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Tort Reform Policy More than State Law Dominates Section 2 of the Third Restatement

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Good afternoon, or "May it please the Court," as it were. Following up on the last presentation, I join my colleague Jerry Palmer[1] in expressing concern about the *Restatement* and agree that the *Black & Decker* case[2] is evidence of the harsh impact of the inflexible alternative design requirement expressed in section 2. Mr. Palmer provided a graphic in which he demonstrated how the alternative design requirement will become a filter for a broad range of tort actions, beyond strict liability for design defect.[3] In antitrust parlance, the effect of this requirement would be referred to as a bottleneck, a point through which all injured and aggrieved consumers must pass.

The problem with any bottleneck is that the entity that controls (or in this case defines) the terms for access through this essential portal has enormous power. Power refers to the role played by the *Restatement* and the ALI regarding the redefinition of the parameters of tort litigation. The *Restatement* forces us to ask the following question: Was the law in the United States to the effect that no tort action focused on defect can go forward unless the reporters vision of alternative design is satisfied? The answer is NO! That may be the perspective of those who seek to limit all civil liability under the banner of tort reform, but it is not substantiated in the case law.

Responding to this charge, we are told that the instructions given to juries already reflect the broad meaning of section 2 and that jurors will see the *Restatement's* mandatory alternative design requirement as part of a generalized risk/utility test, the dominant measure of defect. This is sophistry; the plain meaning of the *Restatement* would not permit defect to be established by showing that the risk of a product outweighs its benefit. The plain meaning is that the plaintiff will be required to concoct an alternative design — and that drives a stake through the heart of current product liability law.

Before I launch into my nine-and-a-half remaining minutes, let me just throw some technologies out for our reporters: sodium pentasulfide, asbestos, TCE's and similar toxins. In these areas, no plaintiff is going to be able to generate an alternative design. Does that mean we no longer have strict liability for dangerous chemicals? Even if alternatives could be produced, the cost of alternative design is fiscally prohibitive for the vast majority of plaintiffs. When I look at these fields, the bottleneck becomes smaller, and fewer and fewer plaintiffs will be able to pass through.

On a more general level, I've been struggling with this *Restatement (Third) of Torts: Products Liability*. It is not that it is difficult to understand. In fact, it is rather magnificent in terms of its clarity and coherence; the reporters are to be commended for that. My broad issues involve several other points.

First, as a legal academic, I face a problem generated by all Restatements. Law professors

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have an obligation to maintain a learning environment in which doctrine is questioned, in which uncertainty is a constant. We teach our students that clients seek out thoughtful, competent, creative lawyers because law is more of an art than a science and that every situation can be seen from multiple perspectives. Uncertainty in fact and uncertainty in law are part of what we deal with.

The *Restatement* provides a momentary and illusory relief from uncertainty, and I find that troubling. Consider this: Does anyone doubt the popularity of a law professor who enters the classroom with a stated goal of telling students the 'skinny,' the 'real dope,' the law 'as it actually is'? The heck with that common law business. Here is a person who dishes up the hidden truth. To students, this professor is a hero. Sadly, such professors mislead students into a world where law is linear and reasoning is doctrinal. And you, as judges and lawyers, know that characterization is just not so.

Second, and more troubling, are the more delicate questions that came up in Jerry Palmer's presentation and also in the presentation in the first part of this program by the reporters. In this *Restatement* there is a defining moment: the selection of an inflexible alternative design requirement for defect cases outside of a tiny and exceptional group of overt and unconscionably defective goods. The reporters may not want this to be the legacy of the *Restatement,* perhaps because the standard is one that can only be seen as defendant centered. To be sure, there are creative and pro-plaintiff components in other parts of this *Restatement,* but the crystal and transformative declaration by which this *Restatement* will be judged is in its choice of this bottleneck. By that selection, this becomes a tool of tort reform.

When I was preparing for this program, like many of you, I heard about the death of Al Campanis. He was an unusual man who Walter Alston said had taught him everything he needed to know about baseball. Yet every obituary I read, everything I heard about Al Campanis, began with a tragic moment in 1987 when he made a blatantly racist remark on television, was immediately fired by the Dodgers and was thereafter, forever, marked. [4] As in biology, sometimes a single event labels or reveals the identifying trait. Is this the fate of this *Restatement*? When you choose something of this force and this magnitude that affects cases in such a profound way, it is inevitable that it will be the symbol by which the document is branded.

The *Restatement* is not just a text to aid judges. Law students place great stock in these publications. What should I advise my students this fall? I teach torts. What am I going to say to them about the *Third Restatement*? Should I tell them that it is a fair statement of the law? Should I tell them that it is a strained reconfiguration of law? I will inform them that sometimes the ALI sets forth propositions and qualifies them by inviting the states to take a leap, to move forward and consider the innovation proposed. Other times, the *Restatement* purports to restate a general and agreed upon interpretation of the common law, as it has done with the alternative design requirement. Should I tell them that this is the law? Should I tell them that the drafters wrote it because they were expressing their hope, the 'best way' as they saw it?

What I am going to do is tell my students to go to the law library, use Westlaw, use Lexis, and find out for themselves. Here is my guess about what my students are going to say.

Contrary to the *Restatement,* they are going to find that *Sternhagen*[5] case in Montana and the *Potter*[6] case in Connecticut are not aberrant. They are going to conclude, when they look state by state, that there is no consensus in terms of what design defect means, that there is an intricate, important, confusing tapestry of design defect law that involves consumer expectations, not trivialized the way they were in the first section of this program, but talked about broadly and in compassionate terms. They are going to find risk-utility, which they will come to call the Wade Seven Test (for which they will develop confusing acronyms), as having many, many different meanings in different states. They are going to find alternative design among those factors, but they will find that it is not a mandatory requirement in the majority of states.[7]

At this point, I imagine a discussion will follow in my class. Students will ask one another and me, why the *Restatement* has focused on this singular requirement. Why is it in the *Restatement*? I will tell them that, personally, I do not know what went on at the American Law Institute. I'm not part of that inner room, that sanctum sanctorum of legal profession.

I only know that the outcome, the selection of this singular criteria, was never part of the advocacy of those who argue on behalf of injured consumers. It was never part of the agenda of those who argue on behalf of women's rights. It was never part of the strategy of those who sought to tear the cloak off of the asbestos and tobacco industries. It was never part of the agenda of the consumer movement. That I know.

I will refer them to a new law review industry; there are scores of professors and attorneys trying to understand, comment on, and deconstruct the *Restatement.* It is really quite something. The reporters of the *Restatement* have already produced two lengthy pieces. One of them was just distributed. It is a defense of their work, refuting the charge that the *Restatement* is a reflection of the tort reform agenda.[8] Other authors have attacked the work, as I have done today. Professors Frank Vandall, [9] Marshall Shapo,[10] Jerry Phillips,[11] Ellen Werthheimer,[12] and Howard Klemme [13] have produced articles saying that the *Restatement* is flawed. Professor Vandall contends that the election of 'alternative design' is "not accurate." [14] Klemme says that it is a "substantial misrepresentation."[15] This is serious criticism in this community.

Some of this criticism, however, misses the point. With all due deference to public choice theory, imagine the innocent consumer who acquired a product and is thereafter injured or killed, who used the product in a foreseeable way, who with reasonable inquiry and inspection could not have anticipated the harm, who learns that in order to prevail in such a situation that a person will have to build a better mousetrap. Through this scenario, the consumer will learn that there is no expectation that a product will perform safely — if the *Third Restatement* law is applied.

One defense of the *Restatement* is that it does not require, by its very text, the production of an alternative design. Frankly, that is precisely what the text requires. Further, what is a

jury going to think when the state jury instructions are modified to conform with the *Restatement* and they are given the language of section 2? It *does* mean building a better mousetrap. It does force the plaintiff to become an expert in the technology that caused the plaintiff's injury and redo the product. That is what is required.

A few months ago, Professor Rebecca Korzec wrote an article in the *Boston College of International and Comparative Law Review*[16] examining the European product liability directive. The directive selects consumer expectation as the singular test, the only fair and rational means to undertake an analysis of what a defect is. Now, we all understand that the directives have a different meaning in Europe than in the United States because of the variation in the legal systems. Even with that qualification, we do know that this directive represents their best thinking.

Consumer expectation also represents the best thinking of a number of American courts, and it is trashed by the *Third Restatement.* Korzec notes, "The abandonment of consumer expectation may be shortsighted and imprudent."[17] Ellen Wertheimer likewise notes, "One is forced to conclude [that] the *Third Restatement* is a mistake, doctrinally and practically. It does not, cannot set forth a consensus . . . for there is none."[18] Wertheimer concludes, "[t]he *Third Restatement* makes one thing perfectly clear: The drafting process followed [by the ALI] is a political one." [19]

I don't know if that is true. The point of the matter is that there was a substantive choice made. If it is wrong, you are the group that needs to take action.

This is the definitional moment of the *Restatement.* No one is seriously debating manufacturing defect. No one is questioning what to do with putrid food or misproduced items. These are not matters of controversy. Controversy happens when you deal with a product that is made by a company that is not negligent and the product ends up killing people, and there is no readily available alternative, or the cost of producing an available alternative is prohibitive. In that area the *Restatement* fails you, as judges, and, more importantly, fails the public.

Notes

1. *See* Jerry R. Palmer, *General Discussion of Restatement (Third)*, 8 KAN J.L. & PUB. POL'Y 35 (1998).
2. Stanczyk v. Black and Decker, Inc., 836 F. Supp. 565 (N.D. Ill. 1993).
3. *See* Palmer, *supra* note 1, at 35.
4. *See, e.g.*, Mike Littwin, *Remark Defined Former Dodger*, THE COMMERCIAL APPEAL, June 23, 1998; at D1, Associated Press, *Campanis Dies at 81, Will Be Remembered for Slip of Tongue*, BUFFALO NEWS, June 22, 1998, at S12.
5. *See* Sternhagen v. Dow Chemical Co., 935 P.2d 1139 (Mont. 1997).
6. *See Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319 (Conn.1997).
7. *See id.* at 1331-32 n.11.
8. *See* James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 HOFSTRA L. REV. 667 (1998).
9. *See* Frank J. Vandall, *The Restatement (Third) of Torts: Product Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV 1407 (1994).
10. *See* Marshall S. Shapo, *A New Legislation: Remarks on the Draft Restatement of Products Liability*, 30 U. MICH J.L. REFORM 215 (1997).
11. Jerry J. Phillips, *Achilles Heel*, 61 TENN. L. REV. 1265 (1994).

12. Ellen Wertheimer, *The Third Restatement of Torts: An Unreasonably Dangerous Doctrine*, 28 SUFFOLK U. L. REV. 1235 (1994).
13. Howard C. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173 (1994).
14. Vandall, *supra* note 9, at 1408.
15. Klemme, *supra* note 13, at 1174.
16. Rebecca Korzec, *Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectation Test*, 20 B.C. INT'L & COMP L. REV 227 (1997).
17. *Id.* at 249.
18. Wertheimer, *supra* note 12, at 1255.
19. Wertheimer, *supra* note 12, at 1256.