Colloquy on Products Liability: Comprehensive Discussions on the *Restatement (Third) of Torts: Products Liability* 112 (Mar. 22, 1996) (transcript on file with the *University of Michigan Journal of Law Reform*).


My feeling is that a motion delayed is a motion denied.

46. 464 F.2d 957 (5th Cir. 1972).

47. See *id.* at 968.
known as inclusions. Arguably, the blade had a manufacturing defect because it contained more inclusions than normally found in the type of steel used to make the blade. On the other hand, the inclusions could be a design defect because Ford had used cheap metal in the fan blades, thereby causing the large number of inclusions in the metal.

Harley-Davidson Motor Co. v. Wisniewski also shows the difficulty in trying to categorize product defects as either design or manufacture. As the plaintiff rode his Harley-Davidson motorcycle around a curve, the clamp holding the throttle to the handle bar disconnected. The throttle slid off the handlebar and resulted in injuries to the plaintiff. The clamp disconnected because a screw on the clamp had been cross-threaded on the assembly line. Does this situation involve a manufacturing defect or a design defect? It would be a manufacturing defect if the assembly line robot malfunctioned and cross-threaded the screw on the “C” clamp. On the other hand, it would be a design defect if the robot was programmed so that every Harley-Davidson leaving the assembly line had a similar problem with its throttle.

The issue of whether a product had a manufacturing defect or a design defect is important because if it is a section 2(a) manufacturing defect, the plaintiff can sue in strict liability. If, however, it is a section 2(b) design defect the plaintiff has to show “radical negligence.”

Section 2’s effectiveness hinges on the notion that it will be easy to distinguish between a manufacturing defect and a design defect. This belief reflects superficial analysis. As shown in the Pouncey and Harley-Davidson cases, applying magic boxes to actual cases will be challenging at best. At worst, it will divert the court from the fundamental issue of whether the seller should be liable for the defect.

48. See id. Inclusions weaken the metal. See id.
49. See id.
50. See id. at 961.
52. See id. at 702.
53. See id. at 703.
54. See id. at 703-04.
55. See Vandall, supra note 5, at 176 & n.5. In practice, a radical negligence standard will discourage many plaintiffs from bringing close cases.
C. The Draft Lacks an Analysis of the Traditional Policies Underlying Strict Liability

Geoffrey Hazard, the director of the ALI, justified updating the Restatement in the Foreword to the Tentative Draft, stating that "the Restatement Second of Torts has become out of date." Hazard or the Reporters must prove and support this bald conclusion, especially because just the opposite conclusion is more accurate. More than 3000 cases have cited section 402A, and no court has said that it reflects out-of-date policies or that it needs to be rethought. Furthermore, no article or case states that the decisions resting on section 402A have reached the wrong results.

With no concern for the continuing validity of the policies underlying strict liability, the Reporters began with a clean sheet of paper (favoring the manufacturer) despite the fact that the policy concerns underlying strict liability are long-known.

The traditional strict liability policies have been set out as the foundation to section 402A in comment c, which states:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum

56. Tentative Draft No. 1, supra note 24, at xiii.
58. Perhaps the only exceptions are cases involving prescription drugs, which some courts feel fall within comment k's exception for "unavoidably unsafe." See, e.g., Brown v. Superior Ct., 751 P.2d 470, 475-77 (Cal. 1988).
59. Cf. supra notes 19-22 and accompanying text.
of protection at the hands of someone, and the proper persons to afford it are those who market the products.\textsuperscript{60}

These policies have significantly influenced, and remain the foundation in the forty-four states that have adopted some form of strict liability.\textsuperscript{61} As I read the \textit{Restatement (Third)} draft,\textsuperscript{62} I do not see evidence that the Reporters have challenged, debated, weighed, or evaluated these policies. Because law serves as a concrete statement of public policy, these policies must be debated for the draft to succeed.

\textbf{D. Section 8(c) Design Defects in Drugs: A Tabula Rasa}

The proposed \textit{Restatement (Third)} distinguishes between prescription drugs and other products. Section 8(c) of the proposed \textit{Restatement (Third)} provides:

A prescription drug or medical device is not reasonably safe due to defective design when the foreseeable risks of harm posed by the drug or medical device are sufficiently great 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.\textsuperscript{63}

This proposal ignores the well-developed common law policies regarding products liability:\textsuperscript{64} the consumer lacks sophistication consistent with the purposes underlying strict products liability [are] that manufacturers should be deterred from marketing certain products and that the cost of the defense of strict products liability litigation and any resulting judgments should be borne by the manufacturer who is able to spread the cost through insurance and by charging more for its products.

\textit{Id.} at 1196.
with regard to drugs, the loss should be placed on the manufacturer; the seller/manufacturer can spread the loss; and the seller is the cheapest cost averider.

The distinction between mechanical products covered by section 2(b) and prescription drugs covered by section 8(c) is artificial and arbitrary. The drug industry is not monolithic and not all drugs and medical devices are worthy of blanket protection. Some drugs save lives, such as blood pressure medicine and those that prevent infection, but others predominantly cause damage, such as thalidomide, chloromycetin, MER/29, DES, or Oraflex. Indeed, several Oraflex consumers had been killed in Europe before manufacturers introduced the drug in the United States. The Dalkon Shield, a medical device, caused two billion dollars in damages.

65. See, e.g., id. at 1194-95.
66. See id. at 1196.
68. See Sindell, 607 P.2d at 936 ("These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs.").
69. See Grundberg v. Upjohn Co., 813 P.2d 89, 100 (Utah 1991) (Stewart, J., dissenting) (asserting that "decongestants, expectorants, deodorants, hair growth stimulants, skin moisturizers, and cough and cold remedies, for example, [would] have the same immunity as rabies or polio vaccines [and] medications essential in the treatment of cancer, heart disease, or AIDS" and finding "no basis for according drugs used to treat comparatively minor ailments a blanket immunity from strict liability if they are unreasonably dangerous to those who use them (footnote omitted)).
70. See, e.g., United States v. Bogusz, 43 F.3d 82, 89 (3rd Cir. 1994) (describing birth defects caused by thalidomide during the 1960s).
71. See, e.g., Stevens v. Parke, Davis & Co., 507 P.2d 653, 655 & n.2 (Cal. 1973) (stating that chloromycetin "has a history of causing aplastic anemia in certain patients" and that many members of the medical profession consider it to be a dangerous drug, if not "the single most dangerous antibiotic on the market at the time of [the plaintiff's] treatment").
72. See, e.g., Toole v. Richardson-Merrell Inc., 60 Cal. Rptr. 398, 413 (Ct. App. 1967) (discussing eye opacities or cataracts as potential side effects of using MER/29).
73. See, e.g., Sindell, 607 P.2d at 925 (noting that DES could cause "cancerous vaginal and cervical growths" in daughters exposed to the drug during their mother's pregnancy).
75. See The Miracle Drug that Became a Nightmare for Eli Lilly, BUS. WK., Apr. 30, 1984, at 104. Eli Lilly obtained the FDA's approval to market Oraflex, although it had not revealed "extensive evidence of adverse reactions and deaths related to the drug overseas." Schwartz, supra note 74, at 1396.
The Reporters need to review a handful of very important and recent drug design cases: Brown v. Superior Court,77 Kearl v. Lederle Laboratories,78 Toner v. Lederle Laboratories,79 Grundberg v. Upjohn Co.,80 and Shanks v. Upjohn Co.81 All these cases articulate important concerns that deserve consideration. But the Reporters never address the policies of Kearl, Toner, Grundberg, and Shanks.82 Instead, they take a clean sheet of paper and virtually grant immunity to all drug and medical device manufacturers for defective design cases.83 Because of these omissions section 8(c) is void of precedent.84 Most likely, courts will not accept section 8(c) until the Reporters evaluate the cases and the policies and draft a proposal that reflects the law.

77. 751 P.2d 470 (Cal. 1988). The Court wrote that there is an important distinction between prescription drugs and other products such as construction machinery, a lawnmower, or perfume. . . . In the latter cases, the product is used to make work easier or to provide pleasure . . . . Moreover, unlike other important medical products (wheelchairs, for example), harm to some users from prescription drugs is unavoidable.

Id. at 478 (citations omitted).

78. 218 Cal. Rptr. 453 (Cal. Ct. App. 1985). "[W]e are uncomfortable with the rather routine and mechanical fashion by which many appellate courts have concluded that certain products, particularly drugs, are entitled to such special treatment." Id. at 463.

79. 732 P.2d 297 (Idaho 1987). "Like the Kearl court, the Toner court rejected the routine analysis that other courts have followed when granting drugs the comment k exemption. "Courts must decide the applicability of comment k case-by-case . . . ." Id. at 309.

80. 813 P.2d 89 (Utah 1991). "We do not agree, however, with the Brown court's apparent attempt to use the plain language of comment k as the vehicle for exempting all prescription drugs from strict liability rather than relying on the policies underlying that comment." Id. at 95.

81. 835 P.2d 1189 (Alaska 1992). "[W]e find it speculative at best that restricting strict liability design defect claims against prescription drug manufacturers will serve the public interest by enhancing the availability and affordability of prescription drugs." Id. at 1195.

82. Cf. Tentative Draft No. 2, supra note 1, § 8 reporters' note cmt. f (outlining the rationale behind section 8(c) without ever mentioning any of these cases).

83. See Tentative Draft No. 1, supra note 24, § 4. The Reporters stated: "Given the very demanding standard that must be met before a case of defective design of a prescription drug or a medical device can be established, liability is likely to be imposed only under unusual circumstances." Id. § 4 cmt. f.

II. THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY SECTION 2(B) DOES NOT REFLECT CURRENT PRACTICE

A. What Does the Case Law Say?

The Restatement (Third) of Torts: Products Liability section 2(b) is not an accurate representation of the law. It is simply not a Restatement as we know it. The case law cited by the Reporters fails to support the design defect provision, section 2(b), in key ways. First, with regard to risk-utility balancing, the Reporters state, "An overwhelming majority of . . . jurisdictions rely on risk-utility balancing," which the Reporters construe to mean negligence. The cases cited by the Reporters, however, do not support risk-utility balancing as a subset of negligence. The judges in the majority of those cases believed they were applying strict liability. Indeed, one authority suggests that a majority of jurisdictions use a consumer expectations test, not a risk-utility balancing.

Second, the Reporters cite case law in twelve jurisdictions as proof that the reasonable alternative design should be a requirement, but a majority of jurisdictions that have considered the question have decided to the contrary. In fact, contrary holdings govern a total of fourteen jurisdictions. Some hold that a reasonable alternative design is simply one of many factors to

85. See Howard C. Klemme, Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability, 61 Tenn. L. Rev. 1173, 1175 (1994) (asserting that Tentative Draft No. 1 is "demonstrably defective" and that it requires "a more thoughtful, thorough analysis" of the relevant case holdings); Vargo, supra note 4, at 536-37 (arguing that while the Reporters "have expressed strong views on policy," their viewpoint "is not determinative of what the law is").

86. Tentative Draft No. 1, supra note 24, § 2 reporters' note cmt. c.

87. See id.; Vandall, supra note 5, at 169-73.

88. See Vandall, supra note 5, at 169.

89. See Roland F. Banks & Margaret O'Connor, Restating the Restatement (Second), Section 402A—Design Defect, 72 Or. L. Rev. 411, 413-14 (1993). But see Vargo, supra note 4, at 539 (stating that 10 states use the consumer expectations test).

90. See Tentative Draft No. 2, supra note 1, § 2, reporters' note cmt. c.

91. See Frank J. Vandall, The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement, 61 Tenn. L. Rev. 1407, 1413-18 (1994) (reviewing case law of Colorado, Kentucky, Nevada, New Hampshire, and Texas which dictates that reasonable alternative design is one of several factors to consider in determining if a design is defective).
consider in the risk-utility analysis,\(^2\) others shift the burden to the defendant manufacturer to prove that the product was not defective,\(^3\) and others do not require the plaintiff to present a reasonable alternative design.\(^4\) Professor John Vargo's two and one-half year study of the case law found that only three jurisdictions support section 2(b)'s thrust that a plaintiff must present evidence of a reasonable alternative design.\(^5\) In this 450-page study, Professor Vargo examined the cases of every state and concluded that only the common law of Alabama, Maine, and Michigan support the Reporters.\(^6\) Another five jurisdictions have adopted the reasonable alternative design requirement by statute.\(^7\) A total of eight jurisdictions hardly constitute a majority.

Third, the cases do not draw uniform distinctions between manufacturing defects and design defects, as the Reporters argued.\(^8\) "Cronin v. J.B.E. Olson Corp.,\(^9\) an important California case, stated that the distinction is not tenable;\(^10\) and, "Barker v. Lull Engineering, Co.,\(^11\) expressly refused to draw this

---


95. See Vargo, supra note 4, at 536.

96. See id.

97. See id. at 537. Illinois, Louisiana, Mississippi, Ohio, and Texas have enacted statutes imposing the alternative design requirement. See 7 ILL. COMP. STAT. 5/2-2104 (West 1995); LA. REV. STAT. ANN. § 9:2800.59 (West 1991); MISS. CODE ANN. § 11-1-63 (1996); OHIO REV. CODE ANN. § 2307.75 (Anderson 1995); TEX. CIV. PROC. & REM. CODE ANN. § 82.005 (West 1986).

98. See supra Part I.B.2.

99. 501 P.2d 1153, 1163 (Cal. 1972) (affirming verdict which held that a defective hasp allowed bread trays to slam forward in a truck).

100. See id. at 1163 (refusing to distinguish between manufacturing and design defects in order "to avoid providing . . . a battleground for clever counsel").

demarcation.\textsuperscript{102} Fourth, the jurisdictions split evenly on whether a seller should be charged with knowledge at the time of sale or at the time of trial.\textsuperscript{103}

\textbf{B. The Restatement (Third) Section 2(b) Design Defect May Be Rejected}

A few states will probably adopt section 2(b). Perhaps three—Alabama,\textsuperscript{104} Maine,\textsuperscript{105} and Michigan\textsuperscript{106}—already follow its principles via common law.\textsuperscript{107} Forty-four states have adopted some form of strict liability;\textsuperscript{108} only through policy analysis can they be convinced that they were wrong. Undoubtedly some states will adopt parts of the Tentative Draft. The Georgia Supreme Court used the Tentative Draft to help it define a risk-utility balancing test,\textsuperscript{109} although it rejected making the existence of a reasonable alternative design a requirement for a design defect claim.\textsuperscript{110} The New York Court of Appeals, in \textit{Denny v. Ford Motor Co.},\textsuperscript{111} demonstrated a different perspective on products liability. In \textit{Denny}, the plaintiff's Ford Bronco II rolled over when she slammed on her brakes to avoid hitting a deer. The plaintiff brought suit based both on strict liability and on breach of implied warranty of merchantability.\textsuperscript{112} Applying the risk-utility test, the court upheld the jury's finding that the

\begin{enumerate}
\item \textsuperscript{102} See \textit{id.} at 451–52.
\item \textsuperscript{103} See Vandall, supra note 5, at 179–82 (arguing that the Reporters have changed strict liability theory into negligence theory by opting for the date-of-sale standard). In \textit{Dart v. Wiebe Mfg. Inc.}, 709 P.2d 876 (Ariz. 1985), the court adopted the time of trial approach. \textit{Id.} at 881. Indeed, the Reporters cite four jurisdictions for the theory that the manufacturer is charged with knowledge at the time of trial: Hawaii, Massachusetts, Pennsylvania, and Washington. See Tentative Draft No. 1, supra note 24, § 2 cmt. i. Cf. Ellen Wertheimer, \textit{Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back}, 60 U. CIN. L. REV. 1183, 1203 & n.71 (1992) (stating that "[i]f knowledge of the product's danger is not imputed to the manufacturer, strict products liability becomes a negligence doctrine").
\item \textsuperscript{104} See \textit{Beech v. Outboard Marine Corp.}, 584 So. 2d 447, 450 (Ala. 1991).
\item \textsuperscript{105} See \textit{St. Germain v. Husqvarna Corp.}, 544 A.2d 1283, 1285 (Me. 1988).
\item \textsuperscript{107} See \textit{Vargo}, supra note 4, at 536.
\item \textsuperscript{108} See \textit{id.} at 553.
\item \textsuperscript{109} See \textit{Banks v. ICI Ams., Inc.}, 450 S.E.2d 671, 674 (Ga. 1994) ("[W]e see no reason to conclude definitively that the two theories merge in design defect cases.").
\item \textsuperscript{110} See \textit{id.} at 674–75.
\item \textsuperscript{111} 662 N.E.2d 730 (N.Y. 1995), \textit{reh'g denied}, 664 N.E.2d 1261 (N.Y. 1996).
\item \textsuperscript{112} See \textit{id.} at 733.
\end{enumerate}
plaintiff could not recover under strict liability because the product was not defective.\textsuperscript{113} The Denny court, however, upheld the trial court’s finding for the plaintiff on the breach of implied warranty of merchantability,\textsuperscript{114} applying the consumer expectations test.\textsuperscript{115} In other words, the court concluded that there was no liability for design defect because the Bronco II was suitably designed for use as an off-road vehicle, but still found liability under breach of implied warranty of merchantability because it was marketed as a conventional passenger vehicle and did not meet consumer expectations for such a vehicle.\textsuperscript{116} Denny indicates that some courts, provided the opportunity to adopt section 2(b) of the Tentative Draft, will reject it and continue to follow their own common law.

The Supreme Court of New Mexico has also rejected the Reporters’ approach in draft section 2(b). In Brooks v. Beech Aircraft Corp.,\textsuperscript{117} the plaintiff sued the aircraft manufacturer for the wrongful death of her husband.\textsuperscript{118} Plaintiff’s husband died flying a plane produced by Beech Aircraft. The plane was not designed or sold with a shoulder harness. The plaintiff claimed that the lack of harness enhanced her husband’s injury, causing his death.\textsuperscript{119} Alleging a design defect, she sued in negligence and strict liability.\textsuperscript{120} After reviewing the policies behind the imposition of strict liability,\textsuperscript{121} the court held that a plaintiff can bring a design defect claim in negligence and strict liability and may prove design defect without showing that the manufacturer did not meet industry standards or government regulations.\textsuperscript{122} The court thus rejected the Restatement’s notion that only negligence principles, and not strict liability, apply to design defects.\textsuperscript{123}

\textsuperscript{113} See id. at 735.
\textsuperscript{114} See id. at 739.
\textsuperscript{115} See id. at 736. The court said that the test for implied warranty is whether the product is merchantable and that consumer expectations are a factor of merchantability. See id.
\textsuperscript{116} See id. at 733.
\textsuperscript{117} 902 P.2d 54 (N.M. 1995).
\textsuperscript{118} See id. at 55.
\textsuperscript{119} See id. No government regulation or industry custom required the installation of shoulder harnesses at the time the defendant manufactured the aircraft. See id.
\textsuperscript{120} See id.
\textsuperscript{121} See id. at 57–58.
\textsuperscript{122} See id. at 55.
\textsuperscript{123} See id. at 62–63. The court stated:

In most instances a manufacturer is aware of the risks posed by any given design and of the availability of an alternative design. . . . [W]e disagree with the premise that fairness requires the rejection of strict liability in design cases . . . .
III. THE RESTATEMENT (THIRD) OF TORTS: 
PRODUCTS LIABILITY SECTION 2(B): A PRODUCT WITH A MANUFACTURING DEFECT THAT SHOULD BE REJECTED

A. Under the Restatement (Third), Fewer Suits Will Be Brought

What impact will section 2 have on suits by injured consumers? Many suits for design defect, based on radical negligence, will be lost because negligence is inherently harder to prove than strict liability.\(^{124}\) In addition, the courts likely will interpret the reasonable alternative design concept as a condition precedent to suit or as a requirement for liability.\(^{125}\) As a result, plaintiffs will not bring many small suits or will see their suits dismissed at the pretrial stage. For example, assume that the cost of an expert or model to prove a reasonable alternative design\(^{126}\) would be fifteen thousand dollars, and the expected verdict is forty thousand dollars. If courts apply section 2(b) in that jurisdiction, the prospective plaintiff is not likely to bring suit. Whatever the proof of reasonable alternative design might cost, this new expense will affect dramatically the plaintiff's attorney's decision regarding bringing suit. The plaintiffs in small cases will not be able to afford the cost of producing evidence of a reasonable alternative design, either in the form of a prototype or as qualified expert testimony.

\[\ldots\] [W]e believe that it is logical and consistent to take the same approach to design defects as to manufacturing flaws.

*Id.* at 63.

124. See *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162 (Cal. 1972) (noting that "the very purpose of our pioneering efforts in [strict liability] was to relieve the plaintiff from problems of proof inherent in pursuing negligence").

125. This result would mimic Florida, where the plaintiff in a medical malpractice action must attach a certification that a medical doctor is willing to testify that the defendant medical doctor was negligent. Without this memorandum, Florida courts dismiss the case. See Bill Wagner, Remarks at the Colloquy on Products Liability: Comprehensive Discussions on the *Restatement (Third) of Torts: Products Liability* 137–38 (Mar. 22, 1996) (transcript on file with the *University of Michigan Journal of Law Reform*).

126. See Tentative Draft No. 2, *supra* note 1, § 2 cmt. e (describing how either a prototype or qualified expert testimony would suffice for plaintiff to establish a prima facie case).
On the other hand, plaintiffs will continue to bring suits with expected large verdicts because the outcome will justify the expenditure necessary for the proof of an alternative design.\textsuperscript{127} Language in Tentative Draft No. 2 suggests that the drafters sought precisely this result: the elimination of smaller suits.\textsuperscript{128}

\section*{B. Institutionalizing Needless Ambiguity}

One of the foundational goals of the \textit{Restatement (Third)} is clarity.\textsuperscript{129} A glance at section 2, however, reveals that the second line of section 2(b) uses the word "foreseeable."\textsuperscript{130} By retaining the concept of foreseeable risk the reporters have guaranteed ambiguity under the \textit{Restatement (Third)} section 2(b). This ambiguity results in part from the fact that proximate cause, the most challenging and ambiguous concept in tort law, also rests on the concept of foreseeability.\textsuperscript{131} In addition, foreseeability is an open-ended, discretionary decision made by judges and by juries. Indeed, even the Reporters became confused over this concept. In the Preliminary Draft, they argued that it was not foreseeable that a person would stand on the back of a chair with horizontal bars.\textsuperscript{132} Soon thereafter, in the Council Draft, they reversed themselves and found that standing on the back of a ladderback chair was foreseeable.\textsuperscript{133}

To better achieve their goal of clarity, the Reporters ought to eliminate the concept of foreseeability. Remove it and erase it

\begin{itemize}
\item \textsuperscript{127} \textit{See} Vandall, \textit{supra} note 5, at 190.
\item \textsuperscript{128} \textit{Cf} Tentative Draft No. 2, \textit{supra} note 1, § 2 cmt. c (stating that the requirement of a reasonable alternative design "imposes an important practical constraint in design defect cases . . . [seller/manufacturer] liability is not justified unless that added safety [provided by plaintiff's alternative design] would have prevented or reduced the plaintiff's harm").
\item \textsuperscript{129} \textit{See} \textit{Restatement (Third) of Torts: Products Liability} (Preliminary Draft No. 1, 1993), at 3 [hereinafter Preliminary Draft No. 1]; \textit{see also} Tentative Draft No. 2, \textit{supra} note 1, § 2 cmt. c (stating that the "confusion brought about by these various definitions of 'state of the art' is unfortunate").
\item \textsuperscript{130} Tentative Draft No. 2, \textit{supra} note 1, § 2(b).
\item \textsuperscript{131} \textit{Compare In Re Arbitration Between Polemis and Furness, Withy & Co.,} 3 K.B. 560 (1921) (holding defendant liable for all "direct" harms associated with its act), \textit{with} Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) (finding defendant liable only to foreseeably endangered plaintiffs). For additional discussion, see Frank Vandall & Ellen Wertheimer, \textit{Torts, Cases, Materials, Problems} (forthcoming Mar. 1997).
\item \textsuperscript{132} \textit{See} Preliminary Draft No. 1, \textit{supra} note 129, § 101 cmt. l.
\item \textsuperscript{133} \textit{See} \textit{Restatement (Third) of Torts: Products Liability} § 101 cmt. p (Council Draft No. 1, 1993).
\end{itemize}
from the draft. They need to recognize that weighing factors, alone, suffices as a workable test. Because balancing is already an inherent part of section 2(b), the addition of foreseeability is overkill.134

CONCLUSION

The treatment of design defect in the Restatement (Third) is 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 garnered sufficient votes.

The ALI can adopt whatever proposal it wants. What needs to be made clear is that section 2(b) does not rest on case law or articulated policy. It is therefore merely opinion and, as such, entitled to as much respect as any other opinion. 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.135 Although Congress was unsuccessful in changing products liability law in 1996136 to reduce consumer rights,137 the ALI has succeeded.

Until an appropriate foundation is laid, jurisdictions will likely reject section 2(b) of the Tentative Draft. There are three reasons for this lack of acceptance: 1) the draft fails to address the policies that underlie traditional strict liability; 2) it is a woefully inadequate representation of the existing case law; and 3) it clearly favors manufacturers by eliminating strict liability, skirting negligence, and adopting a radical new theory with little attempt to balance the interests of the consumers. Perhaps a word of caution is in order: buildings constructed without a foundation often collapse.

134. See id.; Vandall, supra note 5, at 184–85. Indeed, Professor Oscar Gray suggests that the real problem with insurability is not clarity of the law, but rather changes in the law. See Oscar S. Gray, Reflections on the Historical Context of Section 402A, 10 TOURO L. REV. 75, 78 (1993).
137. See President’s Letter to Congressional Leaders on Product Liability Legislation, 32 WEEKLY COMP. PRES. DOC. 514 (Mar. 16, 1996).