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THE AMERICAN LAW INSTITUTE IS DEAD IN THE WATER*

Frank J. Vandall**

When you watch a sailboat, often it will appear to stop or become "dead in the water." Three common ways for this to happen are (1) the wind stops blowing; (2) poor helmsmanship causes the boat to be steered into the wind; or (3) the boat hits several large waves that bring it to a stop. In my view, it appears as if The American Law Institute is dead in the water.

The ALI has come to a stop in the water of persuasiveness because it has hit four huge waves. The first wave was the requirement of a reasonable alternative design as a prerequisite to bringing a design defect case.1 The second wave was the exclusion of tobacco and handguns from the design defects section.2 The third wave was the flawed definition of a defective drug,3 and the fourth wave was the Enterprise Responsibility Study of 1991.4

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* All of my comments refer to The American Law Institute's role in producing the Restatement (Third) of Torts: Products Liability.

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2. Section 2, comment d states:
   Products such as ... tobacco[ ] [and] firearms ... may be found to be defective only upon proof of the requisite conditions in Subsection (a), (b), or (c). If such products are defectively manufactured or sold without reasonable warnings as to their danger when such warnings are appropriate, or if reasonable alternative designs could have been adopted, then liability under §§ 1 and 2 may attach. Absent proof of defect under those Sections, however, courts have not imposed liability for categories of products that are generally available and widely used and consumed, even if they pose substantial risks of harm.

Id. § 2 cmt. d. The result is that the drafters have eliminated tobacco and handguns from the design defects section. See Frank J. Vandall, The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect, 68 TEMPLE L. REV. 167, 193 (1995).

3. Section 6 provides in part:
   (b) For purposes of liability under Subsection (a), a prescription drug or medical device is defective if at the time of sale or other distribution the drug or medical device:
I. THE REASONABLE ALTERNATIVE DESIGN REQUIREMENT

Contrary to the position taken by the ALI, the majority of courts that have considered the question of reasonable alternative design do not require it as a basis for proving strict liability. The reasonable alternative design requirement is supported by only three jurisdictions: Alabama, Maine, and Michigan.

Section 2(b) of the Restatement (Third) of Torts: Products Liability reads like a wish list for manufacturing America. It obliterates strict liability for defective products with four bold strokes. First, the Reporters suggest that section 2(b) is merely a return to negligence. The comments to the Restatement state the following: “Subsections (b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objectives as does liability predicated on negligence.”

Section 2(b) is not a return to traditional negligence. It is a creation of a novel cause of action—radical negligence—because it requires proving a reasonable alternative design in almost every case.

(1) contains a manufacturing defect as defined in § 2(a); or
(2) is not reasonably safe due to defective design as defined in Subsection (c); or
(3) is not reasonably safe due to inadequate instructions or warnings as defined in Subsection (d).

(c) A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.

RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6(b) (Proposed Final Draft 1997).

4. The Reporters for this study proposed a test for design defects which would adopt a risk-utility analysis whereby a design may be considered defective only when there was a “feasible alternative design.” 2 THE AM. LAW INST., REPORTERS’ STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 81 (1991) [hereinafter 2 ALI REPORTERS’ STUDY]; see also Jerry J. Phillips, Comments on the Reporters’ Study of Enterprise Responsibility for Personal Injury, 30 SAN DIEGO L. REV. 241, 242 (1993).


9. “I call this standard ‘radical negligence’ because the plaintiff must prove more than negligence. He must prove that a reasonable alternative design... was available at the time of the sale
Second, the Reporters sunk traditional strict liability by binding it to manufacturing defects with the following language: “A product is defective when . . . it contains a manufacturing defect . . . . A product: (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product . . . .”

Manufacturing defects are trivial because they are often easy to prove and rarely occur. When a manufacturing defect occurs, such as brake pads being left off a new car, the plaintiff’s task is easy. He or she merely shows that the brake pads were left off the car. Almost all of these cases will be settled because the manufacturers do not want it known that the new car left the plant without brake pads. These cases are easy to prove under strict liability or negligence.

Third, the Reporters have all but erased traditional negligence from the products liability lexicon. The Reporters accomplished this slight of hand by saying:

The rules in this Section . . . define the bases of tort liability for harm caused by product defects . . . . Claims based on product defect . . . must meet the requisites set forth in Subsection (a), (b), or (c) . . . . As long as these requisites are met, doctrinal tort categories such as negligence or strict liability may be utilized in bringing the claim.

Clearly, the broad language of section 2(b) is intended to erase “old-fashioned” negligence. “Early drafts of section 2(b) strongly implied that the cause of action for traditional negligence had been eliminated—that only section 2(b) was available as a cause of action for defective design.”

With regard to the question of whether the common law action of negligence would exist after the Restatement (Third), the Reporters have presented a take it or leave it attitude. The open debate, present in

of the product.” Vandall, supra note 7, at 266-67.
11. For a discussion of the differences between manufacturing defect and design defect, see Vandall, supra note 2, at 176-79.
13. “‘Old fashioned’ negligence places on the plaintiff the burden of proving an absence of due care, but does not require her to prove that a reasonable alternative design was available as a condition precedent to suit.” See Vandall, supra note 7, at 267 n.42. “‘Old fashioned’ negligence is the cause of action we all studied in law school. It rests on the idea that a person may be negligent if he or she fails to exercise reasonable care.” Id. at 262.
14. Id. at 267; see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. j (Tentative Draft No. 1, 1994) (“The rules in this Section exclusively define the bases of tort liability for harms caused by products defects . . . .”).
the process of adopting past Restatements, has diminished in recent times. Instead, the attitude of the Reporter seemed to be that we have worked hard to write this document, and if you don’t like it, it is up to you to overturn it. The give-and-take that we saw in crafting the Restatement (Second) of Torts section 402A, for example, was missing.\footnote{There were at least three full institute discussions over a four-year period prior to the adoption of section 402A. See Marshall S. Shapo, In Search of the Law of Products Liability: The ALI Restatement Project, 48 VAND. L. REV. 631, 690-91 (1995).}

Fourth, the most important coup for the ALI was putting section 402A on the table for reconsideration in the first instance. There was no reason to reconsider section 402A. It was adopted in almost every state.\footnote{See id. at 637.} The decisions were sound and the results under section 402A were good. The foundation of products liability theory had never been challenged by the ALI.\footnote{See Vandall, supra note 7, at 261-62.}

II. THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY EXCLUDES TOBACCO AND GUNS FROM ITS DEFINITION OF DESIGN DEFECT

The second large wave that the ALI hit, which helped to stop its forward progress, was the exclusion of tobacco and guns from the definition of design defect in section 2(b). The $368.5 billion tobacco settlement proposed in June 1997,\footnote{See John M. Broder, Cigarette Makers in a $368 Billion Accord to Curb Lawsuits and Curtail Marketing: Major Concessions, N.Y. TIMES, June 21, 1997, at A1.} suggests that the ALI is biased against consumers in deleting tobacco and guns from section 2(b). The ALI all but closed the door on defective design suits for tobacco and handguns. Section 2(b) provides as follows: “[A product] is defective in design when the foreseeable risks of harm . . . could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.”\footnote{RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (Proposed Final Draft 1997).}

At present, there is no alternative design for tobacco or handguns. Under the Restatement (Third), therefore, neither can be defective. The Reporters make the exclusion of tobacco and guns crystal clear in comment d when they say:

The requirement in Subsection (b) that plaintiff show a reasonable alternative design applies . . . even though the plaintiff alleges that the category of product sold . . . is so dangerous that it should not have

15. There were at least three full institute discussions over a four-year period prior to the adoption of section 402A. See Marshall S. Shapo, In Search of the Law of Products Liability: The ALI Restatement Project, 48 VAND. L. REV. 631, 690-91 (1995).
16. See id. at 637.
17. See Vandall, supra note 7, at 261-62.
been marketed at all. Common and widely distributed products such as
alcoholic beverages, tobacco, firearms and above-ground swimming
pools may be found to be defective only upon proof of the requisite
conditions in Subsection . . . (b) . . . .

Due to the lack of alternative designs for cigarettes and guns, the
ALI's exclusion has the effect of insulating the manufacturers from de-
sign defect suits. The ALI explains its position as follows: "[C]ourts
have concluded that legislatures and administrative agencies can, more
appropriately than courts, consider the desirability of commercial distri-
bution of some categories of widely used and consumed, but nevertheless
dangerous products." What the ALI fails to recognize is the subtle
and almost complete control that the tobacco manufacturers have over
Congress, which accounts for why the only meaningful challenge to the
tobacco industry came from the courts. After the tobacco settlement,
individuals will be able to sue for their cancer and their addiction. How-
ever, it may be necessary for these individuals to be able to prove that
cigarettes are defective. If forced to sue solely under section 2(b) of the
Restatement (Third), individual smokers may lose because they cannot
prove a defect.

During the final minutes of the closing session of the ALI Annual
Meeting in 1997, the door was perhaps left open a crack to cigarette li-
ability. Comment e states that a manufacturer of a toy gun that shoots
rubber pellets could be held liable for a defective design even though
there is no reasonable alternative design. Comment d then stated that
this narrow exception did not apply to tobacco, alcohol, firearms, or
above-ground pools. A motion was made and passed that tobacco be
deleted from the list of exceptions to the toy gun example. This means
that it is now possible to argue that tobacco products are like a toy gun

20. Id. § 2 cmt. d (citation omitted).
21. Id.
22. Tobacco companies are able to wield great control in Congress since they donate mil-
lions of dollars to Congressional candidates. See Don Van Natta, Jr., U.S. Subsidiaries of Foreign
Companies Gave Heavily to G.O.P., N.Y. TIMES, Feb. 21, 1997, at A25 (giving an example of a
donation by one tobacco company to the Republican party of over half a million dollars). The to-
bacco industry has also spent over $30 million in lobbying Congress this past year. See Maureen
23. See Bruce Kaufman, ALI Membership Grants Final Approval to Influential Product Li-
ability Treatise, BNA PROD. LIAB. DAILY, May 23, 1997, at D2. I thank Thomas Galligan at LSU
for bringing this point to my attention.
24. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIABILITY § 2 cmt. e (Proposed Final Draft
1997).
25. See id. § 2 cmt. d.
that shoots rubber pellets. The manufacturer can be held liable for a defective design even though there is no reasonable alternative design for the toy gun nor for tobacco. However, this route is awfully circuitous, and if comment e was intended to bring the boat around and allow a design defect suit against tobacco manufacturers arguably that would have been clearly stated.

Under section 402A of the Restatement (Second), it is certainly arguable that cigarettes spiked with nicotine are defective. This can also be argued with regard to cigarettes that are designed to addict and capture young children as consumers.

Similarly, the Reporters for the Restatement (Third) should have kept the door open to liability against the manufacturer of handguns.

Professor Steven Shavell argues that the market can only work effectively when products are priced at their true social cost, meaning that the price of each product should reflect the actual damage that it causes to society. If we hold gun manufacturers liable, then the cost of the product would include not merely raw materials, labor, and other


29. Smoking causes 350,000 deaths each year. See Frank J. Vandall, Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers, 52 Ohio L.J. 405, 405 (1991). Section 402A of the Restatement (Second) of Torts provides that any product in a defective condition which is unreasonably dangerous to the user subjects the seller to liability. See RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). A product causing 350,000 deaths each year to its users is certainly unreasonably dangerous to the user.


31. See supra note 2.

32. For discussions of the differences in valuation of social cost using a negligence standard and a strict liability standard, see A. Mitchell Polinsky & Steven Shavell, Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?, 13 Int'l Rev. Law & Econ. 239 (1993); and Steven Shavell, Strict Liability Versus Negligence, 9 J. Legal Stud. 1 (1980). Professor Shavell states that in ideal economic circumstances, "product prices will tend to reflect the full social cost of production, inducing consumers to make socially correct purchase decisions." Steven Shavell, The Optimal Level of Corporate Liability Given the Limited Ability of Corporations to Penalize Their Employees, 17 Int'l Rev. Law & Econ. 203, 203 (1997).
“inputs,” but also the aggregate damage the product causes to society. If we were to follow Professor Shavell’s model, handguns would be priced higher to reflect these externalities. If priced at their true social cost, guns would be much more expensive, and far fewer would be purchased. Absent such attempts to internalize the social cost of guns, government agencies have resorted to alternate means to reduce the social harm caused by gun use. For example, Boston has introduced a program to reduce the number of handguns on the street, by seizing illegal guns.

Moreover, the case law with regard to handgun manufacturer liability is not, at present, encouraging. The Fifth Circuit Court of Appeals, in a Louisiana case brought by the mother of a pre-med student who had been raped and then murdered with a handgun, denied the plaintiff’s claim of manufacturer liability. The court held that the plaintiff’s absolute liability theory applied only to an ultrahazardous activity related to land or other immovables and thus had no application to gun marketing. The court of appeals also held that the murderer was a superseding cause that cut off the liability of the gun manufacturer. In a Maryland case involving the civil liability of a handgun manufacturer, the court rejected the argument that the manufacturer could be held liable under either a strict liability or an ultrahazardous activity theory. Nevertheless, a hopeful sign is represented by an ordinance adopted by the city of Washington, D.C. The ordinance holds manufacturers of automatic weapons strictly liable.

The argument for holding handgun manufacturers strictly liable is simple: the cost of handguns exceeds their benefit, and therefore under section 402A of the Restatement (Second), handguns should be considered defective and unreasonably dangerous. As a result, the manufacturers of handguns should be strictly liable for the tortious injuries that
handguns cause. As with the proposed tobacco settlement, the handgun manufacturers should be held liable to the states for the costs of treating all intentional and criminal gunshot injuries not involving self-defense. If the costs of these damages were transferred from the states to the gun manufacturers, the gun manufacturers would pass these costs on to the consumers of guns. Consequently, the prices of guns would rise and fewer handguns would be purchased.40

When guns are drawn in self-defense, the person usually shot is an innocent victim rather than the attacker.41 More tragically, large numbers of children accidentally shoot themselves each year.42 What is becoming clear in our crowded, diverse, stress-filled, and often intoxicated society is that handguns are defective, and that strict liability should be the first step initiated in order to pass the extraordinary costs of these defective products on to the manufacturers and consumers. The Reporters mistake was to prematurely close the door to handgun discourse and liability. The debate on handgun liability, as with tobacco, rather than being over, is just beginning.43

III. THE ALI'S DEFINITION OF A DEFECTIVE DRUG IS FLAWED

Section 6 of the Restatement (Third) of Torts: Products Liability is titled “Liability of Seller or Other Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices.” The test for a defectively designed prescription drug is as follows:

A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or

39. See Raymond E. Gangarosa et al., Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol, 22 FORDHAM URB. L.J. 81, 85 (1994). The authors asserted that “an examination of the medical, social, historical, economic, and legal factors dictates that a cause of action against alcohol and tobacco manufacturers should be available to public hospitals to recover their expenditures for the uncompensated medical treatment that is necessitated by alcohol and tobacco abuse.” Id.

40. See id. at 104-05 & n.118.

41. According to a 1986 study, guns are 43 times as likely to be accidentally used on someone known by the defender rather than an attacker. See Angela P. Swinson, Campaign for Gun Trigger Locks Heating Up, PATRIOT-NEWS (Harrisburg), Nov. 20, 1997, at B8.

42. The Centers for Disease Control found that approximately 800 children and teenagers were unintentionally killed by people with firearms in 1994. Almost 200 of them were young children. See id. Gun accidents were the fifth leading cause of death for children under the age of 14 in 1991. See id.

43. The Mayor of Philadelphia is considering a suit against the gun manufacturers to recover the costs of homicide unit overtime, the expense of counseling survivors of murder victims, and other costs. See Craig R. McCoy & Clea Benson, Philadelphia Prepares Suit of Gun Industry, ATLANTA J.-CONST., Jan. 10, 1998, at A5.
medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.\textsuperscript{44}

The Reporters do not cite any cases that adopt the test that they suggest.\textsuperscript{45} It is a flawed test for design defect because there will always be some doctor who will prescribe the drug for a particular class of patients. This is because the drug manufacturers would not have produced the drug and gone through the multi-million dollar test process if there was not some market for the drug. The relevant question is not whether there is a market for the drug; the question is whether the drug is defective.\textsuperscript{46}

Critics have been quick to attack the new test for design defects of pharmaceuticals. Professor Teresa Schwartz critiques the Restatement (Third) test for defectively designed drugs as follows:

The proposal for pharmaceutical liability \ldots\ is decidedly favorable to defendants and is likely to reduce rather considerably the role of the common law in assuring the safety of prescription products.

\ldots\ By adopting this heightened, super negligence standard, the drafters aim to narrow considerably the category of prescription products that can be found defective in design. Arguably it comes very close to eliminating design claims altogether.\textsuperscript{47}

Angela Rushton also makes clear the problems with the Restatement (Third):

The effect of the Draft is to not only radically alter the traditional definition of “design defect” as used in strict liability cases, but also to increase the plaintiff’s burden with regard to the traditional negligence standard. Such an overbearing standard is wholly unsupported by case law and is problematic as a substantive rule of law. The broad standard imposed by this section completely immunizes pharmaceutical manufacturers from claims brought under a design defect theory. As such,

\begin{itemize}
\item \textsuperscript{44} Restatement (Third) of Torts: Prods. Liab. § 6(c) (Proposed Final Draft 1997).
\item \textsuperscript{45} While the reporters’ note lists a number of cases which apply strict liability for harm caused by defectively designed prescription drugs or medical devices, none of them adopt the specific test stated in section 6(c). See id. § 6 reporters’ note, cmt. f.
\item \textsuperscript{46} There might be a market for Thalidomide, but that does not mean it is safe, i.e., not defective, when prescribed for pregnant women. See infra notes 71-73.
\item \textsuperscript{47} Teresa Moran Schwartz, Prescription Products and the Proposed Restatement (Third), 61 Tenn. L. Rev. 1357, 1363, 1380 (1994) (citations omitted).
\end{itemize}

What is perhaps of greatest concern is that the test for a defectively designed drug reads as if it were written by a lobbyist for the pharmaceutical companies of America. Drug manufacturers surely have a right to suggest their own test and to do so in a law review article, but such partisan drafting is not what The American Law Institute is about.\footnote{The Institute should at least restate the "majority" position. But even more than that, the Restatement should seek to improve the law in a way which will fairly reflect conflicting interests. \textit{See} Shapo, supra note 15, at 634. By catering solely to the interests of the drug companies, the ALI has failed to produce a viable Restatement. The Restatement has forfeited "whatever claim it may have to be an authoritative pronouncement." \textit{Id.} at 654.}

Under the Restatement test, no drug manufacturer will likely ever be liable for a design defect. The only basis left for suing the drug manufacturers, except for a defective warning, is fraud. If the drug manufacturers have put the drug on the market without adequate testing or have fabricated results, they may be liable for fraud or misrepresentation.\footnote{See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 837 (2d Cir. 1967).}

IV. THE ENTERPRISE RESPONSIBILITY STUDY

The document produced for the ALI known as the Compensation and Liability for Product and Process Injuries ("Enterprise Responsibility Study") led to such an uproar and outpouring of discontent that the ALI was forced to rethink the project.\footnote{See THE AM. LAW INST., COMPENSATION AND LIABILITY FOR PROD. AND PROCESS INJURIES (Council Draft No. 1, 1990); Vargo, supra note 6, at 509-15; \textit{see also} Phillips, supra note 4, at 241 (mentioning the ALI project and the subsequent abandonment of that project).}

The first page of the Enterprise Responsibility Study contains the following disclaimer:

This Reporters’ Study is being circulated by the Council to the members of The American Law Institute for discussion at the Sixty-Eighth Annual Meeting . . . . The Council has reviewed the material contained herein, but its consideration of the material is not yet completed. As of the date of its publication the views expressed in the Reporters’ Study have not been considered by the membership, and they therefore do not represent the position of the Institute on any of the issues with which the Reporters’ Study deals.\footnote{1 THE AM. LAW INST., REPORTERS’ STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY at i (1991) [hereinafter 1 ALI REPORTERS’ STUDY].}

The Foreword to the Enterprise Responsibility Study provides:

\begin{quote}
\[\textit{\textbf{Vol. 26:801}}\]
\end{quote}
This two-volume Reporters' study is the product of the project formerly known as Compensation and Liability for Product and Process Injuries. The Study addresses a complex array of legal problems in an area of law that has been controversial in one way or another for at least 50 years.

. . . . 

. . . [T]he Council has taken no position on the Study as a whole or on particular proposals. 53

The text of the Council's resolution authorizing only publication and circulation of the Reporters' study but not adoption sealed its demise:

RESOLVED, that the two-volume Report on Compensation and Liability for Product and Process Injuries (subject to such revisions as the Reporters may make) be published as a Reporters' Study, be made available for public distribution, and be brought before the membership of the Institute for discussion in May, 1991, with a view to no action being taken by the membership at such meeting . . . . 54

The reason for the failure of the Enterprise Responsibility Study is that it represented almost pure economic theory and was felt to have very little to do with products liability case law. 55 It was simply not a Restatement. 56

Indeed, the Enterprise Responsibility Study seemed to have its own agenda, independent of simply restating the case law:

Tort liability is particularly effective in dealing with emerging hazards that can be treated within the context of particular cases. Idiosyncratic risks are also likely to be better handled by tort adjudication than by broadly designed government regulations.

Of the other settings, regulatory agencies seem best equipped to establish the appropriate prevention incentives, for they are able to select the level of penal stringency that appears most appropriate. In contrast, tort incentives are a function of the compensation paid to victims, posing the difficult problem of how to avoid distorting the judg-

53. Geoffrey C. Hazard, Jr., Foreword to 1 ALI REPORTERS' STUDY, supra note 52, at xi-xii.
54. Id. at xii.
56. The Restatement of Torts provides:

The object of the Institute in preparing the Restatement is to present an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years.

Introduction to RESTATEMENT OF TORTS at viii-ix (1934).
ment about what level of compensation should be required to provide sufficient incentives for safety. 57

The Enterprise Responsibility Study was issued as a Reporters' Study and not as a traditional Restatement. It did, however, function as an early warning. This red flag suggested that the ALI had tacked and was changing course. In hindsight, it is clear that the Enterprise Responsibility Study was a chart for the ALI's new tack that was to follow in the Restatement (Third) of Torts: Products Liability. 58

V. CONCEALED AUTHORITY: THE CASE OF THE MISSING CITATIONS

In reading the Restatement (Third), one is able to look inside the analytical framework and see pure market economics rather than law. For example, in explaining section 2(b), the Reporters state an obviously silly example: "Society does not benefit from products that are excessively safe—for example, automobiles designed with a maximum speed of 20 miles per hour . . . ." 59

One might ask, "What are examples of excessively safe products? What are the Reporters talking about?" Perhaps they are thinking about the Volvo, a car that has always been marketed with safety as a primary concern, but we see that the law has not forced Volvo to make an excessively safe car. Instead, Volvo has decided to create a market niche for itself by suggesting that its cars are safer than others. This has proven to be a good strategy for a car that historically has fallen short with regard to such typical consumer attractions as ride, style, acceleration, and refinement. 60

Perhaps the Reporters are referring to the alleged demise of the general aircraft industry. This is a refrain that is often heard—that prod-

57. 1 ALI REPORTERS' STUDY, supra note 52, at 256. Chief Justice Shirley S. Abrahamson has noted the foundering of the ALI with regard to the Enterprise Responsibility Study: "[W]hether the individual members of the ALI can indeed remain objective [in voting on adoption of such projects] is open to question. . . . [T]he increasing influence of the Institute and the controversial nature of its projects serve to compound the problem." Shirley S. Abrahamson, Refreshing Institutional Memories: Wisconsin and The American Law Institute: The Fairchild Lecture, 1995 Wis. L. Rev. 1, 24.


59. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (Proposed Final Draft 1997). The Reporters do not provide a footnote for their "excessively safe" theory.

60. CONSUMER REPORTS called the Volvo 960 "boxy" and "cumbersome," but praised its safety features. See Road Test, CONSUMER REP., Aug. 1992, at 511-12.
uits liability suits caused the death of the general aircraft industry, but that argument reflects superficial analysis. The restructuring of the general aircraft industry can be explained in a much more fundamental way. Why should anyone buy a new airplane? Every FAA-certified airplane is at all times in superb condition and capable of flying at a moment’s notice. Why? Because the FAA requires it. If a part is worn or frayed, the FAA requires that it be replaced. Some parts (engines) are rebuilt on an hourly basis. The result is that every general aviation aircraft is almost as good as a new plane. Where airplane safety falls short, however, is in electronics, which can often be upgraded at a nominal cost. What stringent regulation by the FAA has done is to require owners to continually maintain their planes. Why would someone buy a new plane, for example, when the plane he or she has is just as good in every way as the plane that he or she was going to buy? Rather than it being a function of too much safety putting the general aircraft industry out of business, it is a function of appropriate safety. Certainly no one would suggest—and the Reporters have not—that we should allow uncertified general aircraft to fly.

Perhaps the Reporters, in using the words “excessively safe,” are referring to pharmaceuticals. Perhaps they are dredging up the argument that strict liability has forced too much testing by pharmaceutical companies, and therefore we do not have a broad enough range of prescription drugs. This argument is also flawed. The Food and Drug Administration (“FDA”) has, for example, initiated a fast track for the treatment

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61. See John H. Boswell & George Andrew Coats, Saving the General Aviation Industry: Putting Tort Reform to the Test, 60 J. AIR L. & COM. 533, 547-49 (1994-1995) (claiming that the general aviation industry was “on the verge of death,” and that manufacturers such as Cessna and Piper had either stopped making single-piston engine aircraft or were declaring bankruptcy due to lawsuits).


63. “[A]n aircraft may not fly without receiving a certificate of airworthiness from [the FAA].” Ashley W. Warren, Compliance with Governmental Regulatory Standards: Is It Enough to Immunize a Defendant from Tort Liability?, 49 BAYLOR L. REV. 763, 783 (1997).

64. See id.

65. See id.


of AIDS and has been somewhat successful. Many people who had tested positive for AIDS are now testing clear of the disease.

Indeed, the drug that led to the FDA’s very cautious and thorough approach is Thalidomide. It was sold in England and Germany and led to numerous children being born with missing and deformed limbs. Today, however, Thalidomide is being sold in the United States for the treatment of AIDS. Thalidomide decreases the physical debilitation of AIDS patients. If products liability law had created an excessively safe environment for drugs, we would certainly not have a fast track for AIDS drugs. Nor would we have one of the most dangerous prescription drugs ever marketed now being sold in the United States. Because there are no citations for the term “excessively safe” in the Restatement (Third), the term may very well be the academic equivalent of “the sky is falling.”

VI. CONCLUSION

The ALI can print anything it wants. First-year law students are taught that Restatements are secondary authority and persuasive only. The change is that now the Restatement (Third) of Torts: Products Liability is less persuasive than in the past. The Restatement (Third) is more like a trade journal, and the new perspective of the ALI is clear on its face.

68. See Jerry Gray, House Approves Bill to Speed Review of Medicines, N.Y. TIMES, Oct. 8, 1997, at A16 (stating that both the House of Representatives and the Senate have passed bills allowing for speedier FDA approval of AIDS treatments).

69. See Lawrence K. Altman, Powerful Response Reported in a Combined AIDS Therapy, N.Y. TIMES, July 11, 1996, at A16 (discussing how the taking of “drug cocktails,” containing a new type of drug called a protease inhibitor, causes the virus level in many patients to drop below detectable levels).

70. See Sabra Chartrand, Drug Makers Test Thalidomide as a Treatment for Inflammations That Accompany Serious Diseases, N.Y. TIMES, Feb. 24, 1997, at D2 (discussing how the disastrous effects of Thalidomide use in Europe in the 1950s provoked the FDA to enact sweeping drug testing reforms which are reflected in today’s strict testing standards).

71. See Sheryl Gay Stolberg, Weighing Hope Against Horror, N.Y. TIMES, Sept. 28, 1997, at D1; see also Chartrand, supra note 70, at D2 (stating that between 2,000 and 3,000 children were born in Europe with serious defects due to Thalidomide).


73. Clinical studies have shown that Thalidomide can combat mouth ulcers and weight loss in AIDS patients. See id.; Chartrand, supra note 70, at D2.

74. See Shapo, supra note 15, at 682, 685. Restatements simply tell what the law in a general area is and what it should change to. See BLACK’S LAW DICTIONARY 1313 (6th ed. 1990).

75. Rather than restating the law, the Restatement (Third) provides a manufacturer friendly set of rules which leave them free from liability in a large number of situations. This increases profits. See, e.g., supra notes 49 and 50 and accompanying text.
The ALI made a $368.5 billion mistake with regard to tobacco. One would think that such an enormous error would cause the ALI to pause (or tack for a better breeze).

Why the Restatement (Third) reads the way it does becomes more clear when we list those manufacturers who directly benefit from the new proposals: tobacco, alcohol, handguns, above-ground pools, prescription drugs, and all manufacturers who are routinely sued for amounts less than $100,000.\(^7\) Honda has been very successful with their automobiles by changing models every five years. Perhaps the winds of support and encouragement would again blow favorably upon the ALI if they followed Honda’s lead and began work on a new draft of section 2(b). “The Restatement . . . has become out of date.”\(^7\)

The task facing the ALI is how to refill its sails, how to get the boat moving again. To maintain its neutrality and effectiveness, the ALI must ask how it might return to its mission of restating the common law\(^7\) and avoid becoming merely another conservative voice for tort reform. Otherwise it is likely to remain dead in the water.

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\(^7\) Expert witnesses, which would be required to provide alternate designs in product liability cases, often cost up to $40,000. See Stanczyk v. Black & Decker, Inc., 836 F. Supp. 565, 568 (N.D. Ill. 1993) (estimating expert fees to cost between $20,000 and $40,000); Jochims v. Isuzu Motors, Inc., 141 F.R.D. 493, 494, 497 (S.D. Iowa 1992) (finding fees of $150 to $250 per hour and total costs exceeding $40,000).

\(^7\) RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (Tentative Draft No. 1, 1994). This statement is the sum of the ALI Director’s evaluation of section 402A of the Restatement (Second) of Torts.

\(^7\) See Introduction to RESTATEMENT OF TORTS at viii-ix (1934).