

4-15-1997

## Inside the Restatement

Aaron D. Twerski

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Torts Commons](#)

---

### Recommended Citation

Aaron D. Twerski *Inside the Restatement*, 24 Pepp. L. Rev. Iss. 3 (1997)  
Available at: <https://digitalcommons.pepperdine.edu/plr/vol24/iss3/2>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# Inside the Restatement\*

Aaron D. Twerski\*\*

## I. INTRODUCTION

The American Law Institute Council recently approved the *Proposed Final Draft* (Preliminary Version 1996) of the *Restatement (Third) of Torts: Products Liability* and recommended its adoption at the Institute's annual meeting in May 1997.<sup>1</sup> As Reporters, James A. Henderson, Jr. and I<sup>2</sup> were responsible for drafting the black-letter law and comments, both of which have been the subject of considerable debate and controversy.

The purpose of this Article is to provide insight into the developments that have shaped our views in the drafting of the *Restatement*. I begin in Part II with an overview of the drafting process.<sup>3</sup> Part III continues with a discussion of the interplay between the doctrine of *res ipsa loquitur* and the requirement of a reasonable alternative design.<sup>4</sup> Part IV examines liability for a manifestly unreasonable design.<sup>5</sup> Several difficult policy issues that are often litigated in crashworthiness cases

---

\* Annotated Remarks of Professor Twerski's speech *Inside the Restatement*, given at the Association of American Law Schools Conference on Torts, Washington, D.C., June 5-8, 1996. Professor Henderson has reviewed this Article and is in general agreement, but the views expressed are those of the author alone.

\*\* Newell DeValpine Professor of Law, Brooklyn Law School; A.B., 1962, Beth Medrash Elyon Research Institute; B.S., 1970, University of Wisconsin-Milwaukee; J.D., 1965, Marquette University.

1. The American Law Institute (ALI) Council approved the draft on December 12, 1996. The vote contemplates approval of suggested changes to the section dealing with liability for the sale of used products by a committee to be appointed by the President of the ALI, Professor Charles Alan Wright, and the Director, Professor Geoffrey A. Hazard, Jr.

2. Professors Henderson and Twerski are the co-Reporters of the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Final Draft, Preliminary Version 1996).

3. See *infra* notes 9-16 and accompanying text.

4. See *infra* notes 17-26 and accompanying text.

5. See *infra* notes 27-32 and accompanying text.

are covered in Part V.<sup>6</sup> Prescription drug issues are examined in Part VI,<sup>7</sup> and the relationship between the *Uniform Commercial Code* (UCC) and the *Restatement (Third)* is discussed in Part VII.<sup>8</sup>

## II. THE DRAFTING PROCESS

Before beginning the discussion of the more substantive issues of this Article, I would like to provide an overview of the arduous process involved in bringing a Restatement from a nascent concept to a draft that receives approval from the Institute's membership. The drafting process is a dynamic one, involving three formal levels of intense discussion and deliberation.

The drafting of a Restatement section begins with the preparation by the Reporters of a preliminary draft of the black-letter law and the comments. The Institute provides various groups with a copy of the *Preliminary Draft*. These groups then meet with the Reporters to share their reactions to this initial draft. At the outset of a Restatement project, the Institute appoints a group of formal advisors who remain in close contact with the Reporters throughout the project.<sup>9</sup> These advisors typically meet for a two-day conference where they thoroughly discuss the *Preliminary Draft*. The Members Consultative Group<sup>10</sup> holds a second meeting, comprised of ALI members who, because of their interest in the project, have elected to become part of the formal consultative process. The Reporters then hold a third meeting with bar

---

6. See *infra* notes 33-44 and accompanying text.

7. See *infra* notes 45-54 and accompanying text.

8. See *infra* notes 55-61 and accompanying text.

9. Attorneys, distinguished academics, and judges comprise the group of advisors. The persons in this group are: Kenneth S. Abraham, University of Virginia School of Law; Sheila L. Birnbaum, Skadden, Arps, Slate, Meagher & Flom (New York); Roger C. Cramton, Cornell Law School; Oscar S. Gray, University of Maryland School of Law; Michael D. Green, University of Iowa College of Law; Robert L. Habush, Habush, Habush & Davis (Milwaukee); Robert E. Keeton, United States District Court for the District of Massachusetts; Carolyn Dineen King, United States Court of Appeals for the Fifth Circuit; Hans A. Linde, Oregon Supreme Court; John W. Martin, Jr., Vice President and General Counsel, Ford Motor Co. (Dearborn); Vincent L. McKusick, Retired Chief Justice, Supreme Judicial Court of Maine; Robert L. Rabin, Stanford Law School; Paul D. Rheingold, Paul D. Rheingold, P.C. (New York); Gary T. Schwartz, University of California at Los Angeles School of Law; Victor E. Schwartz, Crowell & Moring (Washington, D.C.); Marshall S. Shapo, Northwestern University School of Law; Michael Traynor, Sierra Club Legal Defense Fund (San Francisco); Bill Wagner, Wagner, Cunningham, Baughan & McLaughlin (Tampa); and Paul C. Weiler, Harvard University Law School.

10. For a current list of the Members Consultative Group, see RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY vii-xii (Proposed Final Draft, Preliminary Version 1996).

liaison groups. In drafting the *Restatement*, committees of the American Bar Association (ABA),<sup>11</sup> the Association of Trial Lawyers of America (ATLA),<sup>12</sup> the Defense Research and Trial Lawyers Association,<sup>13</sup> and the Product Liability Advisory Council (PLAC)<sup>14</sup> met with the Reporters to discuss the various preliminary drafts.

The Reporters consider comments from these various groups and then prepare a second draft, which they present to the ALI Council (Council Draft).<sup>15</sup> The ALI Council meets to discuss and finally vote on the draft. The Council may suggest revisions to the Council Draft. Only after receiving approval of the ALI Council do the Reporters undertake the preparation of a tentative draft for presentation to the full ALI membership at the annual May meeting for approval.

At the annual meeting, the members often present and vote on formal amendments to the tentative draft. Additionally, members frequently suggest language changes to the Reporters. Although the membership votes on the tentative draft, final approval of a Restatement project is contingent upon the approval of a proposed final draft at the annual meeting by the membership. Currently, Jim Henderson and I are working on the *Proposed Final Draft of the Restatement (Third) of Torts: Products Liability* that we will present to the membership at the annual meeting in May 1997.<sup>16</sup>

11. The ABA was established in 1878 and currently has over 375,000 members. ENCYCLOPEDIA OF ASSOCIATIONS 631-32 (31st ed. 1996). The Association was created for the purpose of promoting professional improvement, providing public services, improving civil and criminal justice administration, and increasing the public availability of legal services. *Id.*

12. Currently with 60,000 members, the ATLA was founded in 1946 for the purpose of protecting victims' rights, including those concerning product safety. *Id.* at 738.

13. The Defense Research and Trial Lawyers Association is an organization consisting of 19,000 members. *Id.* at 695.

14. The PLAC is a non-profit organization consisting of defense attorneys and manufacturers who submit amicus briefs on product liability cases. Judith Resnik, *Whose Judgment? Vacating Judgments, Preference for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1489 (1994).

15. The ALI Council, consisting of approximately 60 members from the bench, bar, and academia, is the executive body of the ALI. See RESTATEMENT (SECOND) OF TORTS: PRODUCTS LIABILITY iii-iv (1995) (listing current ALI Council members).

16. Three tentative drafts were presented to the membership: (1) the first tentative draft, see RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 1, 1994) [hereinafter Tentative Draft No. 1]; (2) the second tentative draft, see RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 2, 1995) [hereinafter Tentative Draft No. 2]; and (3) the third tentative draft, see RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 3, 1996) [hereinafter Tentative Draft

### III. RES IPSA LOQUITUR AND REASONABLE ALTERNATIVE DESIGN

One of the topics that profited from the intense deliberative process was the proper interplay between res ipsa loquitur and the prerequisite of a reasonable alternative design to establish liability in a design defect case.

It is undisputed that res ipsa loquitur applies to product liability cases.<sup>17</sup> *Tentative Draft No. 1* limited the application of the res ipsa doctrine to manufacturing defect cases. It provided:

§ 3. *Inference of Manufacturing Defect Without Proof of Specific Defect.* When a product fails to function as a reasonable person would expect it to function and causes harm under circumstances where it is more probable than not that the malfunction was caused by a manufacturing defect, the trier of fact may infer that such a defect caused the malfunction and plaintiff need not specify the nature of the defect.<sup>18</sup>

We argued that a plaintiff bringing a claim for an alleged design defect should not be allowed to use res ipsa to establish a prima facie case. The *Restatement's* test for design defect, based on a risk-utility analysis, requires that a plaintiff show that a reasonable alternative design of the defendant's product could have been adopted that would have avoided or reduced the foreseeable risks of harm posed by the defendant's product.<sup>19</sup> If a plaintiff utilizes res ipsa in a design defect case to establish a

---

No. 3]. The most recent draft is the preliminary version of the proposed final draft, dated October 18, 1996. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Final Draft, Preliminary Version, 1996) [hereinafter Proposed Final Draft]. This Article will, for the most part, employ the use of the second tentative draft unless the draft significantly differs from the proposed final draft, in which case a notation will be made.

17. See, e.g., *Dietz v. Waller*, 685 P.2d 744, 747-48 (Ariz. 1984) ("[N]o specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the accident was caused by a defect."); *Harrell Motors, Inc. v. Flanery*, 612 S.W.2d 727, 729 (Ark. 1981) ("[P]roof of the specific defect is not required when common experience tells us that the accident would not have occurred in the absence of a defect."); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1153 (Fla. Dist. Ct. App. 1981) ("It is immaterial that the plaintiffs failed to identify the specific cause of the malfunction since it is inferred that the malfunction itself . . . is evidence of the product's defective condition."); *Murray v. Farmers Ins. Co.*, 796 P.2d 101, 104 (Idaho 1990) ("[I]f the plaintiff cannot prove that a specific defect caused the accident, it will suffice if it can be shown that the product malfunctioned, and that there are no other reasonably likely causes of the malfunction.").

18. *Tentative Draft No. 1*, *supra* note 16, § 3.

19. The *Restatement (Third)* test for design defects reads: "[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 . . . and the omission of the alternative design renders the product not reasonably safe."

*Tentative Draft No. 2*, *supra* note 16, § 2(b).

defect, then a court would excuse the plaintiff from having to show a reasonable alternative design: the court infers the defect from the very occurrence of the incident that brought about the harm.

Second, the *Restatement* explicitly rejects the consumer expectations test<sup>20</sup> as a stand-alone test for a defect.<sup>21</sup> If plaintiffs use *res ipsa* in a design defect case, it could be argued that the consumer expectations test would come in through the back door. A plaintiff would essentially assert that the defendant's product was defective because the product caused injury under circumstances that disappointed a reasonable consumer's expectations. Thus, the use of *res ipsa* in a design defect case would partially reinvigorate the application of the consumer expectations test. Concerned with the possible internal inconsistencies that might arise if the *Restatement* were to recognize *res ipsa* in design defect cases, we originally took the position that it applied only to manufacturing defect cases.

In *Tentative Draft No. 2*, we relaxed the requirement of a reasonable alternative design in cases where the product fails to perform its mani-

20. Under the consumer expectations test, a product is defective if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS: PRODUCTS LIABILITY § 402A cmt. i (1965).

21. The *Restatement (Third)* explicitly rejects the consumer expectations test. See *Tentative Draft No. 2*, *supra* note 16, § 2 cmts. c, f. In addition to the reasons set forth in the comments, rejection of the consumer expectations test was further supported by our finding that the courts that had actually applied this test rarely did so without engaging in some risk-utility balancing. See, e.g., *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830, 834-35 (Iowa 1978). "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . ." Proof of unreasonableness involves a balancing process. On one side of this is the utility of the product and on the other is the risk of its use." *Id.* (quoting in part RESTATEMENT (SECOND) OF TORTS § 402A cmt. i); *Baughn v. Honda Motor Co.*, 727 P.2d 655, 660 (Wash. 1986) (stating that the consumer expectations test actually combines the consideration of consumer expectations with an analysis of the risk and utility inherent in a product's use).

The consumer expectations test has been rejected at both the high side and at the low side, meaning that the failure of a product to meet consumer expectations does not, in itself, make out a case for design defect, nor does the fact that a product meets consumer expectations serve as a defense to a design defect case. Such an application would reaffirm the patent danger rule, which the *Restatement (Third)* explicitly rejects. See *Tentative Draft No. 2*, *supra* note 16, § 2 cmt. c ("Subsection (b) does not recognize the obviousness of a design-related risk as precluding a finding of defectiveness."); see also *id.* § 2 cmt. f.

festly intended function, thus triggering the conclusion that a defect of some kind is the most probable explanation for the injury-causing event. Section 3 of *Tentative Draft No. 2* provided:

*§ 3. Circumstantial Evidence Supporting Inference of Product Defect*

It may be inferred that the harm sustained by the plaintiff was caused by a product defect, without proof of the specific nature of the defect, when:

(a) the incident resulting in the harm was of a kind that ordinarily would occur only as a result of product defect; and

(b) evidence in the particular case supports the conclusion that more probably than not:

(1) the cause of the harm was a product defect rather than other possible causes, including the conduct of the plaintiff and third persons; and

(2) the product defect existed at the time of sale or distribution.<sup>22</sup>

We base our continued support of this provision on the rationale that, in some design flaw cases, the flaw is so fatal that the design causes the product to malfunction in a manner identical to that of a manufacturing defect. For example, assume that the seat of a bicycle is designed in such a way that, during ordinary use, the seat disconnects with the body of the bicycle. When this occurs, the bicycle has malfunctioned in a way that is similar to the manner in which a bicycle with a serious manufacturing defect would fail. In theory, a plaintiff alleging defective design has the ability to demonstrate the fatal design shortcoming of the defendant's bicycles. If the design is fatally flawed, that design flaw is common to that bicycle model. However, because the incident is one that would ordinarily occur only as a result of a product defect, as a practical matter, the courts should allow a jury to infer a defect without requiring the plaintiff to show the type of defect involved.

Critics have argued that a plaintiff should specify a design defect whenever possible,<sup>23</sup> and that once we allow the plaintiff to infer a possible design defect based on *res ipsa*, courts will begin to countenance design defect cases predicated on a consumer expectations test.<sup>24</sup> This

---

22. Tentative Draft No. 2, *supra* note 16, § 3. The *Proposed Final Draft* differs from the second tentative draft in that the final draft replaces "the cause of the harm was a product defect rather than other possible causes, including the conduct of the plaintiff and third persons," *see id.*, with "the incident that harmed the plaintiff was the result of a product defect rather than being solely the result of other possible causes." *See Proposed Final Draft, supra* note 16, § 3.

23. *See, e.g., Jonathan M. Hoffman, Res Ipsa Loquitur and Indeterminate Product Defects: If They Speak For Themselves, What Are They Saying?*, 36 S. TEX. L. REV. 353, 378 (1995) ("Courts do and should prefer claims based on evidence of specific defects whenever possible.").

24. Some courts, in applying the section 3 principle, talk in terms of the product failing to meet consumer expectations. *See, e.g., Doyle v. White Metal Rolling & Stamping Corp.*, 618 N.E.2d 909, 916 (Ill. Ct. App. 1993).

[A] plaintiff may create an inference that a product was defective by direct

result, however, is unlikely to occur for several reasons. First, there is a vast difference between utilizing the consumer expectations test as a black-letter test for defect and using it in the context of *res ipsa*. The former is a clear-cut liability rule, the latter is an inference of defect that the defendant can rebut. Admittedly, *res ipsa* has an expansive quality to it. The line between its use as a liability rule and as a permissible inference is not razor sharp. However, that is to the good. Allowing some room for play is a healthy phenomenon. Ultimately, *res ipsa*, unlike the consumer expectations test, will not devour design defect litigation. *Res ipsa* is an old doctrine that has been used by the courts for over one hundred years.<sup>25</sup> It is a limited doctrine used sparingly by the courts, and its occasional use in clear-cut product failure cases will save plaintiffs the expense of high-tech litigation in cases where the inference of product defect is compelling.<sup>26</sup> It will not seriously compromise the rule

---

or circumstantial evidence that: (1) there was no abnormal use of the product; (2) . . . there was no reasonable secondary cause of the injury; and (3) . . . the product failed to perform in the manner reasonably to be expected in light of its nature and intended function.

*Id.*; *Mote v. Montgomery Ward & Co.*, 466 N.E.2d 593, 596 (Ill. Ct. App. 1984) (arguing it was reasonable for the jury to conclude that there was an absence of abnormal use and that the ladder failed to perform in the manner reasonably to be expected in light of its intended function); *Tulgetske v. R.D. Werner Co.*, 408 N.E.2d 492, 495 (Ill. Ct. App. 1980) (plaintiff can make out a strict liability claim by proving that the product failed to perform in a manner reasonably to be expected in light of its intended function); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1146 (Fla. Dist. Ct. App. 1981) (“[E]vidence of the nature of an accident itself may, under certain circumstances, give rise to a reasonable inference that the product was defective because the circumstances of the product’s failure may be such as to frustrate the ordinary consumer’s expectations of its continued performance.”); *Cincinnati Ins. Co. v. Volkswagen, Inc.*, 502 N.E.2d 651, 655 (Ohio Ct. App. 1985) (determining that in a fire case, “the reasonable expectations of a buyer of a motor vehicle is that the main electrical cable harness of such vehicle will not start fire”).

25. *See, e.g.*, *Byrne v. Boadle*, 159 Eng. Rep. 299, 300 (1863) (stating that “there are certain cases of which it may be said *res ipsa loquitur* . . . . In some cases the Courts have held that the mere fact of the accident having occurred is evidence of negligence.”).

26. Yet another reason supports the use of *res ipsa* without requiring the plaintiff to establish an inference of manufacturing defect. To require a plaintiff to establish an inference that the product failed because of a manufacturing defect would place the burden on the plaintiff to negate the possibility that a defective design was responsible for the product failure. Allowing a general inference of product defect when the classic requisites of *res ipsa* are met frees a plaintiff from carrying this onerous burden.



requiring proof of a reasonable alternative design in the classic design defect case.

#### IV. MANIFESTLY UNREASONABLE DESIGN AND REASONABLE ALTERNATIVE DESIGN

In *Tentative Draft No. 1*, the *Restatement* took the position that proof of a reasonable alternative design could not be dispensed with by alleging that a product was so dangerous that it should not have been marketed at all. The language in section 2, Comment c was uncompromising. It provided in part:

The requirement in § 2(b) that plaintiff show a reasonable alternative design applies even though the plaintiff alleges that the category of product sold by the defendant is sufficiently dangerous that it should not have been marketed at all. Thus common and widely distributed products such as alcoholic beverages, tobacco, small firearms, and above-ground swimming pools may be found to be defective only upon proof of the requisite conditions in § 2(a), (b), or (c). If such products are defectively manufactured or sold without reasonable warnings as to their danger when such warnings are appropriate, or if reasonable alternative designs could have been adopted, then liability under §§ 1 and 2 may attach. Absent proof of defect under those Sections, however, courts should not impose liability based on a conclusion that an entire product category should not be distributed in the first instance. Whether tort liability should be imposed for categories of products that are generally available and widely used and consumed, but are considered socially undesirable by some segments of society, should not be resolved by the courts. That issue is better suited to resolution by legislatures and administrative agencies, which can more appropriately consider whether distribution of such product categories should be prohibited.<sup>27</sup>

Few within the ALI argued that risk-utility balancing should be used to declare such products as cigarettes, alcohol, or handguns defective because the overall harm of these products to society outweighs their benefit. Considerable sympathy did exist, however, for allowing the possibility that some products might have such low social utility and present such great risk that a court might declare them defective without going through the formal process of proving a reasonable alternative design. At the suggestion of one of the advisors, we added a separate comment in *Tentative Draft No. 2*. Section 2, Comment d provided:

*d. Design defects: possibility of manifestly unreasonable design.* Several courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design. In large part the problem is one of how the range of relevant alternative designs is described. For example, a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children could be found to be defectively designed within the rule of § 2(b). Toy guns that do not produce injury would constitute reasonable alterna-

---

27. *Tentative Draft No. 1*, *supra* note 16, § 2 cmt. c.

tives to the dangerous toy. Thus, toy guns that project ping pong balls, soft gelatin pellets, or water might be found to be reasonable alternative designs to a toy gun that shoots hard pellets. However, if consideration is limited to toy guns that are capable of causing injury, then no reasonable alternative will, by hypothesis, be available. In that instance, the design feature that defines which alternatives are relevant—the capacity to injure—is precisely the feature on which the user places value and of which the plaintiff complains. If a court were to adopt this characterization of the product, it could conclude that liability should attach without proof of a reasonable alternative design. The court would condemn the product design as defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible utility that no rational adult, fully aware of the relevant facts, would choose to use or consume the product.<sup>28</sup>

The subsequent Reporters' Note makes clear that there is little judicial support for this comment.<sup>29</sup> Courts to date have been unwilling to impose category liability. Dicta in several opinions, however, indicates that some courts do not wish to have their hands tied and might consider imposing liability without proof of a reasonable alternative design for products such as needlessly dangerous toys.<sup>30</sup> Comment d opens the door to such liability. Some commentators express concern that courts will read Comment d expansively and will utilize it to bypass the reasonable alternative requirement that is the governing rule for establishing a classic design defect.<sup>31</sup> We believe that the well-established attitude of courts on the issue of category liability does not warrant such fears.<sup>32</sup> Comment d recognizes that in a very narrow band of cases courts may

28. Tentative Draft No. 2, *supra* note 16, § 2 cmt. d. Robert L. Habush, an advisor to the *Restatement*, suggested Comment d. *See supra* note 9.

29. *See* Tentative Draft No. 2, *supra* note 16, Reporters' Note to cmt. d.

30. *See, e.g.,* Armentrout v. FMC Corp., 842 P.2d 175, 185 n.11 (Colo. 1992) (en banc) (citing *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1328 n.5 (Or. 1978)); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 97 n.8 (Minn. 1987) ("Conceivably, rare cases may exist where the product may be judged unreasonably dangerous because it should be removed from the market rather than be redesigned."); *Wilson*, 577 P.2d 1322, 1328 n.5 (Or. 1978) (en banc) ("There might be cases in which the jury would be permitted to hold the defendant liable on account of a dangerous design feature even though no safer design was feasible (or there was no evidence of a safer practicable alternative).").

31. *See* Harvey M. Grossman, *Categorical Liability: Why the Gates Should Be Kept Closed*, 36 S. TEX. L. REV. 385 (1995) (explaining why categorical liability should not be embraced as part of the product liability system).

32. For an extensive discussion as to why courts have rejected category liability, see James A. Henderson Jr. & Aaron D. Twerski, *Closing the American Product Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991).

wish to bypass the formal requirements of section 2(b), and that when the stringent conditions set forth in Comment d are met, then the imposition of liability would not be inconsistent with the spirit of the *Restatement*.

## V. CRASHWORTHINESS: RESOLVING TWO DIFFICULT ISSUES

The *Restatement* recognizes a cause of action for increased harm due to product defect. *Tentative Draft No. 2*, section 11(a) sets forth the basic rule:

When a product is defective within the meaning of § 2 and the defect is a substantial factor in increasing the harm suffered by the plaintiff beyond the harm that would have resulted from nondefect-related causes, the product seller is subject to liability for the increased harm.<sup>33</sup>

Although there was no dissent within the ALI as to the basic rule,<sup>34</sup> two issues surrounding the application of the increased harm doctrine arose in the deliberations. The first issue concerns the problem that arises when a plaintiff's expert can opine only that the plaintiff's injuries would have been reduced had the product been defect-free, but is not able to testify as to the extent that the damages would have been reduced. The *Restatement* adopts the strong majority position known as the *Fox-Mitchell* rule.<sup>35</sup> This approach requires the plaintiff to prove that the product defect was a substantial factor in increasing the harm suffered by the plaintiff beyond the harm that would have resulted from other causes. Once the plaintiff meets that burden, then if there is no proof supporting what damages would have resulted in the absence of the

---

33. *Tentative Draft No. 2*, *supra* note 16, § 11(a).

34. In the early years of tort liability for defective product design, some courts refused to recognize a duty on the part of an auto manufacturer to design a reasonably crashworthy vehicle. *See, e.g., Evans v. General Motors Corp.*, 359 F.2d 822, 824-25 (7th Cir. 1966), *overruled by Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977). The overwhelming majority, however, followed the view of *Larsen v. General Motors Corp.*, 391 F.2d 495, 501-03 (8th Cir. 1968), which held that collisions are foreseeable and that manufacturers must design cars so that they are reasonably crashworthy. The *Larsen* rule now is the majority position of American courts. In *Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 784 (W. Va. Ct. App. 1991), the court reviewed the authority and found no support for *Evans*, which *Huff* overruled. For an exhaustive listing of the cases following *Larsen*, see Barry Levenstam & Daryl J. Lapp, *Plaintiff's Burden of Proving Enhanced Injury in Crashworthiness Cases: A Clash Worthy of Analysis*, 38 DEPAUL L. REV. 55, 61 n.33 (1989).

35. The rule receives its name from the two leading cases which adopted the doctrine at an early stage of the law's development. *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978) (applying Wyoming law); *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199 (8th Cir. 1982) (applying Minnesota law). In a lengthy Reporters' Note, we demonstrate that a strong majority of courts follow *Fox-Mitchell*. *See Tentative Draft No. 2*, *supra* note 16, Reporters' Note to cmt. d.

product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.

The defendants argue that, because the plaintiffs must establish a reasonable alternative design or a defect-free product through an expert in order to demonstrate that the defect was a substantial factor in increasing the plaintiff's harm, such an expert must perforce have an opinion as to what injuries could have been avoided had the product been defect-free.<sup>36</sup> The short answer to this argument is that cases continue to arise where litigants are not able to overcome the hurdle of establishing the extent of increased damages with sufficient particularity.

The defense bar's contention that the *Fox-Mitchell* rule does nothing but encourage slothful and sloppy trial preparation by plaintiffs' experts does not carry the day. Plaintiffs have a strong incentive to demonstrate to juries that a plaintiff's injuries were the direct result of the defendant's defective product. Experienced plaintiffs' counsel do not seek to rely on a trial strategy in which the plaintiff is only able to establish some increased harm and require the jury to fill in the rest based on a rule of law which says that when the plaintiffs prove some increased harm the jury must charge the defendant with all of the results of the accident. Such an approach, although theoretically correct, has little jury appeal. The plaintiffs enhance their chances to maximize their damages when they are able to adduce direct evidence on the tie-in between defect and injury. When plaintiffs rely on the *Fox-Mitchell* rule, they do so generally because more specific testimony is not available.

Defendants further argue that the *Fox-Mitchell* rule places them in an unenviable position. Defendants usually defend crashworthiness cases by denying the claim that the product was defective. In order to minimize damages when a plaintiff's expert asserts some increased harm, the *Fox-Mitchell* rule would require them to hypothesize that the product was indeed defective and then argue that, in any event, the defect did not cause all of the injuries that the plaintiff suffered. In short, the defendant would have to come forward with evidence minimizing the increased-harm injuries. Defendants contend that as a practical matter, they cannot try these cases in the alternative. Once defendants concede the possibility of defect, they seriously compromise their first-line defense.

---

36. See, e.g., Heather Fox Vickles & Michael E. Oldman, *Enhanced Injury Should Not Equal Enhanced Liability*, 36 S. TEX. L. REV. 417, 435-36 (1995) (discussing the expert witness' role in enhanced injury claims).

With full recognition that defense arguments on this matter have substance, we support the *Fox-Mitchell* rule. After all the arguments, we are left with a severely injured plaintiff whose expert points to product defect as a cause of increased injury. We should not encourage exaggerated and fabricated expert testimony to fill the requirements of an unyielding rule that requires the plaintiff to establish the extent of the increased harm. The plaintiff must establish that there has been some increased harm due to product defect. If that is all that the plaintiff is able to establish, then as between a plaintiff who has been harmed by the defendant's product defect but cannot quantify its exact parameters, and the defendant who caused some increased harm, the equities lie with the injured plaintiff.

The second difficult issue we confronted was the role of plaintiff fault in an increased harm case. In general, the *Restatement* had taken the position that plaintiff fault may reduce recovery in product liability cases.<sup>37</sup> This position is the strong majority view. A small number of courts are not willing to apply comparative fault in product liability cases.<sup>38</sup> Some courts take the position that when plaintiff fault results from the failure of a plaintiff to discover a product defect, comparative fault should not apply.<sup>39</sup> At the other extreme, some courts treat assumption of the risk as a total bar to recovery.<sup>40</sup> We eschewed recognizing separate categories of plaintiff fault and recommended that all forms of plaintiff conduct be considered under the comparative fault doctrine.

The issue of comparative fault in the crashworthiness setting presented the Reporters with a predicament. *Tentative Draft No. 1*, section 6, Comment f set forth the dilemma:

*f. Plaintiff's fault in cases of increased harm.* Section 7 sets forth the rules generally governing plaintiff fault in products liability litigation. It provides that all forms of plaintiff fault are to be considered by the trier of fact for the purposes of apportioning liability between the plaintiff and the product seller. The relative seriousness of plaintiff's fault should be taken into account by the trier of fact in allocating the appropriate percentages between the plaintiff and the product seller, but should not serve automatically either to absolve the plaintiff or to bar the plaintiff from recovery.

Cases of increased harm require a different rule. The requirement that an automobile be reasonably crashworthy, for example, aims to protect the plaintiff from increased harm arising from harm-causing uses of the product that defendant should have foreseen and protected against. An automobile, not otherwise defec-

---

37. See *Tentative Draft No. 1*, *supra* note 16, § 7 cmt. d.

38. See, e.g., *Lippard v. Houdaille Indus., Inc.*, 715 S.W.2d 491, 497 (Mo. 1986); *Bowling v. Heil Co.*, 511 N.E.2d 373, 380 (Ohio 1987).

39. See, e.g., *Murray v. Fairbanks Morse*, 610 F.2d 149, 161-62 n.14 (3d Cir. 1979) (applying Virgin Islands law); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 863 (W. Va. 1982).

40. See, e.g., *Fiske v. MacGregor Div.*, 464 A.2d 719, 728-29 (R.I. 1983).

tive, does not become defective because it fails to protect a plaintiff against harm-causing conduct where the risks exceed those that defendant could reasonably have protected against. However, if the risks created by plaintiff's conduct are within the range that justifies crashworthiness protection, plaintiff's conduct creates the very situation in which the plaintiff has a legitimate right to expect the automobile to provide reasonable protection. This is so regardless of the nature of the plaintiff's conduct. Accordingly, plaintiff's fault should not be taken into account in determining the defendant's liability for the defect-caused increase in harm.<sup>41</sup>

Comment f generated significant controversy. Those opposed to its adoption argued it would entitle a drunken driver, a speeding driver, or one who was driving under the influence of narcotics to undiminished recovery in a crashworthiness case. Furthermore, the heavy weight of authority was contrary to Comment f.<sup>42</sup> The membership introduced and approved a formal motion to reverse Comment f and hold all plaintiffs subject to the general rule of comparative fault.<sup>43</sup> *Tentative Draft No. 2*, section 11, Comment f now reflects the will of the membership on this issue. It provides:

*f. Plaintiff's fault in cases of increased harm.* Section 12 sets forth the general rules governing plaintiff's fault in products liability litigation. It provides that all forms of plaintiff's fault are relevant in apportioning liability between the plaintiff and the product seller. The seriousness of plaintiff's fault and the nature of the product defect are relevant in allocating the appropriate percentages between the plaintiff and the product seller, but should not serve automatically to absolve the plaintiff from fault or to bar the plaintiff from recovery. See § 12, Comment *d*. Accordingly, the contributory fault of the plaintiff in causing the accident that re-

41. *Tentative Draft No. 1*, *supra* note 16, § 6 cmt. f.

42. See *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1550-51 (10th Cir. 1989) ("[A]s to that portion of damages for which the original tortfeasors and the crashworthiness tortfeasors are concurrent tortfeasors, . . . the negligence of all of the tortfeasors, and of the Plaintiff, must be compared."); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 693-94 (Tenn. 1995) ("[T]he fault of the defendant and of the plaintiff should be compared with each other with respect to all damages and injuries for which the conduct of each party is a cause in fact and a proximate cause."); see also VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 11-5(a) (3d ed. 1994).

43. The following motion was adopted at the annual meeting of the ALI, May 17-20, 1994. The 1994 Addendum to *Tentative Draft No. 1* stated:

[A]ll forms of plaintiff fault are to be considered by a jury for the purposes of apportioning responsibility between the plaintiff and the product seller. The relative seriousness of plaintiff's fault should be taken into account by the trier of fact in allocating the appropriate percentages between the plaintiff and the product seller but should not serve automatically to absolve the plaintiff from fault or bar the plaintiff from recovery.

*Tentative Draft No. 1* (Addendum), *supra* note 16, § 6 cmt. f.

sulted in defect-related increased harm is relevant in apportioning damages between or among the parties, according to applicable apportionment law. In apportioning damages in these cases, it may be important that requiring a product to be designed reasonably to prevent increased harm aims to protect the plaintiff from harm when the plaintiff is in a position where self-protection is no longer possible.<sup>44</sup>

There is no easy way out of this quandary. We are satisfied that the Institute has come out the right way on this closely balanced question. Courts will be free to instruct juries that they may take into account the nature of the defect and that, in crashworthiness cases, the product should have protected occupants in the event of an accident whether the plaintiff or other parties caused the accident. Juries will have to weigh and balance the equities in assessing the percentage of responsibility that they assign to the various parties.

## VI. PRESCRIPTION DRUGS: LIABILITY FOR FAILURE TO WARN AND DEFECTIVE DESIGN

No discussion of the section dealing with prescription drugs can begin without some reference to section 402A, Comment k.<sup>45</sup> Cognoscenti know this comment dealing with unavoidably unsafe products to be enigmatic and unpenetrable. The treatment of prescription drugs in Comment k leaves the reader bewildered as to whether the rules for failure to warn or design defect differ from those that govern products in general. It appears that Dean Prosser, the Reporter for the *Restatement (Second)* who drafted this section, meant to carve out some separate status for prescription drugs, but what he intended remains a mystery. In the interim, the courts have decided hundreds of cases making reference to the famous Comment k. For all practical purposes, they might as well have been citing the Oracle at Delphi.

Section 8 of *Tentative Draft No. 2* seeks to clarify the ambiguities that have haunted this area of the law for almost three decades.<sup>46</sup> First, as to the action for failure to warn, the *Restatement* provides that a manufacturer is subject to liability for failing to provide "reasonable instructions or warnings regarding foreseeable risks of harm."<sup>47</sup> Liability does not devolve on a drug manufacturer for failing to warn about risks that were not foreseeable at the time of sale. Liability for failure to warn does not

---

44. Tentative Draft No. 2, *supra* note 16, § 11 cmt. f.

45. For a discussion of Comment k, see James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1536-45 (1992), and James A. Henderson, Jr. & Aaron D. Twerski, *Will A New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257, 1264-65 (1993).

46. See Tentative Draft No. 2, *supra* note 16, § 8.

47. *Id.*

differ markedly from that which governs product manufacturers in general.<sup>48</sup> The *Restatement* imposes a foreseeability requirement in section 2 for all failure to warn claims.<sup>49</sup> Case law supports this proposition with regard to products in general,<sup>50</sup> and many courts explicitly require foreseeability as a necessary predicate in any drug case.<sup>51</sup>

48. See *id.* § 2(c).

49. *Id.*

50. See *id.* Reporters' Notes to § 2 cmt. l.

51. See, e.g., *DeLuryea v. Winthrop Lab.*, 697 F.2d 222, 228-29 (8th Cir. 1983) (applying Arkansas law); *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 426 (2d Cir. 1969) (applying Connecticut law); *Gaston v. Hunter*, 588 P.2d 326, 340 (Ariz. Ct. App. 1978); *Woodill v. Parke Davis & Co.*, 374 N.E.2d 683, 686-87 (Ill. App. Ct. 1978), *aff'd*, 402 N.E.2d 194 (Ill. 1980); *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 548 (Ind. Ct. App. 1979); *Moore v. Vanderloo*, 386 N.W.2d 108, 116 (Iowa 1986); *Martin v. Hacker*, 628 N.E.2d 1308, 1311 (N.Y. 1993) ("The manufacturer's duty is to warn of all potential dangers in its prescription drugs that it knew, or, in the exercise of reasonable care, should have known to exist.")

In *Carlin v. Superior Court (Upjohn Co.)*, the court struggled with the question of whether strict liability should apply in a drug failure to warn case. *Carlin v. Superior Court (Upjohn Co.)*, 920 P.2d 1347, 1348-54 (Cal. 1996). Apparently all of the opinions agree that some negligence-type concepts are internalized in the law of strict liability. *Id.* at 1354, 1358. For example, all agree that liability will attach only for risks that were reasonably scientifically knowable. The *Restatement* agrees with this view. See Tentative Draft No. 2, *supra* note 16, § 8(d)(2) cmt. g. The conflict between the majority and the dissent deals not so much with the issue of reasonable foreseeability but rather with what standards are to govern whether a risk is of sufficient magnitude to disclose. Neither the majority nor the dissenting opinions cited the relevant section of the comments. Section 8, Comment d speaks to the problem in general. It provides:

*d. Liability for failure adequately to instruct or warn prescribing and other health care providers.* Failure to instruct or warn is the major basis of liability for manufacturers of prescription drugs and medical devices. When prescribing health care providers are adequately informed of the relevant benefits and risks associated with various prescription drugs and medical devices, they can reach appropriate decisions regarding which drug or device is best for specific patients. Sometimes warnings serve to inform health care providers of unavoidable risks that inhere in the drug or medical device. By definition, such a warning would not aid the health care provider in reducing the risk of injury to the patient by taking precautions in how the drug is administered or the medical device is used. However, warnings of unavoidable risks allow the health care provider, and thereby the patient, to make an informed choice whether to utilize the drug or medical device . . . .

Tentative Draft No. 2, *supra* note 16, § 8 cmt. d.

To the extent that the controversy concerns the magnitude of the risk that should trigger a duty to warn, I find little in the *Restatement* draft that addresses the question. Courts are, of course, free to interpret the *Restatement* as they see fit. This



It is in the area of drug design that the *Restatement (Third)* provides the clarity that has been so sorely lacking to date. Relying on Comment k, many courts have refused to recognize a cause of action based on defective drug design.<sup>62</sup> However, a significant number of courts have indicated a willingness to entertain a cause of action for defective drug design.<sup>63</sup> Yet, there has been considerable confusion as to what it takes to make out a case of defective design. On reflection, it became clear that if a given drug is the drug of choice for some class of patients, then courts should not find the drug designed defectively. Courts should not declare FDA approved drugs defective when a reasonable medical provider would prescribe the drug for any class of patients. Clearly, some drugs are inappropriate for some patients. It is the role of proper warnings to alert the medical profession about the dangers inherent in the use

---

Reporter can only point out that, in his view, the statements by the various opinions in *Carlton*, as to the position of the *Restatement* on the issue in conflict, are inapposite.

52. See *Brown v. Superior Court*, 751 P.2d 470, 482-83 (Cal. 1988); *Grundber v. Upjohn Co.*, 813 P.2d 89, 92-95 (Utah 1991).

53. See, e.g., *Brochu v. Ortho Pharm. Corp.*, 642 F.2d 652, 654-55 (1st Cir. 1981) (applying New Hampshire law and finding design defect cause of action proper when an available alternative design would have provided the same benefits with far less risk); *Rohrbough v. Wyeth Lab.*, 719 F. Supp. 470, 476-77 (N.D. W. Va. 1989) (stating that design of vaccine is subject to ordinary risk-utility analysis), *aff'd*, 916 F.2d 970 (4th Cir. 1990); *Kociemba v. G.D. Searle & Co.*, 695 F. Supp. 432, 433-35 (D. Minn. 1988) (finding single balancing test for reasonableness in determining liability for design defect); *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1193-98 (Alaska 1992) (discussing public policies supporting strict liability for defectively designed products which outweigh the policies protecting pharmaceutical companies); *West v. Searle & Co.*, 806 S.W.2d 608, 611-13 (Ark. 1991) (holding manufacturer may defend against design defect case by demonstrating through risk-utility analysis that product was unavoidably unsafe); *Adams v. G.D. Searle & Co.*, 576 So. 2d 728, 732-33 (Fla. Dist. Ct. App. 1991) (stating that protection from design defect liability extends only to products that pass risk-utility balancing test for reasonable design, not to all drugs and medical devices per se); *Toner v. Lederle Lab.*, 732 P.2d 297, 308-09 (Idaho 1987) (stating in dictum that protection from design claims will be given only on a case-by-case basis, that applicability of unavoidably unsafe exemption depends on whether the product's benefits outweigh the risks, and noting that Comment k by its terms does not give blanket immunity to all drugs); *Savina v. Sterling Drug, Inc.*, 795 P.2d 915, 924-26 (Kan. 1990) (holding that in failure to warn cases courts determine application of Comment k on a case-by-case basis); *Allison v. Merck & Co.*, 878 P.2d 948, 954 (Nev. 1994) (stating that strict liability is appropriate even when overall benefits of drug outweigh risks); *Feldman v. Lederle Lab.*, 479 A.2d 374, 382-83 (N.J. 1984) (stating in dictum that "[d]rugs, like any other products, may contain defects that could have been avoided by better manufacturing or design"); *Davila v. Bodelson*, 704 P.2d 1119, 1127-28 (N.M. Ct. App. 1985) (finding that unavoidably unsafe exemption from strict liability is appropriate when useful drug poses certain dangers even when properly prepared and labelled); *White v. Wyeth Lab.*, 533 N.E.2d 748, 752 (Ohio 1988) (arguing that prescription drugs do not per se fall within Comment k, but will be considered on a case-by-case basis).

of such drugs. The fear that some physicians will pay inadequate attention to a warning and misprescribe a drug does not serve as an adequate predicate to declare a drug defectively designed on the ground that allowing the drug on the market will result in significant risk to the general user population. Patients should not be forced to use alternative drugs of lesser efficacy merely because some physicians will be guilty of malpractice by failing to heed adequate warnings.

If the test for defective drug design is whether a reasonable health care provider, knowing the foreseeable risks and therapeutic benefits of the drug, would prescribe it for any class of patients, then one may legitimately ask whether the design cause of action adds anything to the traditional cause of action for failure to warn. A drug that has no legitimate use for any class of patients is most likely to be one that fails to adequately warn health care providers of the risks attendant to its use. Presumably, if the drug manufacturer truly warned about the attendant risks, the physicians would not prescribe the drug when other drugs of lesser risk would serve the same purpose.

One need not quarrel with the observation that defectively designed drugs under the *Restatement* definition will most likely be drugs with inadequate warnings, yet still insist that the drug design cause of action has a role to play. Plaintiffs routinely bring actions based on both defective design and inadequate warning. When a cause of action is legitimate and has independent veracity, there is no reason to deprive the plaintiff of the claim. Furthermore, in a world in which the common law doctrine of joint and several liability has been seriously compromised by both legislative and judicial reform, fault allocation and ultimate recovery may vary greatly depending on whether the cause of action against the drug manufacturer is based on failure to warn, defective design, or both. As between a physician who has committed malpractice in prescribing a drug and a drug manufacturer who has been found liable for manufacturing a defective drug, the fault allocation may be weighted more heavily against a drug manufacturer if, in addition to inadequate warning, a drug is found to be defectively designed.

Finally, as my co-Reporter, Jim Henderson, has demonstrated in a recent article,<sup>54</sup> the case law supporting the *Restatement* position is more imposing than we first thought. Courts that have struggled with the

---

54. James A. Henderson, Jr., *Prescription Drug Design Liability Under the Proposed Restatement (Third) of Torts: A Reporter's Perspective*, 48 RUTGERS L. REV. 471 (1996).

problem of drug design have come to recognize the good common sense of the position that a drug should be declared defective in design only if doctors should not prescribe the drug for any class of patients. Once the drug has a legitimate niche, the manufacturer should be held liable only for failure to warn.

## VII. THE RELATIONSHIP BETWEEN THE RESTATEMENT (THIRD) AND THE UCC

The *Restatement (Third)* and the UCC differ in their respective definitions of defect. The *Restatement* employs a risk-utility test;<sup>55</sup> under Article 2 of the UCC, the consumer expectations test governs.<sup>56</sup> Given this difference, the question arises as to whether the UCC definition of defect in an action for breach of the implied warranty of merchantability will govern where a plaintiff sues for personal injury or property damage.

In *Denny v. Ford Motor Co.*,<sup>57</sup> the New York Court of Appeals affirmed risk-utility balancing for actions based in tort. However, it held that the consumer expectations test would apply in actions brought under the UCC, reasoning that

as long as that legislative source of authority exists, we are not free to merge the warranty cause of action with its tort-based sibling regardless of whether, as a matter of policy, *the contract-based warranty claim may fairly be regarded as a historical relic that no longer has any independent substantive value.*<sup>58</sup>

The *Restatement* takes the position that, when a plaintiff brings suit for personal injury or property damage, the tort definition of defect should govern liability.<sup>59</sup> The *Restatement* rejected the consumer expectations test as an independent test for defect.<sup>60</sup> To allow a plaintiff to bring an action based on consumer expectations by merely changing the label on the case is inconsistent with the goal of uniformity which underlies the *Restatement (Third)* and all ALI projects. It appears unseemly for the ALI to proclaim in its *Restatement* project that claims for person-

---

55. See Tentative Draft No. 2, *supra* note 16, § 2 cmt. c.

56. U.C.C. § 2-314(2)(c) (1989). Courts have interpreted section 2-314(2)(c), which states that "[g]oods to be merchantable must be . . . fit for the ordinary purposes for which such goods are used," to be synonymous with a consumer expectations test. See *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 454 (Cal. 1978); *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 736 n.4 (N.Y. 1995).

57. *Denny*, 662 N.E.2d at 736-39.

58. *Id.* at 736 (emphasis added).

59. Proposed Final Draft, *supra* note 16, § 2 cmt. n provides: "This Restatement contemplates that a well-coordinated body of law dealing with liability for harm to persons or property arising out of the sale of defective products would adopt the tort definition of defect whether the action is characterized as one sounding in tort or implied warranty of merchantability." *Id.*

60. See *supra* notes 20-21 and accompanying text.

al injury or property damage should not be grounded by a consumer expectations test and then, in its UCC project, to proclaim that the consumer expectations test governs the selfsame action for personal injury and property damage. However, the problem is even more profound. If a state were to disagree with the *Restatement* and seek to impose a different test for defect under its products liability law, that test should govern personal injury and property damage cases. The UCC should not control the courts by defining defect for tort law purposes.

The *Denny* case demonstrates the mischief that occurs when the legislature forces the UCC definition on a court. After thirty years of products liability litigation, the legislature should not force a court to adopt a definition of defect that it characterizes as an "historical relic."<sup>61</sup> Article 2 of the UCC is currently under revision. It should make clear that its definition of defect for commercial law purposes does not necessarily govern in cases of personal injury and property damage. Courts should be free to develop the appropriate definition of defect under products liability law and should not have their hands tied by the drafters of the Code. Of course, as a Reporter for the *Restatement*, I would hope that courts would adopt the *Restatement* definition. In any event, the tail should not wag the dog. The Code cannot and does not undertake to work out the nuances of the law of defect. Courts charged with the responsibility of doing so should be free to use tort principles to decide tort cases.

### VIII. CONCLUSION

I have attempted to provide a glimpse into the process of writing the *Restatement*. My co-Reporter, Jim Henderson, and I have sought to keep an open door to all who endeavored to comment upon and improve the quality of the drafts both substantively and aesthetically. When arguments persuaded us, we recommended changes from our original drafts. When we believed that our original position was principled and correct, we remained steadfast. Throughout, as a result of informed and lively critique, the drafts became more sophisticated and nuanced. The forum provided by the ALI for reasoned deliberation served this project well. It called on the Reporters to be both teachers and students of the law. It was for this writer the quintessential academic experience.

---

61. See *Denny*, 622 N.E.2d at 736.

