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# The Politics of the Products Liability Restatement

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# THE POLITICS OF THE PRODUCTS LIABILITY RESTATEMENT

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Some critics of the Restatement (Third) of Torts: Products Liability ("Products Restatement") have argued that the project was highly politicized, with the Reporters acting as brokers negotiating compromises among powerful interests.<sup>1</sup> Having served as the Reporters in question, we would like to set the record straight. In no meaningful sense of the term did we "play politics" in our roles as drafters of the new Restatement. As for the criteria (possibly "political") upon which we were selected in the beginning, we cannot speak because obviously we were not involved in our own selection. Nor can we speak to the motivations (possibly "political?") behind the individual votes cast at the Annual Meetings of The American Law Institute before whom we brought various proposals over a five-year period. However, we can speak from firsthand experience regarding external political pressures brought to bear on us in formulating our drafts.

If the term "political" is defined as used in common parlance, then we categorically assert that external political pressures played no role in influencing our participation in the Products Restatement. At no time did any individual or group threaten to withhold support or approval unless we succumbed to making a change with which we disagreed as to

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1. See, e.g., Marshall S. Shapo, *A New Legislation: Remarks on the Draft Restatement of Products Liability*, 30 U. MICH. J.L. REFORM 215, 217 (1997) [hereinafter Shapo, *A New Legislation*]; Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 645-46 (1995) [hereinafter Shapo, *The ALI Restatement Project*].

the substantive merits. Stated differently, we sincerely believe that the new Restatement is as good as we were capable of making it. We are human and surmise it is not perfect. But we also know it is not a "political" document as the phrase is commonly used. If this assertion appears extreme, so be it. It is the truth, as we know it.

Of course, if the term "politics" is broadened to include the art of opening up the process to persons with varying views of public policy, engaging them in dialogue, and responding on the merits to their criticisms and suggestions regarding what the law is and should be, we plead guilty to having "played politics" in the first degree. From the very outset of the project the ALI encouraged the broadest possible participation from all constituencies.<sup>2</sup> We received lengthy submissions from plaintiff and defense groups on a host of issues. Academicians made their voices heard both directly and in the law reviews<sup>3</sup> and often

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2. For every project, the ALI appoints a group of formal Advisers who review all preliminary drafts before the drafts are submitted to the ALI Council for approval. Three Advisers were nationally known plaintiffs' counsel: Robert L. Habush, Paul D. Rheingold, and Bill Wagner. Their counterparts on the defense side are equally prominent: Sheila L. Birnbaum, John W. Martin, Jr., and Victor E. Schwartz. The other thirteen members of the Advisers were law professors and members of the judiciary. They brought to the project widely differing views and perspectives on the law of products liability. The Reporters met with the Advisers for two-day sessions each year of the project. In addition, approximately 300 ALI members joined the Members Consultative Group. This group also received all preliminary drafts and met with the Reporters once each year. Finally, representatives from the American Bar Association ("ABA"), the Association of Trial Lawyers of America ("ATLA"), the Defense Research Institute ("DRI"), and the Product Liability Advisory Council ("PLAC") also received preliminary drafts and met with the Reporters to discuss them each year. The Reporters, after receiving comments and suggestions from all of these groups, prepared drafts that were then presented to the ALI Council. The Council is the executive body of the ALI and consists of approximately sixty members drawn from the bench, bar, and academia. The Council discussed and critiqued the drafts. After formal approval of a draft by the Council, the Reporters prepared a tentative draft that was distributed to the entire membership and was then discussed and voted on at the Annual Meeting of the ALI in May of each year. Thus, each draft was subject to intense scrutiny by constituencies that represented almost all conceivable interests.

3. See, e.g., Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663 (1995); Philip H. Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043 (1994) (arguing that imposition of unduly burdensome proof requirements in the Products Liability Restatement are contrary to the notion of strict liability and hinders access to the courtroom for meritorious claimants); Harvey M. Grossman, *Categorical Liability: Why the Gates Should Be Kept Closed*, 36 S. TEX. L. REV. 385 (1995) (arguing that strict products liability should not be imposed upon an entire class of products without an independent determination of defect); Theodore S. Jankowski, *Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Warning Decisions*, 36 S. TEX. L. REV. 283 (1995) (arguing that a risk-utility test should be the only measure of determining design and warning defects); 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 (1994) (disagreeing with the Products Restatement's usage of the risk-utility test as the sole test to prove defect); Joseph W. Little, *The Place of Consumer Expectations in Product Strict Liability Actions for Defectively Designed Products*, 61 TENN. L. REV. 1189 (1994)

avored us with early drafts of their articles. Judges wrote to us not only suggesting substantive changes but also requesting clarifications as to whether our pronouncements were to be interpreted as rules of law or were merely factors that would be considered by them in deciding whether a case merited submission to a jury. Needless to say, all of these submissions reflected "political" views in this broader, benign sense. One could hardly imagine drafting a workable Restatement without involving "political" views in the broader sense of the term.

When suggestions were made and we thought them meritorious, we would often share them with some of the Advisers to the project or with ALI members who had spoken on the subject at the ALI Annual Meeting or at Members Consultative Group meetings. On occasion, sharp disagreement arose among those whose advice we sought. When we perceived that a substantive suggestion was correct but that the suggested language was either too harsh or possibly misleading, we sought to cure the deficiency by careful drafting. The costs to us, as Reporters, of involving informed members in the deliberative process were substantial. Bringing as many people into the process as possible exacted an enormous toll in time and effort. But it was time and effort well spent. As the drafts evolved, they became more nuanced and sophisticated. We tried to take heed of even the harshest of our critics. The impact of their

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(arguing that the consumer expectations test should not be completely abandoned in the definitions of defective design and defective warning); David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661 (1997) (developing a new "cost-benefit micro-balancing" test for assessing design defects); Jerry J. Phillips, *Achilles' Heel*, 61 TENN. L. REV. 1265 (1994) (arguing that the ALI should seek to refine the notion of strict liability in defect cases rather than reject it completely); Shapo, *A New Legislation*, *supra* note 1, at 215; Shapo, *The ALI Restatement Project*, *supra* note 1, at 631; Frank J. Vandall, *Constructing a Roof Before the Foundation Is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261, 279 (1997) [hereinafter Vandall, *Constructing a Roof*] (concluding that "[t]he treatment of design defect in the *Restatement (Third)* is a political statement" and that it fails to properly assess present case law); Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407 (1994) [hereinafter Vandall, *The Reasonable Alternative Design Requirement*] (arguing that the reasonable alternative design requirement in defect cases is not supported by a majority of the case law and would drastically limit suits by injured consumers); John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 557 (1996) (analyzing each state's common law, statutes and pattern jury instructions on design defect and concluding that "the strict liability consumer expectations test is utilized over six times more often than the ALI [risk-utility] rule"); Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1454 (1994) (concluding that the Products Restatement's imposition of a reasonable alternative design requirement in defect cases is "neither intellectually justifiable, morally acceptable, or economically sound").

arguments can be found throughout the Products Restatement.

Interestingly enough, the most significant modifications to the Products Restatement drafts occurred with regard to the most controversial sections of the Products Restatement. For example, the earliest draft of the Products Restatement provided that a plaintiff, in order to make out a case of defective design, must prove the availability of a "reasonable alternative design" that would have reduced or avoided harm to the plaintiff.<sup>4</sup> Powerful policy arguments as to why that should *not* be an inexorable rule were made by the plaintiffs' bar and some members of the legal academy.<sup>5</sup> Over time we became convinced that several important exceptions to that rule should be set forth, and they were embodied in the final draft.<sup>6</sup> We were under no illusions that pro-

4. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (Tentative Draft No. 1, 1994) (setting forth the "reasonable alternative design" test as the exclusive test for design defect).

5. The strongest advocates for a more inclusive definition of design defect were Robert L. Habush, Bill Wagner, and Professor Marshall S. Shapo. The views of Philip H. Corboy and Professor Marshall Shapo are detailed in the articles set forth, *supra* note 3.

6. The two most significant exceptions to the "reasonable alternative design" requirement are set forth in section 2, comment e and section 3. Section 2, comment e provides:

*e. 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 Subsection (b). Toy guns unlikely to cause injury would constitute reasonable alternatives 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 the realism of the hard-pellet gun, and thus its capacity to cause injury, is sufficiently important to those who purchase and use such products to justify the court's limiting consideration to toy guns that achieve realism by shooting hard pellets, then no reasonable alternative will, by hypothesis, be available. In that instance, the design feature that defines which alternatives are relevant—the realism of the hard-pellet gun and thus its 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, and deem the capacity to cause injury an egregiously unacceptable quality in a toy for use by children, it could conclude that liability should attach without proof of a reasonable alternative design. The court would declare the product design to be defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product.

RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. e (1998).

Section 3 provides:

§ 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 existing at the time of sale or distribution, without proof of a specific defect,

viding for these exceptions would lead to the organized plaintiffs' bar approving of the design standard, even as modified. We embraced the exceptions not out of considerations of political expediency, but because we believed them to be right. Indeed, an argument can be made that these changes came at considerable political cost—the vocal disaffection of some defense-oriented critics generated by these exceptions was, and remains, quite substantial.<sup>7</sup>

In short, we aimed at building consensus whenever our research supported doing so. But in a number of instances, we made significant substantive changes even when it was clear to us that we would thereby curry favor with no one, and even when we were sure that the change would upset powerful interests on one side or another. Ultimately, our endorsement of those changes carried the day with a substantial majority of the ALI membership voting at the Annual Meeting in May 1997, not because they pleased constituencies, but because they rang true. If we accomplished a measure of success, it came about not because we were politically adept, but because we involved the body politic at every

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when the incident that harmed the plaintiff:

(a) was of a kind that ordinarily occurs as a result of product defect; and

(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

*Id.* § 3.

Comment b to section 3 makes it clear that under appropriate circumstances, one may draw an inference of design defect without proof of a "reasonable alternative design":

Although the rules in this Section . . . most often apply to manufacturing defects, occasionally a product design causes the product to malfunction in a manner identical to that which would ordinarily be caused by a manufacturing defect. Thus, an aircraft may inadvertently be designed in such a way that, in new condition and while flying within its intended performance parameters, the wings suddenly and unexpectedly fall off, causing harm. In theory, of course, the plaintiff in such a case would be able to show how other units in the same production line were designed, leading to a showing of a reasonable alternative design under § 2(b). As a practical matter, however, when the incident involving the aircraft is one that ordinarily occurs as a result of product defect, and evidence in the particular case establishes that the harm was not solely the result of causes other than product defect existing at time of sale, it should not be necessary for the plaintiff to incur the cost of proving whether the failure resulted from a manufacturing defect or from a defect in the design of the product. Section 3 allows the trier of fact to draw the inference that the product was defective whether due to a manufacturing defect or a design defect. Under those circumstances, the plaintiff need not specify the type of defect responsible for the product malfunction.

*Id.* § 3 cmt. b.

7. See, e.g., Grossman, *supra* note 3; 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 (1995) (suggesting that the "res ipsa" exception in section 3 of the Products Restatement can co-exist with the risk-utility test and reasonable alternative design requirement of section 2 only if section 3 is understood to define an entirely separate class of indeterminate defects).

step of the process. This involvement assured not only a fair hearing for opposing views, but also an avenue for modification and amendment of the drafts.

## I. THE "POLITICS" OF REASONABLE ALTERNATIVE DESIGN

### A. *The Triumph of Risk Utility over Consumer Expectations*

From the outset it was clear that in formulating a rule for design defect we had to choose between some form of risk-utility test and a test based on the disappointment of consumer expectations. For all practical purposes these were the tests for defective design reflected in the decided case law.<sup>8</sup> Admittedly, several jurisdictions had articulated a two-pronged test for defect that allows a plaintiff to prevail if the product design fails either the risk-utility or the consumer expectations test.<sup>9</sup> However, the overwhelming majority of jurisdictions eschews this "either-or" approach.<sup>10</sup> Our examination of the case law<sup>11</sup> and the writ-

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8. For cases supporting risk-utility balancing as the standard for design defect, see *infra* note 11. Only a small minority of states recognizes the consumer expectations test as a stand-alone test for design defect. See, e.g., *Rahmig v. Mosely Mach. Co.*, 412 N.W.2d 56 (Neb. 1987); *Woods v. Fruehauf Trailer Corp.*, 765 P.2d 770 (Okla. 1988).

9. See, e.g., *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979); *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978); *Ontai v. Straub Clinic & Hosp. Inc.*, 659 P.2d 734 (Haw. 1983).

10. The jurisdictions set forth, *supra* note 9, are the only ones to espouse this two-pronged approach to defect. All others that have spoken either embrace the risk-utility test or the consumer expectations test. See, e.g., *Lester v. Magic Chef, Inc.*, 641 P.2d 353 (Kan. 1982) (affirming the trial court's refusal to instruct the jury that defect in design may be found if it satisfies either the risk-utility or consumer expectations test).

11. The case law supporting risk-utility balancing as the standard for design defect is overwhelming. See, e.g., *Townsend v. General Motors Corp.*, 642 So. 2d 411, 418 (Ala. 1994); *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1191 (Ala. 1985) (requiring both a reasonable alternative design and that the "utility of the alternative design outweighed the utility of the design actually used"); *Armentrout v. FMC Corp.*, 842 P.2d 175, 182 (Colo. 1992) (en banc) (affirming the trial court's jury instruction which stated, "[a] product is unreasonably dangerous because of a defect in its design if it creates a risk of harm to persons which is not outweighed by the benefits to be achieved from such design"); *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 535 (Del. 1998) (holding that a reasonable alternative design is necessary to prove a design defect in a crashworthiness case); *Warner Freuhauf Trailer Co. v. Boston*, 654 A.2d 1272, 1276 (D.C. 1995) (holding that "the plaintiff must 'show the risks, costs and benefits of the product in question and alternative designs,' and 'that the magnitude of the danger from the product outweighed the costs of avoiding the danger'" (quoting *Hull v. Eaton Corp.*, 825 F.2d 448, 453-54 (D.C. Cir. 1987))); *Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 331 (Fla. 1983) (opining that the term "unreasonably dangerous" describes more accurately a manufacturer's or supplier's liability by balancing "the likelihood and gravity of potential injury" versus the product's utility, the availability of "safer products to meet the same need, the obviousness of the danger, public knowledge and expectation of the danger, the adequacy of instructions and warnings on safe use, and the abil-

ity to eliminate or minimize the danger without seriously impairing the product or making it unduly expensive"); *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 673 (Ga. 1994) (stating that the court's review of case law and treatises "revealed a general consensus regarding the utilization in design defect cases of a balancing test whereby the risks inherent in a product design are weighed against the utility or benefit derived from the product"); *Guiggey v. Bombardier*, 615 A.2d 1169, 1172 (Me. 1992) (determining whether a product is defectively dangerous by balancing "the danger presented by the product against its utility"); *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 539 A.2d 701, 706 (Md. Ct. Spec. App. 1988) (finding the risk-utility test "the only appropriate test to be applied in the instant case because it allows 'full consideration of the relative merits of a product design'" (quoting Edward S. Digges, Jr. & John G. Billmyre, *Product Liability in Maryland: Traditional and Emerging Theories of Recovery and Defense*, 16 U. BALT. L. REV. 1, 16 (1986))); *Caron v. General Motors Corp.*, 643 N.E.2d 471, 476 (Mass. App. Ct. 1994) (noting that jury must engage in a risk-utility analysis in defective design cases); *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207, 213 (Minn. 1982) (rejecting the latent-patent danger rule in design defect cases and substituting a "reasonable care" balancing test); *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 254 (Miss. 1993) (noting that a plaintiff may "recover for any injury resulting from" a product if she can prove that "the utility of the product is outweighed by the danger that the product creates"); *Rix v. General Motors Corp.*, 723 P.2d 195, 201 (Mont. 1986) (finding that a jury must engage in risk-utility balancing in design defect cases); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 846 (N.H. 1978) (stating that when "weighing utility and desirability against danger, courts should also consider whether the risk of danger could have been reduced without significant impact on product effectiveness and manufacturing cost"); *Smith v. Keller Ladder Co.*, 645 A.2d 1269, 1270 (N.J. Super. Ct. App. Div. 1994) (stating that determining "whether a product has been defectively designed ordinarily involves a 'risk-utility analysis'"); *Carrel v. Allied Prods. Corp.*, No. 9-94-24, 1995 WL 423388, at \*4 (Ohio Ct. App. July 11, 1995) (noting that under the statutory risk-utility test a plaintiff must prove "that the product design is in a defective condition because the benefits of the challenged design do not outweigh the risks inherent in such design" (quoting *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d 489, 494 n.5 (1988), *rev'd on other grounds*, 677 N.E.2d 795 (Ohio 1997)); *Hoyt v. Vitek, Inc.*, 894 P.2d 1225, 1231 (Or. Ct. App. 1995) ("Whether a product is defectively designed . . . is a question . . . for the court to consider by balancing the product's utility against the magnitude of the risk associated with its use." (citing *Roach v. Kononen/Ford Motor Co.*, 525 P.2d 125 (Or. 1974)); *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 682-83 (W. Va. 1979) (testing allegedly defective products by a risk-utility balancing test).

Some states have enacted statutes requiring a risk-utility balancing approach for design defect claims. *See, e.g.*, LA. REV. STAT. ANN. § 9:2800.56 (West 1997) (adopting a risk-utility standard and providing that a product is designed unreasonably dangerously if, "at the time the product left its manufacturer's control," a safer, alternative design for the product existed and the "likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product"); MISS. CODE ANN. § 11-1-63(b) (Supp. 1997) (providing that a product is not defectively designed if claimant's harm "was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability"); OHIO REV. CODE ANN. § 2307.75(E) (Anderson Supp. 1996) (providing that a product is not defectively designed if a plaintiff's injury resulted from "an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability"); TEX. CIV. PRAC. & REM. CODE ANN. § 82.005 (West 1997) (providing that plaintiff must prove the existence of a "safer alternative design" that "would have prevented or significantly reduced" the claimant's risk of injury "without substantially impairing the product's utility").



ings of leading academic commentators<sup>12</sup> convince us that the risk-utility approach not only represents the strong majority rule but also constitutes the only sensible method for establishing a standard for defective design. The consumer expectations test is not only hopelessly open-ended but also potentially self-contradictory. Basing liability on defective product design is not a sport for dullards. If one attacks a product design as defective, a manufacturer seeking to correct the defect must redesign the product. Frequently the redesign, in eliminating the original risks, introduces other risks of roughly equal magnitude. Consumers injured by either of the designs can justifiably argue that their expectations were disappointed. If both claims are recognized as valid, a manufacturer cannot rationally respond to the demands of the law, short of removing its product from the market. That is not the law, nor should it be.

If, indeed, risk-utility balancing is the strong majority view and is so logically compelling, how is it that courts often make reference to the consumer expectations test in defective design cases? As we searched the reported cases, we discovered that courts invoke consumer expectations in three very distinct ways. Some courts use the test as a clumsy

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12. See, e.g., WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 149, 644 (4th ed. 1971) (defining the standard of conduct in negligence as a balancing of "the risk, . . . probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued" and writing that in the area of design defect a manufacturer's liability appears to be "essentially a matter of negligence"); David A. Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 359 (1974) (arguing that "courts should consider, in light of the facts of the particular case, the merits of the policies underlying strict liability and balance [those] considerations against countervailing factors"); James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1532-34 (1992) (analyzing design defect cases and concluding that the great majority of courts apply some form of risk-utility balancing test); W. Page Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUMB. L. REV. 293, 313 (1979) (proposing that a product be determined defectively designed "if a reasonable person would conclude that the magnitude of the danger . . . outweighs the utility of the design"); William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 553-54 (1985) (endorsing use of risk-utility analysis in design defect cases); David G. Owen, *Risk-Utility Balancing in Design Defect Cases*, 30 U. MICH. J.L. REFORM 239, 239 (1997) ("Courts and commentators increasingly comprehend that ascertaining design defectiveness in products liability cases requires some kind of 'risk-utility' balancing."); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 464 (1979) ("There can be little doubt about the correctness of the risk-benefit standard for design defect . . ."); Victor E. Schwartz, *The Uniform Product Liability Act—A Brief Overview*, 33 VAND. L. REV. 579, 586 (1980) (writing that the Uniform Product Liability Act has adopted a standard for design defect cases that "balances risk against utility"); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973) (listing factors to be balanced in a risk-utility analysis).

circumlocution of the risk-utility test.<sup>13</sup> These courts assert that consumers have a right to expect reasonably designed products. A product is not reasonably designed if it fails to meet risk-utility standards. Therefore, products that fail to meet risk-utility standards fail to meet consumer expectations. A second, and more common, application of consumer expectations occurs in a special class of cases where courts perceive no need to perform risk-utility balancing to reach a conclusion of product defect. On occasion, products fail unexpectedly and catastrophically while being used normally. When a product fails to perform its manifestly intended function, a court may impose liability saying that the product failed the consumer expectations test.<sup>14</sup> This version of the consumer expectations test is nothing more than the traditional rule of *res ipsa loquitur* in a products liability setting.<sup>15</sup> When the incident that harmed the plaintiff is of a kind that ordinarily occurs as a result of product defect, the finder of fact may draw a common-sense inference that a defect was responsible for the harm.<sup>16</sup> Finally, some courts utilize the consumer expectations test as a thinly disguised version of the patent danger rule.<sup>17</sup> In the early period when design defect liability was in

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13. 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 the scale is the utility of the product and on the other is the risk of its use." (citations omitted)); *Seattle-First Nat'l Bank v. Tabert*, 542 P.2d 774, 779 (Wash. 1975) (en banc) ("In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant . . .").

14. See *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."); *Tulgetske v. R.D. Werner Co.*, 408 N.E.2d 492, 496 (Ill. App. Ct. 1980) (holding that a plaintiff can make out a strict liability claim by proving that a product failed to perform in a manner reasonably to be expected in light of its intended function); *Cincinnati Ins. Co. v. Volkswagen of America, Inc.*, 502 N.E.2d 651, 655 (Ohio Ct. App. 1985) (finding in a fire case, that "the reasonable expectations of a buyer of a motor vehicle is that the main electrical cable harness of such vehicle will not start a fire").

15. See *Welge v. Planters Lifesavers Co.*, 17 F.3d 209, 211 (7th Cir. 1994) ("The doctrine [of *res ipsa loquitur*] is not strictly applicable to a products liability case because . . . the defendant . . . has parted with possession and control of the harmful object before the accident occurs. . . . But the doctrine merely instantiates the broader principle, which is as applicable to a products case as to any other tort case, that an accident can itself be evidence of liability." (citations omitted)).

16. See cases cited *supra* note 14.

17. See, e.g., *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1407 (7th Cir. 1994) (holding that Illinois law precluded liability as a matter of law in a case where a two year-old child started a fatal fire with a cigarette lighter, concluding that "[t]he ordinary consumer expects that if a

its developmental stage, courts held that manufacturers had no duty to eliminate open and obvious dangers from their designs, even if they could do so at a reasonable cost.<sup>18</sup> Most courts have abandoned the "patent danger rule,"<sup>19</sup> but some have retained it by utilizing the rubric of the consumer expectations test.<sup>20</sup> Products that are patently dangerous do not disappoint consumer expectations. The Products Restatement takes note of each of these usages of the consumer expectations test.

### 1. Rejecting Consumer Expectations Rubric When Actually Applying Risk-Utility Test

The Products Restatement finds no merit whatsoever in adopting the consumer expectations test as the standard for design defect and then making the operative rule depend upon whether the product was reasonably designed utilizing risk-utility standards.<sup>21</sup> If risk-utility balancing is the operative test, then one should simply say so. No substantive difference exists between courts that state that reasonable consumers have a right to expect reasonably designed products and the Products Restatement's risk-utility approach. The Products Restatement has chosen to state its test for defect in a straightforward, non-circular manner.

### 2. Adopting Consumer Expectations Test in Res Ipsa Cases

The second use of the consumer expectations test to impose liability in res ipsa-like cases is embraced in a black letter rule in the Products Restatement. Section 3 provides for liability when the incident that caused the plaintiff's harm is of a kind that ordinarily occurs as a result

lighter's flame is put to some other combustible object, a larger fire ensues"); *Kelley v. Rival Mfg. Co.*, 704 F. Supp. 1039, 1046 (W.D. Okla. 1989) (dismissing a claim of design defect in a case involving an 11-month old child who was seriously injured when the child pulled on the chord of slow cooker partially filled with hot beans off the kitchen table because the product met the expectations of the parent consumer who purchased the product).

18. See, e.g., *Campo v. Scofield*, 95 N.E.2d 802, 804 (N.Y. 1950) ("[T]he manufacturer is under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all.").

19. The New York Court of Appeals overruled *Campo* in *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577 (N.Y. 1976). A strong majority of American courts reject the patent danger rule. See, e.g., *Pike v. Frank G. Hough Co.*, 467 P.2d 229 (Cal. 1970) (in bank); *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437 (Ind. 1990); *Uloth v. City Tank Corp.*, 384 N.E.2d 1188 (Mass. 1978); *Owens v. Allis-Chalmers Corp.*, 326 N.W.2d 372 (Mich. 1982); *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207 (Minn. 1982); *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993).

20. See cases cited *supra* note 17; see also *Elliot v. Brunswick Corp.*, 905 F.2d 1505 (11th Cir. 1990) (rejecting, under Alabama law, the risk-utility claim of a plaintiff on the ground that products whose inherent danger is patent are not unreasonably dangerous as a matter of law).

21. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. g (1998).

of product defect and did not solely result from other causes.<sup>22</sup> The black letter specifically provides that when the res ipsa test is met, liability attaches without the necessity of identifying the type of defect that triggered the harm. It makes no difference if the product failed due to a manufacturing or a design defect.<sup>23</sup> A product that fails its manifestly intended function is blatantly defective.<sup>24</sup> Again, there is no substantive difference between liability imposed by section 3 of the Products Restatement and the judicial imposition of liability in res ipsa cases based on consumer expectations. To be sure, products that fail in res ipsa situations disappoint consumer expectations. The Products Restatement has chosen to articulate this shortcut to the conclusion that a product is defective by setting forth the classic elements necessary to invoke the res ipsa inference rather than create a new substantive test for imposing liability in this class of cases.

### 3. Rejecting the Consumer Expectations Test When It Is Used as a Surrogate for the Patent Damages Rule

The third use of the consumer expectations test as a surrogate for the patent danger rule is expressly rejected by the Products Restatement.<sup>25</sup> As noted, the patent danger rule retains its vibrancy in only a

22. The text of section 3 is set forth *supra* note 6.

23. The text of section 3 and relevant portions of comment b are set forth *supra* note 6. Section 3, comment c makes it clear just how broad the allowed inference is. It provides:

*c. No requirement that plaintiff prove what aspect of the product was defective.*  
The inference of defect may be drawn under this Section without proof of the specific defect. Furthermore, quite apart from the question of what type of defect was involved, the plaintiff need not explain specifically what constituent part of the product failed. For example, if an inference of defect can be appropriately drawn in connection with the catastrophic failure of an airplane, plaintiff need not establish whether the failure is attributable to fuel tank explosion or engine malfunction.

RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 cmt. c (1998).

24. *See id.* § 3 cmt. b. Comment b notes the limited application of the res ipsa-like inference:

It is important to emphasize the difference between a general inference of defect under § 3 and claims of defect brought directly under §§ 1 and 2. Section 3 claims are limited to situations where a product fails to perform its manifestly intended function, thus supporting the conclusion that a defect of some kind is the most probable explanation.

*Id.*

25. *See id.* § 2 cmt. d. Comment d states:

Early in the development of products liability law, courts held that a claim based on design defect could not be sustained if the dangers presented by the product were open and obvious. Subsection (b) does not recognize the obviousness of a design-related risk as precluding a finding of defectiveness. The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff.

small minority of courts.<sup>26</sup> The overwhelming majority of jurisdictions have held that the consumer expectations test should not serve as a shield against the imposition of liability if a plaintiff can establish that under risk-utility standards a safer design could have been implemented that would have prevented harm to the plaintiff.<sup>27</sup>

The Products Restatement thus recognizes the legitimacy of the consumer expectations test as a stand alone test for defect only in the res ipsa-type case. In this class of cases one can infer defect since the product has failed to perform its manifestly intended function. In the classic design case involving controversy as to whether the product as marketed or an alternative provides the optimum in reasonable safety, one cannot infer defect using the consumer expectations test. No substitute exists in non-res ipsa cases for a full presentation of evidence that addresses such factors as the magnitude and probability of foreseeable risks of harm, the instructions and warnings that accompany the product, and the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed.<sup>28</sup>

### *B. Rejecting the Consumer Expectations Test—The Negation of Causation in Products Litigation*

In addition to the reasons set forth, yet another powerful argument can be made for rejecting the consumer expectations test in the classic design defect setting. American tort law insists that causation plays an independent role in determining liability.<sup>29</sup> Causation forces a plaintiff to move from establishing the defendant's violation of a hypothetical standard of care to proving the concrete effects of that violation on the plaintiff's person or property.<sup>30</sup> By forcing the plaintiff to prove that conformance with the hypothetical standard would have made a differ-

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*Id.*; see also *id.* § 2 cmt. g.

26. See cases cited *supra* notes 17 and 20; see also *McCollum v. Grove Mfg., Co.*, 293 S.E.2d 632, 637 n.2 (N.C. Ct. App. 1982) (citing Georgia and Minnesota among the jurisdictions that recognize the "patent danger" rule).

27. See cases cited *supra* note 19.

28. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (1998).

29. See generally ARNO C. BECHT & FRANK W. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* (1961) (analyzing role of causation in tort law); H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1985) (same).

30. See *Jacobs v. Technical Chem. Co.*, 472 S.W.2d 191, 200 (Tex. Civ. App. 1971) (holding in a failure-to-warn case, that plaintiff need not establish causal nexus between defect and plaintiff's injury), *rev'd*, 480 S.W.2d 602, 606 (Tex. 1972) (holding that plaintiff must establish causation but will be aided by a rebuttable presumption of causation); see also *Graves v. Church & Dwight Co.*, 631 A.2d 1248, 1258 (N.J. Super. Ct. App. Div. 1993) (upholding a jury verdict that defendant rebutted presumption that warning was causally related to plaintiff's injury).

ence in *this* case, the causation doctrine provides important confirmation that the standard of care has been established correctly.<sup>31</sup> Furthermore, causation gives voice to fundamental fairness norms.<sup>32</sup> Human conduct often falls short of the ideal. Indiscretions, large or small, most often pass unnoticed because they have no practical ramifications. Tort law pays little attention to the "near miss." It is difficult to imagine a tort doctrine that does not require a substantial causal connection between defendant's breach of a duty and plaintiff's injury. Causation speaks of accountability and takes on a significant moral dimension in making tort doctrine understandable to actors forced by the law to accept responsibility for harms to others.

Under a risk-utility balancing test, when a defendant is charged with failing to adopt a reasonable alternative design, the causation issue is distinct and separable. Consider, for example, a crashworthiness case in which a plaintiff claims injuries resulting from being thrown from a car after impact with an abutment. Plaintiff alleges that the door lock capable of withstanding only 1,000 pounds of pressure during a collision should have been designed with a 2,000-pound capability. One can test whether a lock with the design standard proffered by the plaintiff would have made any difference. If the evidence demonstrates that the force of the collision exerted a 5,000-pound force on the door, the design of the lock may be defective but not causally related to the plaintiff's injuries.<sup>33</sup>

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31. See Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 82 (1975).

32. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 160-89 (1973) (arguing that although "but for" causation examines the cause-effect relationship between defendant's negligent conduct and plaintiff's injuries, proximate causation examines causation as a matter of "social policy"); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985) (surveying scholars' notions of causation and concluding that the concepts of "corrective justice" and "legal responsibility" are entrenched in the causation analysis).

33. See, e.g., *Calhoun v. Honda Motor Co.*, 738 F.2d 126, 130 (6th Cir. 1984) (affirming judgment notwithstanding the verdict where plaintiff failed to establish that the design defect in the motorcycle brakes was the cause of the plaintiff's injury). In crashworthiness cases based on defective design, plaintiff must establish that the defective design caused injury beyond that which the force of the collision would have brought about had the auto been reasonably designed. For example, an Alabama court held:

Consequently, the only proof of damages that will limit the manufacturer's liability in crashworthiness cases is proof that, regardless of the design used, the identical injuries were inevitable. In such a case, the manufacturer's liability is not only limited, it is completely eliminated, because plaintiff has failed to prove "cause in fact," a fundamental element necessary to prove proximate cause between the defective condition and his injuries.

*General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1190 (Ala. 1985). Furthermore an Arizona court held:

Under the stand-alone consumer expectations test, the causation issue becomes one with the determination of defect. Plaintiff asserts, intuitively, that reasonable consumers expect that car doors will remain locked in collisions of the sort in which the plaintiff suffered injury. Thus, not only is liability based on an ethereal standard, causation is a non-issue.<sup>34</sup> It is the perfect plaintiff's case. Plaintiff need not establish any aspect of the case with hard proof. For the plaintiffs' bar, it is truly a cause of action made in heaven.

Limiting the consumer expectations test to *res ipsa*-type cases as set forth in section 3 of the Products Restatement does not compromise the causation issue. The classic *res ipsa* products liability case always merges defect and causation. It does so credibly because when the product malfunctions, the inference that defect is responsible for the injury is so stark that one can hardly argue to the contrary. For example, when a brand new car suddenly spins out of control and plaintiff suffers injury in the ensuing crash, one need not be a rocket scientist to conclude that some sort of defect is the cause of plaintiff's harm.<sup>35</sup> If alternative explanations for the loss of control are eliminated, as they must be under *res ipsa*, defect remains the only culprit.<sup>36</sup> However, when one leaves the

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[I]n a crashworthiness case with an indivisible injury, the plaintiff fulfills his burden of proof by showing that the defective design caused him to sustain injuries over and above those that otherwise would have occurred in the first collision. Once the plaintiff has done so, the burden shifts to the defendant to show that the damages that arose from the enhanced injury are apportionable.

Czarniecki v. Volkswagen of America, 837 P.2d 1143, 1148 (Ariz. Ct. App. 1991); *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 16(a) (1998).

34. The consumer expectations test shares some common ground on this point with actions brought on a failure-to-warn theory. In both, plaintiffs call on the finder of fact to intuit the finding of defect and then ask the courts to relieve them of proving cause-in-fact in any rigorous fashion. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 296-311 (1990). The consumer expectations test is an even more egregious instance of the negation of causation. Actions brought on failure-to-warn theories, it is possible for a defendant to challenge the presumption that the defect was causally related to the harm suffered. *See, e.g.*, *Graves v. Church & Dwight Co.*, 631 A.2d 1248, 1256 (N.J. Super. Ct. App. Div. 1993). The consumer expectations test collapses defect and causation into one issue.

35. *See, e.g.*, *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

36. If alternate causes exist that could have been the sole cause of the injury, one cannot draw an inference that defect was a contributing factor to the plaintiff's harm. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 cmt. d (1998). Comment d states:

*d. Requirement that the incident that harmed the plaintiff was not, in the particular case, solely the result of causes other than product defect existing at the time of sale.* To allow the trier of fact to conclude that a product defect caused the plaintiff's harm under this Section, the plaintiff must establish by a preponderance of the evidence that the incident was not solely the result of causal factors other than defect at time of sale. The defect need not be the only cause of the incident; if the plaintiff can prove that the

realm of *res ipsa* and confronts more balanced and sensitive design problems, the use of the consumer expectations test unacceptably eliminates causation as an independent element of a plaintiff's case.

### C. *The Shapo Proposal—A Listing of Considerations*

At the May 1995 and 1997 Annual Meetings of the ALI, Professor Marshall Shapo proposed that the Institute adopt a new and totally different approach to the problem of defining the standard for defective design.<sup>37</sup> Professor Shapo has made it clear in his writings that he believes that no hard law exists that allows for the development of a clear legal standard for design defect.<sup>38</sup> He therefore proposed, by formal motions at two different Annual Meetings, that the following language should govern defective design:

#### § 1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

One engaged in the business of selling or distributing products who sells a product that is in a defective condition or is otherwise unreasonably dangerous to users or to others who encounter products is liable under any theory of liability applicable to defective or unreasonably dangerous products for any harm to person or property caused by the defect or unreasonably dangerous condition of the product.

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most likely explanation of the harm involves the causal contribution of a product defect, the fact that there may be other concurrent causes of the harm does not preclude liability under this Section. But when the harmful incident can be attributed solely to causes other than original defect, including the conduct of others, an inference of defect under this Section cannot be drawn.

*Id.* § 3 cmt. d. Abundant case law supports this proposition. *See, e.g.,* Sztubinski v. Stanton Trading Corp., No. CIV.A.92-7175, 1994 WL 111353, at \*2 (E.D. Pa. March 25, 1994) (holding that a bottle-opener manufacturer cannot rely on the *res ipsa* inference in impleading a bottle manufacturer where there is no proof that the bottle did not break because of the opener or some other cause); Schlier v. Milwaukee Elec. Tool Corp., 835 F. Supp. 839, 842 (E.D. Pa. 1993) ("Because plaintiff did not negate the evidence pointing to a reasonable, secondary cause for the accident, i.e., wear and tear, plaintiff failed to establish *prima facie* case."); Saieva v. Budget Rent-A-Car, 591 N.E.2d 507, 516 (Ill. App. Ct. 1992) (upholding summary judgment for defendant where "[t]he record supports the reasonable inference that the plaintiff simply lost control of the van because he was driving at an excessive speed on a dark, wet and bumpy rural highway").

37. *Discussion of Restatement of the Law Third, Torts: Products Liability*, 74 A.L.I. PROC. 130, 131-32 (1997) [hereinafter *1997 Discussion of Products Restatement*]; *Discussion of Restatement of the Law Third, Torts: Products Liability*, 72 A.L.I. PROC. 179, 182-84 (1995) [hereinafter *1995 Discussion of Products Restatement*].

38. *See* Shapo, *A New Legislation, supra* note 1, at 216; Shapo, *The ALI Restatement Project, supra* note 1, at 646-50, 685-86.



## § 2. Defectiveness of Products

A product is in a defective or unreasonably dangerous condition, for purposes of section 1, if

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(2) Design aspects of the product make it unreasonably unsafe to persons or property because of considerations that render products defective under applicable law. Considerations principally relevant to a determination of whether a product is defective or unreasonably dangerous include:

(a) The risks of harm from the product outweigh its utility or benefits, as risks, utility and benefits are defined by applicable law;

(b) The costs associated with the injury at issue outweigh the costs of avoiding the injury, as relevant costs are measured by applicable law;

(c) In designing or selling the product, a reasonable seller or distributor would not have expected the risk of injury that occurred;

(d) The advertising, promotion or appearance of the product created an impression of safety relevant to the hazard at issue that reasonably could be judged to have a material influence on decisions to use or encounter the product;

(e) There exists a feasible, reasonable alternative design that would have significantly reduced or avoided the harm that occurred;

(f) There exists a significant difference between the parties with respect to knowledge of the risks of the product in the context of its distribution and marketing.<sup>39</sup>

We find the Shapo proposal to be wholly unsuitable for a plethora of reasons. First and foremost, we disagree with its basic premise that courts have not articulated a rule of law governing defective design. More than thirty years have come and gone since the onset of the products liability revolution in the early 1960s. Thousands of appellate decisions have been published dealing with the issue of defective design. To conclude that American courts have given litigants no guidance as to the standard of liability for design defect cases strains credulity. No industrial colossus could function without a comprehensible standard for defective design. The task of restaters is to parse this huge body of case law, to discern the major themes, and to articulate those themes in rules of law. Professor Shapo offers not a rule of law, but a prescription for despair.

Second, the Shapo considerations appear to be a smorgasbord of

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39. *Text of Proposed Amendments Submitted at 1997 Annual Meeting*, 74 A.L.I. PROC. 892, 892-93 (1997) (proposed by Professor Marshall Shapo).

unrelated ideas. Unlike efficiency-based, risk-utility balancing that requires the trier of fact to decide whether marginal risks outweigh marginal benefits,<sup>40</sup> only factors (a), (b), and (c) in Shapo's proposal appear to demand some sort of risk-utility balancing, and aggregate (rather than marginal) balancing, at that. Factors (d) and (f) appear to stand apart and independent from risk-utility balancing. Nor do the Shapo factors reflect the fairness-based consumer expectations test. Factors (d) and (f) may in some way be related to whether disappointed consumer expectations were responsible for the injury suffered by a plaintiff, but they go well beyond the traditional consumer expectations test.<sup>41</sup> It is difficult to discern what theoretical framework Professor Shapo is espousing. Courts and litigants required to examine Shapo's "considerations" for guidance on how to decide a design defect case would be at sea. Professor Gary Schwartz put it well during the debate on this issue on the floor of the 1995 ALI Annual Meeting.<sup>42</sup> He said that one could argue whether the Reporters' proposal was or was not the majority rule in the United States, but the Shapo proposal reflected the law of no jurisdiction.<sup>43</sup>

Turning to the individual factors, we are frankly puzzled regarding their meaning. Consideration (a) embraces risk-utility balancing but makes a delphic reference to "applicable law." One would think that a Restatement would, itself, set forth what that law is. Consideration (b)

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40. See Owen, *supra* note 3, at 1687. Professor Owen stated:

In design defect litigation, [the] basic issue involves the following fundamental micro-balance question: *whether the manufacturer's failure to adopt a particular design feature proposed by the plaintiff was, on balance, right or wrong.* A congruence between this central issue and the liability test requires that the test focus squarely on the issue of what, in particular, allegedly was wrong with the manufacturer's design decision. More specifically, this inquiry asks whether the increased costs (lost dollars, lost utility, and lost safety) of *altering* the design—in the particular manner the plaintiff claims was reasonably necessary to the product's safety—would have been worth the resulting safety benefits. Thus, the only factors ordinarily relevant in the risk-utility balance are the incremental or "marginal" precaution costs and safety benefits of adopting the particular design safety feature proposed by the plaintiff. The notion of marginal costs and benefits implies a move which here involves the move from the chosen design to the alternative design. And so the proper balance is between the expected precaution costs and the expected safety benefits involved in *altering* the chosen design in the particular fashion proposed by the plaintiff—those costs and benefits incurred in *moving* from the manufacturer's actual chosen design to the plaintiff's hypothetical alternative design.

*Id.* (footnotes omitted).

41. For example, consideration (f), dealing with disparity of knowledge between the manufacturer and consumer, raises issues far different than what the brute expectations of a consumer are with regard to product performance.

42. See 1995 Discussion of Products Restatement, *supra* note 37, at 213-14.

43. See *id.*

sets forth a risk-utility test that, to the Authors' knowledge, has yet to be articulated by any court or scholar. If we understand what Professor Shapo is saying, he is clearly wrong. Consideration (a) speaks to aggregate risk-utility balancing for the product. Consideration (b), however, seems to say that if the cost of a "particular" injury outweighs the cost of avoiding the injury, that may render the product defective.

It is hard to see how any risk-utility balancing for a particular injury is relevant to a decision as to whether a product is defectively designed. Products are manufactured in tens of thousands of identical units. Any given injury may be prevented by some feature that might have avoided the injury at a lower cost than a given catastrophic injury if one simply calculates the cost of the particular feature for that individual product. That is, however, irrelevant to the question of whether the safety feature should have been incorporated into the product line. The probability of a particular injury may be so remote and so far-fetched that to incorporate a safety feature for the entire product line may be unreasonably costly. Alternatively, the safety feature, although helpful in connection with a low-probability injury, may create far greater risks for product performance across the board.<sup>44</sup> Risk-utility balancing for a particular injury is espoused by no one and with good reason. It is antithetical to any notion of reasonable and sensible design.

Professor Shapo includes two consumer expectations-type considerations in his list, but it is difficult to fathom how they might be applied in deciding whether a product is defectively designed. Thus, consideration (d) declares that promotion and advertising is relevant to the issue of design defect when it has a "material influence on decisions to use or encounter the product." We can understand that advertising and marketing may encourage dangerous product use and thus increase the probability of harm. Comment g to section 2 of the Products Restatement makes that point.<sup>45</sup> However, Professor Shapo seems to be suggest-

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44. The Products Restatement is clear on this part:

When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product other dangers of equal or greater magnitude.

RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (1998); *see also* *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1058 (11th Cir. 1994) (applying Alabama law); *Glover v. Bic Corp.*, 987 F.2d 1410, 1423 (9th Cir. 1993) (applying Oregon law).

45. The comment provides:

Consumer expectations, standing alone, do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety. Nevertheless, consumer expectations about product performance and the dangers attendant to product use affect how risks are per-

ing that advertising and marketing may affect whether a buyer decides to purchase or use the product. This raises the issue of whether a manufacturer has provided sufficient information to consumers so that they can make informed choices as to whether they wish to buy or use the products.<sup>46</sup> The Products Restatement recognizes that a cause of action for failure to provide sufficient information for consumer choice is relevant to failure-to-warn liability.<sup>47</sup> But how informed choice is relevant to design liability is a mystery. Indeed, the central premise of an informed-

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ceived and relate to foreseeability and frequency of the risks of harm, both of which are relevant under Subsection (b). Such expectations are often influenced by how products are portrayed and marketed and can have a significant impact on consumer behavior. Thus, although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe.

RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. g (1998) (citation omitted).

46. The courts developed an informed choice action in products liability almost a decade after the onset of the products liability revolution. The first case to refer to an informed choice theory was *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973). Several early commentators distinguished between warnings to reduce the risk of harm, risk reduction warnings, and warnings only to inform the purchaser that use of the product involves a non-reducible risk—informed choice warnings. See, e.g., Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 621-26 (distinguishing “risk reduction” warning cases from “informed choice” warning cases); A.D. Twerski et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 519 (1976) (arguing that some failure-to-warn cases belong in the realm of “informed consent” rather than in products liability). Others now recognize this distinction. See, e.g., MARC A. FRANKLIN & ROBERT L. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 608-14 (3d ed. 1983) (dividing failure-to-warn cases into two categories, cases that involve “words advising of risk” and cases that involve “words reducing risk”); JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 342-50 (3d ed. 1997).

47. The Products Restatement recognizes a failure-to-warn cause of action based on informed choice:

In addition to alerting users and consumers to the existence and nature of product risks so that they can, by appropriate conduct during use or consumption, reduce the risk of harm, warnings also may be needed to inform users and consumers of nonobvious and not generally known risks that unavoidably inhere in using or consuming the product. Such warnings allow the user or consumer to avoid the risk warned against by making an informed decision not to purchase or use the product at all and hence not to encounter the risk. In this context, warnings must be provided for inherent risks that reasonably foreseeable product users and consumers would reasonably deem material or significant in deciding whether to use or consume the product. Whether or not many persons would, when warned, nonetheless decide to use or consume the product, warnings are required to protect the interests of those reasonably foreseeable users or consumers who would, based on their own reasonable assessments of the risks and benefits, decline product use or consumption. When such warnings are necessary, their omission renders the product not reasonably safe at time of sale.

RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. i (1998).

choice products liability case is that a well-designed product may present risks that a consumer may not wish to encounter.

Consideration (f) in Shapo's list is no less enigmatic. Professor Shapo suggests that if "there exists a significant difference between the parties with respect to the knowledge of the risks of the product in the context of its distribution and marketing," such a difference would be relevant to whether the product was defectively designed. Once again, disparities in knowledge of risks are relevant to failure-to-warn liability. However, with regard to design liability, the issue is *not* the disparity of knowledge or risk but whether the probability of foreseeable harm is sufficient to warrant a safer design.

We urged that the Shapo proposal be rejected because it is theoretically unsound, practically unworkable, and out of harmony with the overwhelming body of American case law. The vast majority of ALI members agreed with us on both occasions.<sup>48</sup> Professor Shapo simply failed to present a viable alternative to the proposal of the Reporters.

## II. THE POLITICS OF TORT REFORM

Several critics have sought to discredit the Products Restatement by labeling it a "tort reform" project.<sup>49</sup> In the past decade, manufacturers have prevailed on state legislatures to enact product liability legislation that, for the most part, has been antithetical to the interests of plaintiffs. Groups such as the American Trial Lawyers Association have vigorously opposed these "tort reform" initiatives. Those seeking to characterize the Products Restatement as a "tort reform" package have either not read the new Restatement or they have, themselves, a political agenda in retaining the outmoded and open-ended section 402A as the operative rule in American courts. Obfuscation and open-endedness are apparently viewed, in some circles, as a desideratum. A court that has no need to adhere to a rule of law or a coherent theoretical structure has a roving mandate to "do good." Law, fairly articulated and evenly applied must, of necessity, impose constraints. Thus, political opposition to the Products Restatement may stem not so much from what it says

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48. See *1997 Discussion of Products Restatement*, *supra* note 37, at 137; *1995 Discussion of Products Restatement*, *supra* note 37, at 199, 215.

49. See, e.g., *Roundtable on Products Liability Litigation*, TRIAL, Nov. 1997, at 22; Larry S. Stewart, *The ALI and Products Liability: "Restatement" or "Reform,"* TRIAL, Sept. 1994, at 28, 30 ("[T]he reporters may be feeling too much the gravitational pull of tort 'reform.'"); Vandall, *Constructing a Roof*, *supra* note 3, at 279 ("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.").

than from the fact that it says anything at all.<sup>50</sup>

The charge that the Products Restatement constitutes the ALI equivalent of "tort reform" legislation is simply ludicrous. Consider the following positions that the Products Restatement takes that have been strongly opposed by business and manufacturing interests.

#### A. *Conformance to State-of-the-Art Is Not a Bar to Recovery*

In a fairly large number of jurisdictions, the business community has sought to enact legislation creating a "state-of-the-art" defense.<sup>51</sup> The purpose of this legislation is to establish an absolute immunity for manufacturers if their products meet existing state-of-the-art standards. The Products Restatement explicitly rejects any formal state-of-the-art defense. Section 2, comment d provides:

Defendants often seek to defend their product designs on the ground that the designs conform to the "state of the art." The term "state of the art" has been variously defined to mean that the product design conforms to industry custom, that it reflects the safest and most advanced technology developed and in commercial use, or that it reflects technology at the cutting edge of scientific knowledge. . . . This Section states that a design is defective if the product could have been made safer by the adoption of a reasonable alternative design. If such a design could have been practically adopted at time of sale and if the omission of such a design rendered the product not reasonably safe, the plaintiff establishes defect under Subsection (b). . . . *If plaintiff introduces expert testimony to establish that a reasonable alternative design could practically have been adopted, a trier of fact may conclude that the product was defective notwithstanding that such a design was not adopted by any manufacturer, or even considered for*

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50. See Aaron D. Twerski, *From a Reporter's Perspective: A Proposed Agenda*, 10 *TOURO L. REV.* 5, 19 (1993) (prognosticating, as a Reporter at the outset of the Products Restatement project, that critics would attack the work product because it would clarify the law); see also James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 *AM. U. L. REV.* 1257, 1266-67 (1993) ("Although all may agree in the abstract that clarity is a desideratum, there may be considerable sympathy and nostalgia for the studied ambiguity of section 402A. The confusion may be viewed as a positive good allowing for a more leisurely development of the law . . . ." (footnote omitted)).

51. Their efforts have been successful in several jurisdictions. See, e.g., *IOWA CODE ANN.* § 668.12 (West 1987) (conformance with the state-of-the-art at the time the product was designed is a defense); *KY. REV. STAT.* § 411.310(2) (Michie 1992) (presumption exists that if a product conforms to generally recognized and prevailing standards or the state-of-the-art in existence at the time the design was prepared, it is not defective; presumption is rebuttable by a preponderance of the evidence).

*commercial use, at the time of sale.*<sup>52</sup>

The italicized language is particularly important. It makes clear that if plaintiff presents a reasonable alternative design that could have been practically adopted, the fact it "was not adopted by any manufacturer or even considered for commercial use at the time of sale," does not necessarily prevent a finding that the product was defective.

### *B. Explicit Rejection of the Patent Danger Rule*

Defendants continue to argue that the consumer expectations test should be utilized as a shield against recovery.<sup>53</sup> As noted earlier, the Products Restatement takes the position that the consumer expectations test should not bar recovery if plaintiff can establish a reasonable alternative design.<sup>54</sup> Section 2, comments d and g are unmistakably clear in this regard:

Early in the development of products liability law, courts held that a claim based on design defect could not be sustained if the dangers presented by the product were open and obvious. Subsection (b) does not recognize the obviousness of a design-related risk as precluding a finding of defectiveness. The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff.<sup>55</sup>

Subsection (b) . . . rejects conformance to consumer expectations as a defense. The mere fact that a risk presented by a product design is open and obvious, or generally known, and that the product thus satisfies expectations, does not prevent a finding that the design is defective.<sup>56</sup>

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52. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (1998) (emphasis added).

53. See, e.g., Roland F. Banks & Margaret O'Connor, *Restating the Restatement (Second), Section 402A—Design Defect*, 72 OR. L. REV. 411, 418 (1993) (creating a proposed rule which advocates the consumer expectations test as a bar to design defect liability).

54. See *supra* text accompanying notes 25-28.

55. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (1998).

56. See *id.* § 2 cmt. g.

*C. Reasonable Design Rather than Warnings Is Necessary for  
Optimal Product Safety*

The rule set forth in section 402A, comment j provides, “[w]here warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.”<sup>57</sup>

This position illegitimately gives primacy to the role of warnings.<sup>58</sup> It allows a defendant to escape liability for inadequate design by simply warning against risks. The Products Restatement rejects this primitive notion decisively. Section 2, comment l provides:

Reasonable designs and instructions or warnings both play important roles in the production and distribution of reasonably safe products. In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings . . . .<sup>59</sup>

57. RESTATEMENT (SECOND) OF TORTS: PRODS. LIAB. § 402 cmt. j (1965).

58. The comment j presumption has been sharply criticized. One commentator has argued:

The comment j presumption embodies the behavioral assumption that “reasonable” users can be expected to receive, correctly interpret, and obey every comprehensible warning accompanying every product they use or encounter. Yet, people are exposed each day to innumerable risks created by appliances that may malfunction or be mishandled; by potentially toxic pollutants, food additives, and other chemical substances; by cosmetics, drugs, and cleansing agents that may be improperly applied and are inherently dangerous for some sensitive individuals; by machine tools, presses, and other industrial or occupational equipment; and by hazardous transportation and recreation devices. Indeed, almost all products present substantial risks if improperly manufactured, designed, or used. People would have to read, understand, remember, and follow innumerable product warnings to protect themselves from all product-related risks they may confront. Moreover, risk assessment is only one realm of decisionmaking and people must devote some of their limited time and attention to many other types of choices.

Howard Latin, “Good” Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193, 1206-07 (1994) (footnote omitted); see also A.D. Twerski et al., *supra* note 46, at 506 (arguing that section 402A, comment j is “a gross simplification of a very complex problem” and opining that assuming that consumers will comply with the warnings “may work some of the time but not all of the time”).

59. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. l (1998).



#### D. *Recognition of Res Ipsa Inference of Defect*

As noted earlier, section 3 of the Products Restatement recognizes a *res ipsa* inference of defect without the necessity of establishing the type of defect responsible for causing plaintiff's harm.<sup>60</sup> It provides:

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

(a) was of a kind that ordinarily occurs as a result of product defect; and

(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.<sup>61</sup>

Courts have said that *res ipsa* does not apply to strict products liability cases because the element of exclusive control of the instrumentality of the harm is lacking.<sup>62</sup> This canard is finally put to rest in the Products Restatement. The recovery should not depend on whether the defendant was physically in control of the product (the instrumentality of the harm). If the facts surrounding the injury lead one to conclude that product defect was a responsible causal agent for the plaintiff's injuries, it is appropriate to draw an inference of defect.

#### E. *Compliance with Statute Does Not Create a Presumption of Non-Defectiveness*

Many tort reform statutes provide that if a product complies with governmental regulations, the product is presumed to be non-defective.<sup>63</sup>

60. See *supra* text accompanying notes 22-24.

61. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 (1998).

62. See *supra* note 15; see also *Tresham v. Ford Motor Co.*, 79 Cal. Rptr. 883, 885-86 (Ct. App. 1969) (refusing to apply *res ipsa loquitur* to a products liability case because the procedural effect of invoking the doctrine in California is to switch the burden of proof to the defendant).

63. For example, section 108A of the Model Uniform Product Liability Act ("MUPLA") provides:

When the injury-causing aspect of the product was, at the time of manufacture, in compliance with legislative regulatory standards or administrative regulatory safety standards relating to design or performance, the product shall be deemed not defective . . . unless the claimant proves by a preponderance of the evidence that a reasonably prudent seller could and would have taken additional precautions.

Model Uniform Product Liability Act, 44 Fed. Reg. 62,730 (1979). Some state statutes go beyond the MUPLA by creating either an affirmative defense or a rebuttable presumption that a product is non-defective or not unreasonably dangerous based on compliance with regulatory standards. See, e.g., COLO. REV. STAT. ANN. § 13-21-403(1)(b) (West 1997) (rebuttable presumption); N.H. REV. STAT. ANN. § 507:8-g (1997) (affirmative defense); N.D. CENT. CODE § 28-01.3-09 (Supp. 1997)

The traditional common law rule is that compliance with a statute or regulation is evidence that a trier of fact may consider in deciding whether a product is defective, but compliance with a statute or regulation is not binding.<sup>64</sup> The Products Restatement adopts the traditional view and rejects the position that compliance with a statute or regulation creates a formal presumption of non-defectiveness.<sup>65</sup> Furthermore, the Products Restatement takes the position that a product that is in violation of a governmental standard is defective *per se* and that there exists no "justifiable excuse" defense for violating a governmental safety standard.<sup>66</sup>

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(rebuttable presumption); TENN. CODE ANN. § 29-28-104 (1980) (rebuttable presumption); UTAH CODE ANN. § 78-15-6(3) (1996) (rebuttable presumption).

64. See RESTATEMENT (SECOND) OF TORTS: PRODS. LIAB. § 288C (1965); see also *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1085 (D.C. 1976) ("[T]he overwhelming majority of courts presented with similar arguments in product liability cases have held that compliance with federal and state requirements for the manufacture and sale of products does not immunize a manufacturer or seller from liability."); *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 432 N.E.2d 920, 924 (Ill. App. Ct. 1982) ("Compliance with statutes and safety regulations is not conclusive evidence on the question of negligence. It is, however, relevant to that issue." (citations omitted)); *Turner v. Pointe Coupee Parish Sch. Bd.*, 577 So. 2d 755, 756 (La. Ct. App. 1991) ("Compliance (or noncompliance) with the act is simply another factor to be considered in the totality of the circumstances."); *Jackson v. Spagnola*, 503 A.2d 944, 948 (Pa. Super. Ct. 1986) ("The introduction of [the federal automobile safety standard] into evidence was proper, although compliance by Volkswagen with the standards is 'only a piece of the evidentiary puzzle' and does not grant immunity from strict liability." (quoting *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985)); *Lubbock Mfg. Co. v. Perez*, 591 S.W.2d 907, 914 (Tex. Civ. App. 1979) ("[F]act that the Food and Drug Administration, a Federal agency, had previously approved a package insert warning did not relieve the drug company of its obligation to communicate an adequate warning to users of the dangerous drug in question.").

65. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 (1998).

66. See *id.* § 4 cmt. d (explaining the difference between ordinary non-product cases and cases where the defendant violated a state or federal regulatory provision setting standards for product safety). This comment states:

[T]he . . . common-law rule governing noncompliance with safety statutes or regulations in negligence actions not involving products liability claims recognizes that noncompliance with an applicable safety statute or regulation does not constitute failure to use due care when the defendant establishes a justification or excuse for the violation. For example, if noncompliance with an administrative regulation under conditions of emergency or temporary impossibility would not constitute a violation in a direct enforcement proceeding, noncompliance alone does not prove negligence. In connection with the adequacy of product designs and warnings, however, design and marketing decisions are made before distribution to users and consumers. The product seller therefore has the option of deferring sale until statutory or regulatory compliance is achieved. Consequently, justification or excuse of the sort anticipated in connection with negligence claims generally does not apply in connection with failure to comply with statutes or regulations governing product design or warnings.

*Id.*

*F. Recognition of a Post-Sale Duty to Warn for Products Not Defective at the Time of Sale*

Probably no issue has caused as much consternation to manufacturers as the issue of post-sale duty to warn. Defense groups have argued vociferously against the recognition of such a post-sale duty unless the product was defective at the time of sale. Section 10 of the Products Restatement recognizes a post-sale duty to warn that may arise because of information that comes to the seller after the time of sale. Thus, the product need not have been defective at the time of sale for the post-sale warning duty to be triggered.<sup>67</sup>

*G. Liability in Enhanced Injury Cases When the Extent of Enhancement Cannot Be Quantified*

Crashworthiness litigation has embroiled the courts in a debate concerning who bears the burden of proving the extent of enhanced injuries. In a typical case, the plaintiff would have suffered significant injuries as a result of the collision in any event. Plaintiffs seek to prove that their injuries are greater than they would otherwise have been because the automobile or other vehicle was not adequately designed.<sup>68</sup> Some courts have held that it is not sufficient for a plaintiff to establish that the inadequacy of the design was responsible for injuries beyond that which the plaintiff would have suffered but must also quantify the extent of the add-on injuries.<sup>69</sup> Although in most cases experts can opine

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67. *See id.* § 10.

68. At the very least, plaintiffs in crashworthiness cases must establish that the failure to adopt a reasonable alternative design resulted in injuries over and above that which would have resulted from other causes. The Products Restatement provides:

§ 16. Increased Harm Due to Product Defect

(a) When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.

RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 16(a) (1998). Case law supports this proposition. *See, e.g.*, *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1189 (Ala. 1985); *Czarnecki v. Volkswagen of America*, 837 P.2d 1143, 1148 (Ariz. Ct. App. 1991); *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 532 (Del. 1998).

69. *See, e.g.*, *Caiazza v. Volkswagenwerk A.G.*, 674 F.2d 241, 251 (2d Cir. 1981); *Sumner v. General Motors Corp.*, 538 N.W.2d 112, 115 (Mich. Ct. App. 1995), *overruled on other grounds by Lopez v. General Motors Corp.*, 569 N.W.2d 861 (Mich. Ct. App. 1997). The leading decision espousing this view, *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976), predicted that New Jersey would require plaintiffs to quantify the extent of the add-on injuries. If a plaintiff failed to do so, he would recover no damages. The Authors predicted that New Jersey courts, when called upon to rule on this issue, would disagree with the Third Circuit. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 16 reporters' notes, cmt. d (1998). Recently, in *Green v. General Motors*

as to the extent of the enhanced injuries, in some cases they cannot do so with any degree of precision. An expert may only be able to testify that the inadequate design was responsible for some aggravation of the plaintiff's injuries over what they would have been had the vehicle been reasonably designed. When this is the case, those courts that require plaintiff to quantify the enhanced injuries refuse to allow recovery.<sup>70</sup> The Products Restatement rejects this view and endorses the majority position that once plaintiff establishes that a defect is responsible for enhanced injuries, the inability to quantify the amount of those injuries does not relieve the defendant of liability.<sup>71</sup> If at the close of the case evidence has not been introduced that would allow the finder of fact to determine the harm that would have resulted in the absence of product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.

The Products Restatement position has been sharply criticized by the defense bar.<sup>72</sup> They argue that it is unfair to saddle the defendant

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*Corp.*, No. A-5756-95T2, 1998 WL 116851, at \*8 (N.J. Super. Ct. App. Div. March 18, 1998), the court rejected *Huddell* and adopted the majority position. *See also infra* notes 70-73 and accompanying text.

70. *See, e.g., Caiazzo*, 647 F.2d at 251. The *Caiazzo* court declared:

We realize that a plaintiff's burden of offering evidence of what injuries would have resulted absent the alleged defect will be heavy in some instances and perhaps impossible in others. Where it is impossible, however, the plaintiff has merely failed to establish his prima facie case, *i.e.*, that it is more probable than not that the alleged defect aggravated or enhanced the injuries resulting from the initial collision.

*Id.*

71. Restatement (Third) of Torts: Products Liability § 16(b) and (c) provides that in a case where a plaintiff has established that if defect has been responsible for some enhanced harm then

(b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited to the increased harm attributable solely to the product defect.

(c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.

RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 16(b), (c) (1998). This position has come to be known as the *Fox-Mitchell* rule. A strong majority of states support this approach. *See Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199, 1207-08 (8th Cir. 1982) (applying Minnesota law); *Fox v. Ford Motor Co.*, 575 F.2d 774, 787 (10th Cir. 1978) (applying Wyoming law); *Polston v. Boomer-shine Pontiac-GMC Truck, Inc.*, 423 S.E.2d 659, 660 (Ga. 1992); *Lahocki v. Contee Sand & Gravel Co.*, 398 A.2d 490, 498 (Md. Ct. Spec. App. 1979), *rev'd sub nom. on other grounds*, *General Motors Corp. v. Lahocki*, 410 A.2d 1039 (Md. 1980); *Green*, 1998 WL 116851, at \*8.

72. *See, e.g., Heather Fox Vickles & Michael E. Oldham, Enhanced Injury Should Not Equal Enhanced Liability*, 36 S. TEX. L. REV. 417, 451 (1995) (concluding that the enhanced injury doctrine "should not result in enhanced liability for product manufacturers" and noting that the debate over the doctrine "ultimately comes down to a question of fairness—fairness to those directly involved in enhanced injury litigation [and] to the consuming public"); Michael Hoenig, *The American Law Institute Restatement Draft*, N.Y. L.J., May 9, 1994, at 3 (arguing that the

with liability for harm that the plaintiff would have suffered in any event as a result of the collision even if the product had been adequately designed. Plaintiffs should carry the burden of proof on damages, and if they cannot, they should lose. Furthermore, they argue that the case law does not support the Products Restatement's position. We disagree on both points. It appears truly unfair to deny a plaintiff enhanced injury recovery when the reason for the inability to untangle the first and second collision injuries lies at the doorstep of the defendant. It was the defective design of the product that caused the enhanced injuries. Defendant, a wrongdoer who in fact has caused harm to the plaintiff, should not escape liability because the nature of the harm makes an exact determination of the harm impossible.<sup>73</sup> We are also convinced that the authority throughout the country firmly supports the Products Restatement position.<sup>74</sup>

### III. CONCLUSION

The Products Restatement project engendered strong substantive debate. One would not expect otherwise. The ALI has a long tradition of vigorous debate in the area of tort law. Cognoscenti will remember the famous "Battle of the Wilderness" when the titans of American tort law debated whether the Institute should recognize an independent defense of assumption of risk.<sup>75</sup> That debate was not about "politics." It was about what medium the law should utilize to account for voluntary risk-

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Products Restatement position opens the door to plaintiffs seeking deep-pocket defendants in an attempt to circumvent the "apportionment of liability" rule and instead opt to show that the defendant is liable for "all the harm" whether caused by him or other tortfeasors).

73. See RESTATEMENT (SECOND) OF TORTS § 433B cmt. d, at 444 (1965).

74. In a lengthy reporters' note, the Authors demonstrate that a strong majority of courts follow the *Fox-Mitchell* rule. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 16 reporters' note, cmt. d (1998).

75. In *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963), Justice Greenhill described the skirmish:

In preparing Restatement of the Law of Torts, Second, the advisers sharply divided. A group mainly of distinguished deans and professors, favored striking the entire chapter of Assumption of Risk. They would use contributory negligence. The group includes Deans Page, Keeton and Wade, and Professors James, Malone, Morris, Seavey and Thurman. Mr. Eldredge prepared a "dissent" for this group. The group is referred to in the notes to the draft as "The Confederacy." Others including Prosser, Professor Robert Keeton, and Judges Fee, Flood, Traynor and Goodrich supported the existence of the defense of assumed risk. The distinguished scholars refer to the debate, among themselves, as "The Battle of the Wilderness." The Reporter, Prosser, states in the draft that the American Law Institute Council voted unanimously to follow the recommendations of the sections on assumption of the risk.

*Id.* at 378 n.3.

taking on the part of plaintiffs. Similarly the substantive debate about the best way to articulate the standard for defective design pitted sharply differing views against each other. It is unfortunate that the debate concerning the appropriate standard for defective design took place at the same time that the country as a whole was going through what has come to be known as the "tort crisis" and the concomitant "tort reform" movement. But the ALI debate on the issue of defective design and the other issues discussed in this Article was not about the politics of tort reform. It was a substantive debate about what courts have been, and should be, doing. Those who eloquently opposed our views are demeaned by characterizing their efforts and ours in crass political terms. We met openly on the battlefield of ideas, not in smoke-filled back rooms. We exchanged ideas and fought for our respective positions as to what the law is and what it should be. That is the anthem of The American Law Institute. All who participated in its deliberation sang in its chorus.

