Perfecting Tort Design

Restatement (Third) Drafts Defective Design and Warning Claims

By Richard Dean

Since 1965, when it was adopted by the American Law Institute, §402(a) of the Restatement (Second) of Torts has been the cornerstone of product liability litigation in this country. At least 34 states judicially adopted the section, and several states passed specific statutes following its basic provisions. It is cited as authority in at least 3,000 published opinions.

Section 402(a) provides that:

> (1) 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, if
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> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The major impact of §402(a) was to eliminate conclusively a defense of privity and to codify, to the extent a Restatement can, the concept of strict liability in the context of manufacturing defects.

In May 1995, the American Law Institute adopted §§1 through 8 and §11 of the Tentative Draft No. 2 of the Restatement (Third) of the Law of Torts: Products Liability. While work is still in progress regarding Restatement (Third), the sections already accepted represent major changes in the means for proving a defect.

This article will focus on the highlights of §2 of Restatement (Third) relating to proof of a defect, which will replace §402(a) of Restatement (Second). Again it is up to the individual states to determine whether to adopt the new provision. They are free to retain §402(a) if they choose.

It should also be noted that there are many other sections in Restatement (Third), and there are specific provisions dealing with proof of a defect in the area of prescription drugs. They are beyond the scope of this article.

Restatement (Third) follows the familiar form of prior Restatements. Each section starts with a "black letter" statement of the law; continues with a Comment, which incorporates Illustrations; and concludes with a Reporters' Note. The note contains extensive citation to the case law.

One of the acknowledged weaknesses of §402(a) was the fact that its authors primarily focused on problems relating to proving defective manufacturing and did not focus on two other crucial areas of proving defects—defective design and defective warnings. As noted by the reporters for Restatement (Third), "it soon became evident that the rule created to deal with liability for manufacturing defects could not, without considerable difficulty, be applied to design and warning defect claims." Henderson and Twerski, "A Proposed Revision of Section 402a of the Restatement (Second) of Torts," 77 Cornell L. Rev. 1512 (1992).

Sections 1 and 2 of Restatement (Third) directly confront all three areas of possible defect. Section 1 provides that a product is defective if, at the time of sale or distribution, it contains a defect in manufacturing, design, or warning. Section 2 is the crucial section relating to defects:

> *§2. Categories of Product Defect*
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> For purposes of determining liability under §1:
> (a) a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
> (b) a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
> (c) a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Subsection 2(a) represents no change from existing law. It provides for strict liability without fault for manufacturing defects. If there is a deviation from the design or manufacturing specifications, no evidence about efforts at quality control will serve as a defense. Whether a causal connection exists between the defect and the injury remains the major inquiry as to manufacturing defects, and the defect must have been present when the product left the hands of the seller.

In contrast to this strict liability for manufacturing defects, consider the way in which Restatement (Third) treats design and warning defects.

The linchpin of §2(b)'s standard for design defect is the concept of "reasonable alternative design"—an idea that generated extensive discussion within the American Law Institute and the academic community. The proposed test is intended to apply to all design claims whether they are labeled strict liability or negligence.

CONSUMER EXPECTATION

The standard for judging defectiveness is this risk/utility balancing test: A product is deemed defective when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design. The reporters claim that a majority of jurisdictions use some type of risk/utility formula and that once the rhetoric is cut away, this section simply sets forth what most courts seem to be doing in design cases already.

A number of jurisdictions currently use some form of a consumer expectation test. This test permits a defect to be proven if a product does not perform as would be expected by an ordinary consumer when used in a reasonably foreseeable manner. One of the most significant changes in §2 is the elimination of consumer expectation as the sole standard for determining product defect

Indeed, many have argued that the consumer expectation test should be abandoned because of the difficulties in defining what areasonable consumer expects. Critics of the test say that it provides little guidance to juries and that juries often do not have a reasonable expectation as to design possibilities.

Comment (e) to §2(b) provides that a wide range of factors may be considered in determining when an alternative design is reasonable.

> The factors include, among others, the magnitude of the foreseeable risks of harm, the instructions and warnings that accompanied the product, the nature and strength of consumer expectations regarding the product, the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed, and the effects of the alternative design on production costs, product longevity, maintenance and repair, esthetics, and marketability. Plaintiff is not necessarily required to introduce proof on all of these factors; their relevance, and the relevance of other factors, will vary from case to case.

The list of factors is non-exhaustive.

As Comment (e) also notes, the overall safety of the product must be considered. An alternative design that reduces or prevents the harm suffered by one plaintiff may introduce other dangers of equal or greater magnitude. It is not simply enough to prove an alternative that might have prevented the injury, although that is certainly necessary for the proximate cause portion of §2(b).

As with current law, one factor that defendants may use under Restatement (Third) is a comparison of the defendant's design with the design of other products. While such evidence is admissible under §2(b), however, it is not dispositive. Theoretically, a plaintiff could introduce evidence that a reasonable alternative was possible even though the design had not been marketed.

THE RISE OF THE EXPERT WITNESS

While the plaintiff bears the burden of proving a reasonable alternative design under §2(b), Comment (e) specifically says that the plaintiff does not have to produce a prototype to prove a case. Testimony from a qualified expert will suffice.

Indeed, the concept of a "reasonable alternative design" will almost certainly require plaintiffs to retain expert witnesses. Plaintiffs probably do that now in risk/utility jurisdictions, although design experts are not necessarily needed in states where the consumer expectation test is the sole criterion. One of the specific criticisms of §2(b) is the fact that it would increase the cost of litigation for plaintiffs.

The adoption of the reasonable alternative design test will place a premium on defining which products may be compared to the one at issue. Is any product that may be substituted on a functional basis one that may be compared for purposes of the reasonable alternative design analysis? For an in-depthdiscussion of this concept, see Cupp, "Defining the Boundaries of 'Alternative Design' Under the Restatement (Third) of Torts," 63 Tenn. L. Rev. 329 (1996).

In that article, Professor Richard Cupp of Pepperdine invokes the facts of *Driesonstok v. Volkswagenwerk*, 489 F.2d 1066 (4th Cir. 1974), for explanatory purposes. In that case, a Volkswagen van traveling at 40 miles per hour struck a telephone pole, causing leg injuries to a passenger sitting in the front of the van. The passenger sued, claiming the van was defective because it did not utilize a "long hood," which provides more protection to passengers in front-end collisions. The passenger claimed that a longer hood would have absorbed more impact and thus prevented damage to her legs.

In essence, the plaintiff was urging a Cadillac front end on a Volkswagen body. Is this a reasonable alternative, or is it an entirely different product that should not be viewed as an alternative? Obviously, defense counsel will attempt to define a product as narrowly as possible and would argue that such hood changes to a Volkswagen create a new and different product. Plaintiff's counsel would seek a broad definition of a Volkswagen van, i.e., a "passenger motor vehicle."

Much of the battle of reasonable alternative design will be fought over which products may be considered in the same class as the one under challenge. Restatement (Third) recognizes that this is an important issue, but gives no real meaningful guidance on it.

FIVE TESTS

In his article, Professor Cupp proposes five tests for determining whether alternatives are suitable for comparison.

First is similarity of function. A Volkswagen van should probably be compared with other vans and not Cadillacs.

Second is similarity of risk characteristics. If the general nature of the risks of the products are not in the same ballpark, the products may not be appropriate for comparison.

Third is whether the products look alike. Cupp gives the example of glass and plastic bottles.

Fourth is whether there is cross-elasticity of demand. Do the products compete, and would a small change in the price of one result in a consumer switch to the other?

Fifth is consumer autonomy. If a court were to permit Cadillacs to be compared with vans, the eventual result might be a narrowing of the range of available products, thus limiting consumers' opportunity to choose cost and utility factors over safety factors. Restatement (Third) views consumers as knowledgeable and capable of making conscious choices in regard to cost, utility, and safety.

While this issue of appropriate comparisons in design claims will clearly be a major battleground in product liability litigation, Restatement (Third)'s take on warning claims should not produce much litigation. The rule set forth in §2(c) regarding warning defects is not substantially different from the case law on warnings. It is a reasonableness-based inquiry. Once again the Comment provides support for several defenses now often advanced.

First, the Comment suggests that warnings can be too numerous or detailed, and thus more likely to be ignored. Second, the Comment states specifically that there is no need to warn of obvious risks. Restatement (Third) provides an illustration involving a ladder company sued for injuries incurred when a father placed a ladder next to an unlocked door to an adjacent room where his son was playing. The father was knocked off the ladder and injured when the son entered the room where the father was working. The illustration concludes that this danger is obvious to end users, and thus there is no need to warn about it.

Finally, product liability claims not based on defects at the time of sale, such as misrepresentation or negligent entrustment, are not affected by the Restatement.

So far, courts have made limited mention of Restatement (Third). Usually courts have cited it where a provision of the Restatement is consistent with the law in a particular jurisdiction, and the courts have used the reference to suggest that the law of their state is consistent with the general trend of the law. *Saratoga Fishing Co. v. Marco Seattle Inc.*, 69 F.3d 1432 (9th Cir. 1995).

The influence of Restatement (Third) should grow, however, as courts in some jurisdictions and legislatures in others adopt its provisions. Since §§2(a) and 2(c) do not represent major changes from Restatement (Second), the §2 cases to watch will be the §2(b) design cases.