

1998

The Restatement (Third) of Torts: Products Liability-The American Law Institute's Process of Democracy and Deliberation

Victor E. Schwartz

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

Recommended Citation

Schwartz, Victor E. (1998) "The Restatement (Third) of Torts: Products Liability-The American Law Institute's Process of Democracy and Deliberation," *Hofstra Law Review*: Vol. 26: Iss. 3, Article 9.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol26/iss3/9>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY—THE AMERICAN LAW INSTITUTE’S PROCESS OF DEMOCRACY AND DELIBERATION

*Victor E. Schwartz**

INTRODUCTION

The American Law Institute, a group of the United States’s most prestigious judges, law professors, and attorneys, was founded in 1923 to bring coherence, reason, and consistency to state judge-made law. One of the projects the ALI undertakes periodically as part of this mission is to “restate” areas of the common law. The ALI reviews the case law and distills it into a series of “black letter” rules, followed by explanatory “Comments,” which are, in turn, followed by “Reporters’ Notes,” which show the case law basis for the rule itself. Although ALI Restatements have no force of law on their own, they have had a persuasive impact on the courts.

I. THE RESTATEMENT (FIRST) OF TORTS

One of the ALI’s first projects was to restate the law of torts.¹ The Reporter for the Restatement (First) of Torts, Francis H. Bohlen, was

* Victor E. Schwartz is a senior partner in the law firm of Crowell & Moring LLP in Washington, D.C. Mr. Schwartz is co-author of the most widely used torts casebook in the United States, *Prosser, Wade and Schwartz’s Cases and Materials on Torts*, and author of *Comparative Negligence*. He drafted the Model Uniform Product Liability Act and recently served on the Advisory Committee of The American Law Institute’s Restatement (Third) of Torts: Products Liability project. Mr. Schwartz obtained his B.A. summa cum laude from Boston University in 1962 and his J.D. magna cum laude from Columbia University in 1965. He wishes to thank his colleagues, Mr. Mark Behrens and Mr. Barry Parsons at Crowell & Moring for their constructive criticisms and assistance in the preparation of the Article. The views expressed, for better or for worse, remain those of the Author based on his personal experience with the Restatement (Third) project and the law of torts.

1. See RESTATEMENT (FIRST) OF TORTS (1934).

the most famous torts professor in America and the author of the leading torts text of the time. Professor Bohlen was assisted by a distinguished advisory committee, including Judge Herbert F. Goodrich, Professor Warren A. Seavey, and practitioner Laurence H. Eldredge. The project was a "premier" event for the ALI and was prepared from 1923 until 1939. The diverse views of different state courts were slowly and carefully evaluated. In general, when the Restatement (First) of Torts derived a rule, the majority rule was chosen.

Many state courts in the United States turned to the Restatement (First) of Torts as a source of law,² which often had a more powerful impact on a particular state than decisions of sister states.

II. FROM THE RESTATEMENT (FIRST) OF TORTS TO THE RESTATEMENT (SECOND) OF TORTS

A. *The Restatement (Second) of Torts "Team"*

From 1939 until 1950, the law of torts, as is always the case, went through substantial changes. New areas of tort law emerged, such as claims for wrongful injury prior to birth.³ In 1953, the ALI leadership made a decision to restate the law of torts again. To lead this effort, the ALI leadership called upon a renowned professor and author of the leading torts text at that time, William L. Prosser, then Dean of the University of California Law School at Berkeley. Beginning in 1954, Dean Prosser served as Reporter for the Restatement (Second) of Torts.⁴ Dean Prosser passed away in 1971, four years short of the final completion of the work in 1975. The project was brought to a successful conclusion by Dean John Wade of the Vanderbilt University Law School, a dear friend, a person with great insight and an encyclopedic knowledge of tort law, and co-author of our torts case book.⁵

2. See, e.g., *Mills v. Charles Roberts Air Conditioning Appliances*, 379 P.2d 455, 457 (Ariz. 1963) (en banc) (relying on the risk-utility test set forth in the Restatement (First) of Torts); *Crane v. Smith*, 144 P.2d 356, 361 (Cal. 1943) (holding that a possessor of land is under a duty to exercise ordinary care to make a condition reasonably safe for business visitors); *Ellithorpe v. Ford Motor Co.*, 503 S.W.2d 516, 522 (Tenn. 1973) (relying on the Restatement (First) of Torts to determine whether contributory negligence is a viable defense for non-negligence-based conduct).

3. See, e.g., *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946) (holding that a child injured during birth had standing to bring an action for medical malpractice); *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949) (holding that a cause of action existed for the wrongful death of an unborn child); *Williams v. Marion Rapid Transit, Inc.*, 87 N.E.2d 334 (Ohio 1949) (holding that a child injured during pregnancy had a cause of action if the child was viable at the time of injury).

4. See RESTATEMENT (SECOND) OF TORTS (1965).

5. See JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS

Deans Prosser and Wade were aided by an advisory committee composed of distinguished judges, law professors, and practitioners.⁶

B. *The Development of the Restatement (Second) of Torts*

In formulating the new Restatement (Second) of Torts, the Reporters and the Advisers not only sought to reflect social changes that had occurred in the law of torts since the 1930s, but to detect errors that were made and clarify matters that might have been unclear in the Restatement (First) of Torts. They also responded to criticisms expressed in legal literature and in the case law that had been made about the Restatement (First) of Torts.⁷

The Restatement (Second) of Torts was also expanded in scope. The commentary more fully expounded upon the reason behind each “black letter rule,” and the reporters’ notes were more abundant.

Most importantly, the Restatement (Second) of Torts differed from the Restatement (First) of Torts in that its content was shaped more by the Reporters’ and advisory committee’s evaluation of the wisdom of competing case law than a presumption to follow “clear majority” rules. The so-called “minority rule” frequently made its way into the “black letter.”⁸

III. THE BEST KNOWN PART OF THE RESTATEMENT (SECOND) OF TORTS: SECTION 402A

No portion of the new Restatement (Second) of Torts was more reflective of the change in style, content, and format from the Restate-

ON TORTS (9th ed. 1994).

6. The academic members were: Fleming James, Jr. of Yale, Robert E. Keeton of Harvard, W. Page Keeton of Texas, Wex Smathers Malone of Louisiana State, Clarence Morris of the University of Pennsylvania, Warren A. Seavey of Harvard, Samuel D. Thurman, Jr. of Utah, John W. Wade of Vanderbilt, and as of 1962, Allan H. McCoid of Minnesota. The judicial members were Gerald F. Flood, Superior Court of Pennsylvania; Calvert Magruder, United States Court of Appeals for the First Circuit; and Roger J. Traynor, Chief Justice of the Supreme Court of California. The practicing lawyers were Laurence H. Eldredge of Philadelphia and two Advisers to the Council, Francis M. Bird of Atlanta and Charles H. Willard of New York City. See Herbert Wechsler, *Introduction to RESTATEMENT (SECOND) OF TORTS* at viii (1965).

7. See *id.* at ix.

8. See RESTATEMENT (SECOND) OF TORTS § 357 cmt. a (1965) (noting that the rule of section 357, holding a lessor liable for an injury to a lessee due to a condition of disrepair, was a minority rule); *id.* § 674 reporter’s note (noting that the rule of section 674, imposing liability on a party that initiates wrongful civil proceedings, was a minority rule when the Restatement was published); *id.* § 693 reporter’s note (noting that the rule of section 693 regarding indirect interference on marital relations was a minority rule when the Restatement was published).

ment (First) of Torts than section 402A, which ushered in so-called "strict liability" for products.⁹

The development of section 402A, the best known section of the entire Restatement (Second) of Torts, planted the seeds for both the need for and content of the Restatement (Third) of Torts. The key language of section 402A stated:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property. . . . [This rule] applies although . . . the seller has exercised all possible care in the preparation and sale of his product.¹⁰

Section 402A was drafted three different times. When the first draft appeared in 1961, it was applicable only to food and drink.¹¹ The second draft, in 1962, extended 402A to include products for "intimate bodily use."¹²

As of 1962, no further modifications could be made because a fundamental principle behind "Restatements" is that they must restate existing case law. The Reporters and the advisory committee are not permitted to write their own "tort code," no matter how persuasive or "right thinking" their views.¹³ At least a scintilla of existing case law must be the source of each black letter rule.¹⁴

Regardless, the Reporters and the advisory committee wanted to extend strict liability in tort to all products, but they had no case law to support them in 1962. Lo and behold, in 1963, one of the Advisers, the Honorable Chief Justice of the Supreme Court of California, Roger Traynor, wrote *Greenman v. Yuba Power Products, Inc.*¹⁵ *Greenman* was a case that involved a power tool that could be used as a saw, drill, and wood lathe. The plaintiff was using the tool as a lathe when the piece of wood being turned suddenly flew out of the machine, struck him on the forehead, and inflicted serious injuries.¹⁶ Expert witnesses testified that inadequate set screws were used to hold the machine to-

9. See *id.* § 402A.

10. *Id.* § 402A(1), (2)(a).

11. See RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 6, 1961).

12. RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 7, 1962).

13. The ALI does conduct other projects, such as the Model Penal Code, where full latitude to "create" law is available.

14. The ALI's purpose is "educational" and includes "promot[ing] the clarification and simplification of the law and its better adaptation to social needs." The Am. Law Inst., Bylaw § 1.01, reprinted in 74 A.L.I. PROC. 521 (1997).

15. 377 P.2d 897 (Cal. 1963) (in bank).

16. See *id.* at 898.

gether, so that normal vibration could cause the lathe to move away from the piece of wood being turned and “let go” of it.¹⁷ Justice Traynor declared that a “manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”¹⁸

Although some courts had allowed products liability cases to proceed under theories other than negligence, they were basically “contract extension” cases, using implied warranty theories under contract law to “run” beyond the immediate buyer of a product to the person injured by the product.¹⁹ What Justice Traynor did that was new and significant in *Greenman* was to scrap the fiction about implied warranties “running” beyond contracting parties. He anchored his decision in tort law and his views of the public policy that should guide tort law. His principal rationale was that “[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”²⁰

Justice Traynor did not define when a product would be deemed to be “defective,” and he did not make any distinctions among what is now commonly known and will be discussed here as defects in manufacture, defects in design, and defects based on failure to adequately warn. Specifically, the opinion made no distinction between whether the so-called “inadequate set screws” were in accord with the manufacturer’s intended design (a design case) or not in accord and an example of failure in quality control (manufacturing defect).²¹ Justice Traynor provided one rule, indivisible, for *all* products that he believed would provide justice for all. As a result, in 1963, the Reporter, William Prosser, and his advisory committee, including Justice Traynor, now had “the case” to apply section 402A to all products. They did.

When the black letter rule was “restated,” however, it did not use the exact language Justice Traynor had used in *Greenman*, which relied

17. *See id.* at 899.

18. *Id.* at 900.

19. *See Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 84 (N.J. 1960); *see also State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 110 N.W.2d 449, 456 (Iowa 1961) (holding that an implied warranty of fitness exists for automobile manufacturers); *Wojciuk v. United States Rubber Co.*, 108 N.W.2d 149, 185 (Wis. 1961) (holding that privity of contract is not necessary for a plaintiff to bring suit against a tire company for injuries caused by a car tire blow out).

20. *Greenman*, 377 P.2d at 901.

21. *See id.* at 899 (discussing the testimony of the plaintiff’s expert witness).

on the two words: “defective products.”²² The words “unreasonably dangerous” were added to the black letter formula.²³ These words, as well as the word “defect,” became the subject of much litigation over the next thirty years.

IV. SECTION 402A’S USE OF “UNREASONABLY DANGEROUS”— WHAT DID IT MEAN?

The insertion, purpose, and meaning of the words “unreasonably dangerous” into the *Greenman* defect formula were explained in a number of comments to section 402A. Comment k explained that medical devices and pharmaceuticals were not unreasonably dangerous if they had a known, but unavoidable, risk.²⁴ This comment was extended by some courts to situations where the risk was unknown.²⁵ Comment i made it clear that manufacturers were not subject to liability for harms associated with “inherent characteristics” that could not be removed from the product without compromising its desirability to the consumer; specific mention was made of products as varied as sugar, tobacco, alcohol, and even castor oil, but the principle involved would apply to any product that a court deemed to fit within the concept (e.g., a handgun).²⁶ A policy judgment was made not to impose so-called “category liability.” That was reserved for public policy decisions under administrative and criminal law. If society believed that a product should not be made because of its inherent characteristics, society should make its sale unlawful. Comment j made clear that the limitation of “unreasonably dangerous” created a fault-base in failure to warn and also did not require manufacturers to warn about obvious dangers.²⁷ Courts did not always cite or utilize comments i, j, or k, but they were an integral part of the work of section 402A.

Reporter Dean Wade wrote a seminal article that placed section 402A in its context at the time it was promulgated.²⁸ The article showed

22. *Id.* at 901.

23. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

24. *See id.* § 402A cmt. k.

25. *See, e.g.,* *Brown v. Superior Court*, 751 P.2d 470, 481-83 (Cal. 1988) (concluding that for public policy reasons, comment k should not be limited to drugs that are “unavoidably unsafe”). For a discussion of the application of comment k, see Victor E. Schwartz, *Unavoidably Unsafe Products: Clarifying the Meaning and Policy Behind Comment k*, 42 WASH. & LEE L. REV. 1139 (1985).

26. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i.

27. *See id.* § 402A cmt. j.

28. *See* John W. Wade, *On Product “Design Defects” and Their Actionability*, 33 VAND. L. REV. 551 (1980) (explaining the historical and most recent developments of section 402A at that

that the Reporters' and advisory committee's focus was on products that had been mismanufactured.²⁹ Again, comment j dealt with warnings. Other sections of the Restatement (Second) of Torts, specifically sections 395³⁰ and 398,³¹ addressed liability for the defective design of products and utilized a rule based upon fault. Many courts were either unaware of or ignored those sections and comment j as well as Dean Wade's firsthand observations. These courts tried to apply the black letter of section 402A in situations where products were said to be defective, either because of a manufacturer's failure to adequately warn or because of the product's design.³²

The courts grasped at non-negligence "formulas" to try to find and impose strict liability in design and warning defect cases. Some suggested that a negligence formula could be used in a design case, but one should impute knowledge of a risk to a manufacturer and then decide if he was negligent.³³ This "trick" formula imposed knowledge on a party that the party did not have. Some courts took Restatement (Second) section 402A to an even higher water mark of strict liability and rendered it absolute: they imposed liability in failure to warn cases, even if a manufacturer neither knew nor could have known about a risk,³⁴ and in design defects, even if there was no alternative way to make a product given the technology that existed when the product was designed.³⁵

time).

29. For example, a soda bottle that contained a mouse or other foreign element, makeup that had particles of lead that scratched the person's face, or a bicycle that had a bolt left off, causing a wheel to collapse. *See id.* at 554-55; *see also* Schwartz, *supra* note 25, at 1139 (discussing how section 402A was intended to be applied to products not manufactured properly).

30. RESTATEMENT (SECOND) OF TORTS § 395 (1965).

31. *Id.* § 398.

32. *See* Barth v. B.F. Goodrich Tire Co., 71 Cal. Rptr. 306 (Ct. App. 1968); Casetta v. United States Rubber Co., 67 Cal. Rptr. 645, 661 (Ct. App. 1968).

33. *See, e.g.,* Dart v. Wiebe Mfg., Inc., 709 P.2d 876, 880-82 (Ariz. 1985) (en banc) (referring to this process as the "hindsight" test); Sternhagen v. Dow Co., 935 P.2d 1139, 1143-46 (Mont. 1997) (supporting the "imputation of knowledge doctrine"); Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1036 (Or. 1974) (in banc) ("The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved.*").

34. *See, e.g.,* Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 113-14 (La. 1986) (noting that foreseeability is irrelevant); Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434, 437-38 (Mo. 1984) (en banc) (noting that because actual knowledge is not necessary, the state-of-the-art defense is not a viable option for manufacturers); Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 543-45 (N.J. 1982) (noting that foreseeability is irrelevant).

35. *See, e.g.,* Hayes v. Ariens Co., 462 N.E.2d 273, 277 (Mass. 1984) (noting that for strict liability purposes, a state-of-the-art defense is not relevant); O'Brien v. Muskin Corp., 463 A.2d 298, 305 (N.J. 1983) (noting that the state-of-the-art defense will not absolve a manufacturer from liability if the risk-utility analysis is not satisfied); Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 360 N.W.2d 2, 17 (Wis. 1984) ("A product may be defective and unreasonably dangerous even though there are no alternative, safer designs available.").

V. THE UNIFORM PRODUCT LIABILITY ACT BUILDS UPON SECTION 402A

Some courts' arguable "misuse" of section 402A appeared to create problems for interstate commerce. In 1976, President Ford established a twelve-agency task force to study the problem; given the scope and importance of the project, the task force's work was authorized to continue by President Carter.³⁶ The Federal Interagency Task Force concluded that uncertainties in products liability law had adverse effects on interstate commerce.³⁷ Uncertainties stifled innovation, created unnecessary insurance costs, and caused the withdrawal of good products from the marketplace.³⁸ The Department of Commerce, having been asked by President Carter to develop solutions,³⁹ addressed these uncertainties by publishing the Model Uniform Product Liability Act⁴⁰ ("UPLA").

The UPLA was offered by the Carter Administration as "model" legislation that could be utilized by state legislatures. The UPLA built upon what had been learned from a decade of the courts' "handling" of section 402A. First, the UPLA made clear that there was to be *one* set of product liability rules.⁴¹ The Restatement (Second) attempted to create uniform rules, but some courts failed to understand or appreciate this. Courts continued to allow alternative and vague theories of liability predicated on concepts derived from contract, such as implied warranty.⁴²

Second, the UPLA appreciated that a "one black letter rule" approach to all aspects of products liability did not work. Products liability was functional, not theoretical. For example, one specific rule was needed for mismanufactured products, namely, the strict liability rule that Deans Prosser and Wade had thought about when they drafted section 402A. Under this rule, liability would attach in cases concerning a failure of quality control, where the product did not live up to the manu-

36. See INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, FINAL REPORT (1978) [hereinafter FINAL REPORT]; see also Walter Probert, *The Politics of Torts Casebooks: Jurisprudence Reductus*, 69 TEX. L. REV. 1233, 1238 n.39 (1991); Victor E. Schwartz & Mark A. Behrens, *The Road to Federal Product Liability Reform*, 55 MD. L. REV. 1363, 1365 (1996).

37. See FINAL REPORT, *supra* note 36, at VII-243.

38. See *id.*

39. See *id.* at VII-244.

40. See MODEL UNIF. PROD. LIAB. ACT, reprinted in 44 Fed. Reg. 62,714 (Dep't Commerce 1979).

41. See *id.* § 101(B), 44 Fed. Reg. at 62,716.

42. See *supra* notes 32-35 and accompanying text.

facturer's own design standards.⁴³ Experience had shown that this rule was predictable, insurable, and could be applied relatively easily by juries.

Additional rules were needed with respect to a manufacturer's duty to design his product⁴⁴ and to provide adequate warnings about his product.⁴⁵ Based upon a careful examination of a decade of case law, the UPLA recognized that pure strict liability did not work in the areas of design and failure to warn. Holding manufacturers to standards that were impossible to fulfill produced adverse consequences that outweighed the benefits of such a rule. Liability in these instances was ultimately based on fault.⁴⁶ Although it was model legislation, the UPLA became a source of law for courts.⁴⁷

VI. THE DEVELOPMENT OF RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

A. *The Reporter's Study and Two and One-Half Decades of Experience Under Section 402A Leads to the Restatement (Third) of Torts*

In 1990, the ALI's leadership appreciated that dynamic developments in products liability and tort law might call for further study. In response, they established a Reporters' Study on Enterprise Liability for Personal Injury.⁴⁸ While the study was never adopted by the Institute as "official policy," it laid an extensive research predicate to show that there was a clear and present need to "restate" again at least parts of the law of torts. Without question, one area was products liability.

43. See MODEL UNIF. PROD. LIAB. ACT, reprinted in 44 Fed. Reg. at 62,722 (analysis accompanying section 104).

44. See *id.* § 104(B), 44 Fed. Reg. at 62,721.

45. See *id.* § 104(C).

46. See *id.*, 44 Fed. Reg. at 62,722 (analysis accompanying section 104).

47. See, e.g., *Miller v. Lee Apparel Co.*, 881 P.2d 576, 584-85 (Kan. Ct. App. 1994) (noting that the UPLA was the basis for the Kansas products liability statute, and therefore the purposes of the statutes were similar); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 184 (Mich. 1984) (recognizing and approving distinctions among construction defects, design defects, and defects based on failure to adequately warn, as set forth in the UPLA); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 884 P.2d 920, 925-26 (Wash. 1994) (en banc) (considering the analysis set forth in the UPLA where the applicable state statute paralleled the UPLA).

48. See THE AM. LAW INST., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991).

B. *The Reporters: Experience Counted*

A decision was made by the ALI's leadership to restate the law of torts a third time. The initial focus was not on the entire multi-volume Restatement (Second), but an area of law that had undergone the greatest change since the appearance of section 402A in 1965—products liability. Following a tradition that had its roots in 1923, the ALI leadership selected as Reporters the very best academia had to offer: Professors James A. Henderson, Jr. of Cornell Law School and Aaron D. Twerski of Brooklyn Law School. The professors had both the practical and academic vitae that would make them a “good bet” to complete the project and complete it well.⁴⁹

The ALI recognized that the idea of vesting responsibility for “restating” the law of products liability in people who had not published or who had published articles that had a clear bent toward the plaintiff or defendant was unacceptable. Reporters Twerski and Henderson had written extensively in the products liability area.⁵⁰ A review of *all* of their written works indicates that neither scholar could be pigeonholed as “pro-plaintiff” or “pro-defendant.” The ALI also knew that there was a need for persons with maturity and leadership abilities that would command respect. Twerski and Henderson were the right people.

C. *The Advisory Committee: Balance of Interests Rules*

Following traditions set in the Restatement (First) and Restatement (Second), an advisory committee was appointed to assist the Reporters. Once again, the advisory committee was composed of judges, academics, and experienced practitioners.⁵¹ The ALI leadership appreciated that

49. James A. Henderson, Jr. is the Frank B. Ingersoll Professor of Law at Cornell University. A.B. 1959, Princeton; LL.B. 1962, LL.M. 1964, Harvard University. He is the co-author of JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* (3d ed. 1988); and JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* (2d ed. 1992).

Aaron D. Twerski is the Newell DeValpine Professor of Law at Brooklyn Law School. A.B. 1962, Beth Medrash Elyon Research Institute; J.D. 1965, Marquette University; B.S. 1970, University of Wisconsin. He is the author of AARON D. TWERSKI, *CASES ON PRODUCTS LIABILITY* (1972); and co-author of HENDERSON & TWERSKI, *supra*.

50. See James A. Henderson, Jr., *Process Norms in Products Litigation: Liability for Allergic Reactions*, 51 U. PITT. L. REV. 761 (1990); James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991); 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 (1990); Aaron D. Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 HOFSTRA L. REV. 861 (1983).

51. See *RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB.* at v-vi (Proposed Final Draft 1997).

times had changed from the publication of the Restatement (First) and Restatement (Second). Products liability had become a topic of political and social controversy. Strong academic background and knowledge of the subject could not be the sole criteria for selection to the committee; there also had to be a balance of interests.

It has been suggested in this Symposium and at the 1997 annual meeting of the Association of Trial Lawyers of America (“ATLA”) that the interests of plaintiffs were ignored.⁵² These observations do not correspond with the facts. The interests of plaintiffs were fully and clearly recognized. Paul Rheingold, one of the best known plaintiffs’ attorneys in the United States, who has pioneered the MER/29 litigation⁵³ and currently is a leader in the so-called Fen-Phen litigation, was placed on the committee. William Wagner, former president of ATLA and a practitioner who had shown both leadership in the Florida Bar and extraordinary results in courtrooms, was placed on the committee. Robert Habush, a successful practitioner and another former ATLA president, a major leader of the Wisconsin State Bar, and a person well-versed and experienced in the “politics” of products liability law, was also a member. Also included were professors who, during the course of their careers, had shown a particular sensitivity to the plaintiffs’ point of view, such as Professor Marshall Shapo of Northwestern University School of Law.⁵⁴ Rounding out the committee were jurists who had for decades shown a special sensitivity to those same interests.

The advisory committee also included three people who were perceived to have concerns about defense interests and experience. Sheila Birnbaum, former Associate Dean of New York University and Senior Partner in the law firm of Skadden, Arps, Slate, Meagher & Flom in New York City; John Martin, General Counsel of Ford Motor Company; and myself.

Having participated in every single meeting of the advisory committee from the beginning of the project in 1991 to the last one in 1996, I share with the reader that, without a doubt, if there were any “tilt” on the advisory committee, it was clear that it was toward the in-

52. See Marshall S. Shapo, *Products Liability: The Next Act*, 26 HOFSTRA L. REV. 761 (1998) (discussing the burdens placed on the plaintiff by the Restatement’s reasonable alternative design theory); Frank J. Vandall, *The American Law Institute Is Dead in the Water*, 26 HOFSTRA L. REV. 801 (1998) (suggesting that the ALI is “biased” against plaintiffs with respect to tobacco and gun design suits).

53. See Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968).

54. See Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995).

terests of the fine advocates Messrs. Rheingold, Habush, and Wagner.

Another point of equal importance, which might surprise the reader, should be made clear. People on the advisory committee did not always “argue” from the point of view that might appear to be in their day-to-day professional interest. There were genuine, open-ended discussions where, from time-to-time, people were on the opposite side of where they might usually be “pegged” by the public or those who knew them. The process in the advisory committee meetings was one of mutual respect.

What did these meetings do and how did they proceed? At the first meeting, the Reporters discussed concepts and ideas. They also put forward a draft.⁵⁵ The draft was dissected into the smallest of sections and discussed, debated, and revised.

The Reporters had, in a law review article, published their views of what the new Restatement should look like.⁵⁶ Some members of ATLA’s leadership have criticized the Reporters for that endeavor and suggested that the final work was “preordained” by the law review article. To the contrary, the draft provided a target for evaluation, criticism, and revision. There was *no* “hidden” agenda.

D. The New Members of the ALI Team— Members Consultative Group

In addition to the advisory committee, a new body, the Members Consultative Group, was formed for the Restatement (Third) project and other ALI projects. While the advisory committee was chosen by the ALI leadership, any member of the ALI could join the Members Consultative Group, and many did. They included experienced practitioners from all segments of the American Bar. The Members Consultative Group had opportunities, time and again, to meet with the Reporters and to criticize each portion of every draft.

E. Criticism Beyond the Advisory Committee and the Members Consultative Group

The Reporters’ “input” was not limited to the advisory committee and the Members Consultative Group. They also met with leadership of independent groups, such as ATLA, the Product Liability Advisory

55. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (Preliminary Draft No. 1, 1993).

56. See James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

Council, Inc.,⁵⁷ and other interest groups, to make sure that no stone or view was left unturned.⁵⁸

F. *The Council and ALI Membership Review Process*

After the Reporters, the advisory committee, the Members Consultative Group, and others had reviewed and revised each draft, including Tentative Draft No. 1,⁵⁹ Tentative Draft No. 2,⁶⁰ and a Proposed Final Draft,⁶¹ that draft was reviewed in detail by the governing Council of the ALI. The Council is the basic leadership group of the Institute, and only persons of extraordinary background have the privilege to serve. The Council's review process precludes any group or individual from fostering his or her agenda. Its goal is to fulfill the basic purpose of the ALI itself—to assure that ALI work products are the best of professional excellence, fair, balanced, and learned.

After the Council has approved a draft, it is considered by the general membership of the ALI. The general membership considered and evaluated drafts in 1993,⁶² 1994,⁶³ 1995,⁶⁴ 1996,⁶⁵ and the Proposed Final Draft in 1997.⁶⁶ Days of debate and argument focused on each and every section. After further revisions by the diverse ALI membership, a final draft was approved by an overwhelming majority vote on May 17, 1997.⁶⁷

57. The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with 128 corporate members from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products. In addition, PLAC has approximately 300 sustaining members, who are leading products liability defense attorneys from across the United States. PLAC was formed for the purpose of submitting amicus curiae briefs in important appellate cases involving significant public policy issues affecting the law of products liability. PLAC was formed in 1983 and is based in Reston, Virginia. PLAC briefs are highly regarded by courts and practitioners for their scholarship and insight.

58. See Aaron D. Twerski, *Inside the Restatement*, 24 PEPP. L. REV. 839, 841 (1997).

59. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (Tentative Draft No. 1, 1994).

60. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (Tentative Draft No. 2, 1995).

61. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (Proposed Final Draft 1997).

62. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (Preliminary Draft No. 1, 1993).

63. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (Tentative Draft No. 1, 1994).

64. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (Tentative Draft No. 2, 1995).

65. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (Tentative Draft No. 3, 1996).

66. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (Proposed Final Draft 1997).

67. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

G. *The Executive Director—Assuring Fairness*

With two Reporters, an advisory committee, a Members Consultative Group, the Council, and the ALI membership itself, there was an essential need to have supervisory leadership placed in one individual. That responsibility was vested in the Director of the ALI, Professor Geoffrey Hazard. This was not the first controversial project Professor Hazard had shepherded through the ALI process.

Professor Hazard presided over each meeting of the advisory committee and Members Consultative Group. He helped assure that all points of view were considered. When personalities or individual idiosyncrasies began to prevail over the exchange of ideas, Professor Hazard swiftly put the project back on course—reminding those present that the goal of the project was to the search for fair resolutions. It helped that Professor Hazard's background is in legal ethics and not tort law. He came into the project without prior views on the subject. His focus was an overall public policy perspective. When politics and "lobbying" appeared to invade the process, Professor Hazard brought the project back on course and focused the ALI on the end game of professional excellence.

VIII. THE FINAL WORK—A MIDDLE GROUND

It is absolutely incorrect to characterize the Restatement (Third) as a defense or plaintiff-oriented work product. The Restatement (Third) followed the goal and purpose of section 402A of the Restatement (Second) and imposed strict liability on manufacturers for so-called manufacturing defects.⁶⁸ Following the overwhelming body of case law for the past thirty years, as well as the UPLA, the Restatement (Third) utilized fault-based liability for design and warning cases.⁶⁹

Most of the criticism of the Restatement (Third) has come from a few plaintiffs' lawyers and professors sympathetic to their point of view. They have suggested that the Restatement (Third) is too defense-oriented. This assertion is surprising. There are so many modifications and innovations made in the Restatement (Third) that are of assistance to plaintiffs that one cannot list them all in an "overview" such as this Article. In light of the unfounded criticism that the Restatement (Third) is a vehicle for the defense bar, however, it might be helpful to list five.

First, the Restatement (Third) provides a new black letter rule im-

68. *See id.* §§ 1-2.

69. *See id.* § 2(b), (c).

posing a continuing duty to warn on manufacturers.⁷⁰ After a product is in the marketplace with adequate warnings, a new liability exposure can arise if the manufacturer does not act as a reasonable person with respect to a duty to warn about risks discovered after the product has been in the marketplace.⁷¹ The Reporters worked very hard to provide a rule that had clarity and balance. But, a post-sale duty to warn, no matter how carefully stated, is open-ended and uncertain in its application. Also, only a minority of cases support such a duty.⁷²

Second, the Restatement (Third) imposes a new duty “to recall” a product if a manufacturer voluntarily undertakes such a project.⁷³ In effect, the “good Samaritan rule,” so criticized in the area of malpractice, is imposed on manufacturers of products.⁷⁴

Third, in a comment named after advisory committee member and former ATLA President Robert Habush, the Restatement (Third) allows a court, in extraordinary circumstances, to consider imposing liability on a manufacturer for harms caused by a product that is so dangerous that it should never have been made at all, even if there is *no* other way to make the product.⁷⁵ In black letter, the Restatement (Third) would allow the same type of claim with respect to pharmaceuticals that no reasonable medical practitioner would prescribe,⁷⁶ a result that major courts believed was blocked under the Restatement (Second).⁷⁷

Fourth, the Restatement (Third) permits plaintiffs to win cases with design, warnings, and mismanufacture claims under the doctrine of *res ipsa loquitur*, which basically states that you do not have to utilize direct evidence to prove a defect and you do not need an expert.⁷⁸ There is almost no case law in support of this view with respect to defects based on either design or warnings.

Fifth, in what was a severe blow to the automobile industry, the Reporters included a section in the “black letter” for cases involving so-called “secondary collisions,” having as its practical effect that if a per-

70. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 (1998).

71. See *id.* § 10(b).

72. See *id.* § 10(b) reporters' note.

73. See *id.* § 11(a)(2), (b).

74. See *id.* § 11 cmt. c.

75. See *id.* § 2 cmt. e.

76. See *id.* § 6(c).

77. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965); see also *Brown v. Superior Court*, 751 P.2d 470, 481 (Cal. 1988) (interpreting comment k to include all prescription drugs). The *Brown* court noted that it would be receptive to a “method [that] could be devised to confine the benefit of the comment k negligence standard to those drugs that have proved useful to mankind while denying the privilege to those that are clearly harmful.” *Id.*

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

son's injuries are deemed to be indivisible, the manufacturer can be held liable for all of his injuries, including the injuries from the first collision, even though the manufacturer may have only slightly enhanced the injuries in the second collision.⁷⁹ The burden of proof for division is on the manufacturer.⁸⁰ There is unfairness to this approach, because the manufacturer can be held liable for a very serious harm that it did not, in fact, cause. The strong and diligent advocacy efforts of those in the defense bar failed to persuade the Reporters.

In light of these facts, why have plaintiffs' lawyers claimed that the Restatement (Third) is pro-defense? Their focus has been on two basic policy choices. First, as has been indicated, the Restatement (Third) sets forth one united set of rules for products liability.⁸¹ The plaintiffs' lawyers and some academics wanted a more open-ended liability system. Nevertheless, the ALI membership strongly supported the one set of rules. This approach is in accord with the rationale of most of the legal literature, case law from the past three decades, as well as the UPLA. The view that there should be one set of tort rules for products liability was also the key predicate for the decision that began strict products liability in the first place: Justice Traynor's decision in *Greenman*. Justice Traynor saw contract remedies infused in tort law as a "booby-trap for the unwary."⁸² Products liability works well if consumers know their rights and manufacturers know their responsibilities, and the Restatement (Third) tries to fulfill that goal.

The plaintiffs' advocates also objected vehemently to the fact that in a design defect case, the Restatement (Third) requires a plaintiff to show that a reasonable alternative design could have provided overall better safety than the original design. As has been indicated, through an expanded use of *res ipsa loquitur* and the so-called "Habush Amendment," the Reporters eased this requirement.⁸³ As a practical matter, plaintiffs' lawyers in virtually every major products liability design case, from allegedly defective automobiles to medical devices, have shown the jury a reasonable alternative design.⁸⁴ They have helped the jury visualize what was wrong with the product and how it could have been made so as to have avoided causing the plaintiff harm. Winning

79. See *id.* § 16(d).

80. See *id.* § 16 cmt. e.

81. See *id.* § 1.

82. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963) (in bank).

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

84. See 1 M. STUART MADDEN, PRODUCTS LIABILITY § 6.12 (2d ed. 1988).

plaintiffs' lawyers know that this is the only practical way to litigate a design case.

CONCLUSION

The purpose of this Article is not to suggest that Reporters Twerski and Henderson were correct at every turn, but that the Reporters and the ALI review process were fair, deliberative, and democratic. Any careful analysis of the project, from beginning to end, shows this to be true. A review of the ALI processes and procedures, from the inception of restatements of law in 1923 to the latest Restatement (Third) in 1998, indicates that such an approach was and always will be the hallmark of The American Law Institute.

*