# Restatement (Third) of Torts and the Proof of a Reasonable Alternative Design

by Shawn Raiter

## I. Introduction

Since 1967, Minnesota courts have relied on Section 402A of the Restatement (Second) of Torts when considering products liability issues. McCormack v. Hankscraft Company, 154 N.W.2d 488 (Minn.1967). However, in May of 1997, the American Law Institute approved the final draft of the Restatement (Third) of Torts: Products Liability ("Restatement (Third)"). The Restatement (Third) was developed to replace and expand Section 402A. Since its adoption, the Restatement (Third) has received little attention from Minnesota appellate courts. However, because of its significant impact on products liability actions, defense counsel should urge Minnesota courts to apply the Restatement (Third).

Perhaps the most significant impact the Restatement (Third) has on Minnesota law is that it makes proof of a reasonable alternative product design an element of the plaintiff's *prima facie* design defect case. Arguably, although not conclusively, proof of an alternative product design was not a **required element** of the plaintiff's case prior to approval of the Restatement (Third). To date, no Minnesota appellate court has confirmed Minnesota's adoption of the alternative design requirement set out in the Restatement (Third). Because such a requirement provides defense counsel with an additional basis upon which to seek summary judgment, application of the new provisions should be urged.

## II. Minnesota Products Liability Law: a General Background

In McCormack, Minnesota adopted a strict liability analysis for products cases. Owing its origin to both warranty and tort, strict liability theory represents a merger of tort and contract law. Recognizing that true strict liability principles do not apply easily to cases involving defective design and failure to warn, the Restatement (Third) no longer uses the term "strict liability" like its predecessor, Section 402A of the Restatement Second. Compare Restatement (Third) ' 1 with Restatement (Second) of Torts ' 402A (1965). In his concurring opinion in Bilotta v. Kelley Co., 346 N.W.2d 616, 626 (Minn.1984), Justice Simonett recognized the lack of need to determine whether the theory of liability is negligence or strict liability as long as the plaintiff receives the strongest and broadest theory of recovery in design and failure to warn cases. Justice Simonett's position has now been incorporated into the Minnesota Civil Jury Instructions at CIVJIGS 75.20 and 75.25

### A. Defective Design

Minnesota products liability decisions generally involve cases divided into three claimed **tort** causes of action: manufacturing flaw, design defect and failure to warn. In order to recover damages under Minnesota products liability law, a plaintiff must establish: (1) the defendant's product was in a defective condition unreasonably dangerous for its intended use; (2) the defect existed when the product left the defendant's control; and (3) the defect was the proximate cause of the injury sustained. Bilotta, 346 N.W.2d at 623, note 3 (citing Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426, 432 (Minn.1971)).

According to the Minnesota Supreme Court, "A product is defective if it fails to perform reasonably, adequately and safely the normal anticipated or specified use to which the manufacturer intends that it be put, and it is unreasonably dangerous to the plaintiff." Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 155 (Minn. 1982). Whether a product is defective is generally a fact question, but if "reasonable minds cannot differ," it becomes a question of law. Drager by Gutzman v. Aluminum Indus., 495 N.W.2d 879, 882 (Minn.Ct.App.1993).

A manufacturer must exercise that degree of care in planning or designing the product that will avoid any unreasonable risk of harm to anyone likely to be exposed to danger when the product is used in the manner for which it was intended or in an unintended yet reasonably foreseeable manner. Bilotta, 346 N.W.2d at 621 (citing Micallef v. Miehle Co., 348 N.E.2d 571, 577-78 (N.Y.1976)). Minnesota courts apply a "reasonable care" balancing test for determining whether the manufacturer's choice of design strikes an acceptable balance among with respect to competing factors. These factors include:

1. The usefulness and desirability of the product;

2. The availability of other and safer products to meet the same need;

3. The likelihood of injury and its probable seriousness;

4. The obviousness of the danger;

5. Common knowledge and normal public expectation of the danger;

6. The avoidability of injury by care and use of the product (including the effect of instruction or warnings); and

7. The ability to eliminate the danger without incurring the usefulness of the product or making unduly expensive.

Krein v. Raudabough, 406 N.W.2d 315, 318 (Minn.Ct.App.1987) (citing Holm v. Sponco Manufacturing, Inc., 324 N.W.2d 207, 212 (Minn.1982)). The test is an objective standard "which focuses on the conduct of the manufacturer in evaluating whether its choice of design struck an acceptable balance among several competing factors." Bilotta, 346 N.W.2d at 622.

### B. Failure to Warn

To state a cause of action against a manufacturer for failure to provide adequate warnings of dangers inherent in the improper use of its product, the plaintiff must establish the improper use was reasonably foreseeable to the manufacturer. Drager, 495 N.W.2d at 884. Even if an improper use was reasonably foreseeable, a manufacturer has no duty to warn when the product user is aware of the risk or "when the dangers of a product are within the professional knowledge of the user." Willmar Poultry Co. v. Carus Chem. Co., 378 N.W.2d 830, 835 (Minn.Ct.App.1985); Dahlbeck v. Dico Co., 355 N.W.2d 157, 163 (Minn.Ct.App.1984).

The existence of a duty to warn is a question of law. Balder v. Haley, 399 N.W.2d 77, 81 (Minn.1987). The adequacy of the warning, the breach of the duty and causation are generally questions of fact for the jury. Id.

### C. Manufacturing Defects

When a manufacturing defect is alleged, Minnesota law applies a strict liability standard. 4A Minnesota Practice, CIVJIG 75.30 (1999). In a manufacturing defect case, the defect is proved by focusing on the condition of the product and not the manufacturer's conduct. Bilotta, 346 N.W.2d at 621-22. The comments to the Restatement (Third) make it clear the American Law Institute applies this strict liability standard to manufacturing flaws. Restatement (Third) ' 2 cmt. a.

## III. Reasonable Alternative Design as an Element of the Plaintiff's *Prima Facie* Case.

Perhaps the most controversial aspect of the Restatement (Third) is found in Section 2(b). This Section states that when bringing a claim for design defect, the plaintiff cannot make a *prima facie* case of liability without showing there was a reasonable alternative design that: (1) would have prevented the injury; and (2)

would have been safer overall.

According to the definition of design defect under the Restatement (Third), the existence of a reasonable alternative design becomes the very essence of a design defect claim:

> [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.

Restatement (Third) [1] 2(b) (emphasis added). By definition then, the plaintiff bears the burden of proving a "reasonable alternative design" was available to the defendant that would have prevented, or significantly lessened, the claimed injuries. Id., cmt. c.

Defense counsel should note Section 2(b) sets out a two-part test for design defect claims. The plaintiff must first show a reasonable alternative design existed at the time of manufacture. Second, the plaintiff must prove the actual product design was not reasonably safe. This two-part test recognizes that the mere existence of a reasonable alternative design does not necessarily render another design not reasonably safe. Manufacturers do not owe a duty to produce the absolute safest product. Instead, they must design a product that is "reasonably safe." Defense counsel should spend time focusing both the judge and the jury on **both** requirements set out in Section 2(b). Counsel should highlight the fact that a plaintiff's proof of a reasonable alternative design, while necessary, does not in and of itself establish the design at issue was not reasonably safe.

Even before adoption of the new Restatement (Third) provisions, most plaintiffs attempted to provide proof of alternative designs as part of their case. In doing so, plaintiffs often presented evidence of an alternative design that would have arguably prevented **their** injuries. See, e.g., Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn.1987). Often, however, the overall safety of the alternative design was less than the overall safety of the actual design. Recognizing this problem, the Restatement (Third) explains:

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

Restatement (Third) ' 2 cmt. f. Thus, not only must plaintiffs prove the alternative design would have prevented or minimized **their** injury, they must also prove the design would not have posed a greater risk in causing some **other** type of injury.

The plaintiffs' bar has touted the proof of a reasonable alternative design requirement as a "monumental change" to Minnesota law. Michael V. Ciresi & Gary L. Wilson, *A Misstatement of Minnesota Products Liability Law: Why Minnesota Should Reject the Requirement that a Plaintiff Prove a Reasonable Alternative Design*, 21 Wm. Mitchell L.Rev., No. 2, 369, 370 (1995). Specifically, the plaintiffs' bar contends the Restatement (Third) contradicts the Minnesota Supreme Court's conclusion in Kallio. The plaintiffs' bar argues that Kallio rejected the proposition that proof of a feasible, practical alternative design constituted an element of a *prima facie* case of design defect. Id. at 371. A closer reading of Kallio, however, confirms its consistency with Section 2(b) of the Restatement (Third).

In Kallio, the court rejected a jury instruction proposed by the manufacturer which made proof of a reasonable alternative design an element of the plaintiff's *prima facie* case. To the extent Kallio suggests a plaintiff need not prove a reasonable alternative design to survive a dispositive motion, defense counsel should argue this is, at best, *dictum*, as Kallio concluded sufficient proof of a reasonable alternative did exist in that particular case. The court, in fact, rejected an absolute requirement of proof of an alternative design in all cases because it acknowledged the possibility the plaintiff could prove the utility of this type of product was so outweighed by its dangerousness that it should not have been marketed to the public. Kallio, 407 N.W.2d at 97, n. 8. As such, Kallio simply recognized that an

absolute, "no exception" requirement of proof of an alternative design would be unworkable.

Kallio may be further reconciled with Section 2(b) of the Restatement (Third) by reviewing Bilotta. In that case, the Minnesota Supreme Court recognized conscious design choices made by manufacturers should be evaluated by realistic standards. In other words, the jury should balance the risks and benefits of the challenged design as would the manufacturer when it actually designed the product. Bilotta, therefore, advances a risk-benefit analysis anchored to a negligence theory. Coupling Bilotta with Kallio's recognition that proof of a reasonable alternative design will virtually always be an element of the plaintiff's claim provides the exact result of Section 2(b) - no public policy would be advanced by holding a product manufacturer liable where no reasonable and safer alternative exists.

As support for the above analysis of Kallio, defense counsel should review the Reporters' comments to the Restatement (Third). The Reporters indicate a "**fair reading of Minnesota law is that for the majority of design defect cases, proof of a reasonable alternative design is necessary**." Restatement (Third) ' 2, Reporters' Note cmt. c (emphasis added). In fact, the Reporters cite Kallio as support for the position that plaintiffs bear the burden of proving a reasonable alternative design. Restatement (Third) ' 2, Reporters' Note cmt. d. The Reporters go on to note the only exception to the requirement are those "rare cases" in which the product is so unreasonably dangerous it should be removed from the marketplace rather than being redesigned. Id.

Even members of the plaintiffs' bar agree the Reporters' "clear suggestion is that, in all but a few cases, Minnesota requires plaintiff to show a reasonable alternative design as a *prima facie* element of its case in the subject of summary judgment for the failure to do so. Ciresi & Wilson, 21 Wm. Mitchell L.Rev., No. 2 at 386. Despite this acknowledgment, the plaintiffs' bar has urged rejection of the requirement of proof of an alternative practical design as being unfair to plaintiff. Id. Even prior to the adoption of the Restatement (Third), courts from various jurisdictions squarely rejected the unfairness argument. See, e.g., Pree v. Brunswick Corp., 983 F.2d. 863 (8th Cir.1993); Allen v. Minn. Star, Inc., 8 F.3d. 1470 (10th Cir.1993); Elliott v. Brunswick, Corp., 903 F.2d 1505 (11th Cir.1990); Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167 (5th Cir.1990); Owens v. Allis-Chalmers Corp., 326 N.W.2d 372, 378-79 (Mich.1982); Wilson v. Piper Aircraft Corp., 577 P.2d 1332 (Oreg.1978).

Since its adoption in 1997, appellate decisions from several jurisdictions have recognized the proof of an alternative design requirement set out in the Restatement (Third). See, e.g., Hernandez v. Tokai Corp., 2 S.W.3d 251, 256-57 (Tex.1999); Gebhardt v. Mentor Corp., 191 F.R.D. 180, 185 n.2 (D.Ariz.1999); Truchan v. Nissan Motor Corp., 720 A.2d 981, 986 (N.J.Super.1998); Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 337 (Tex.1998). However, although they expressly apply the reasonable alternative design requirement of the Restatement (Third), both Truchan and Martinez contain other analyses that are inconsistent with the Restatement (Third) and Minnesota case law. Truchan, for example, incorrectly extinguishes a proof of causation requirement where the plaintiff shows the manufacturer failed to protect against a foreseeable misuse of the product. In a 5 to 4 decision, the Martinez court applied Texas law to preclude dismissal in favor of the manufacturer where the manufacturer had provided a warning against the product misuse that caused the plaintiff's injury. The dissent in Martinez provides an insightful analysis of the Restatement (Third)'s design defect definition. Defense counsel should carefully read both Truchan and Martinez before citing them to a Minnesota court. If they are cited, the portions of the decisions inconsistent with Minnesota law should be expressly distanced from the case at hand.

Other cases decided prior to 1997 relied on drafts of the Restatement (Third) to conclude that proof of a reasonable alternative design is an element of a *prima facie* design defect case. Pries v. Honda Motor Co., 31 F.3d 543, 545 (7th Cir.1994) (applying Indiana law); Granzka v. Pfeifer, 694 A.2d 295 (N.J.Super.Ct.App.Div.1997). In addition, the Reporters' Note to Section 2 of the Restatement (Third) lists numerous jurisdictions adopting the alternative design requirement without necessarily adopting the Restatement (Third). Minnesota defense counsel should use these cases as support for confirmation from Minnesota courts that proof of a reasonable alternative design **must** be proven for a plaintiff to avoid summary judgment.

As of the time these materials were written, no Minnesota appellate court had

considered whether Section 2(b) of the Restatement (Third) applies in Minnesota to require a plaintiff to prove a reasonable alternative design. Because Minnesota courts have historically accepted most provisions of Section 402A of the Restatement (Second), defense counsel should consider bringing dispositive motions in cases where the plaintiff fails to provide evidence of a feasible alternative design.

Unless and until the Minnesota Supreme Court rejects proof of a reasonable alternative design as an element of a *prima facie* design defect case, defense counsel should handle products liability actions consistent with the Restatement (Third). In doing so, counsel should:

1. Carefully scrutinize plaintiff's expert opinion disclosures to determine whether proof of a reasonable alternative design is provided;
2. Consider dispositive motions seeking dismissal of the action for failure to provide adequate evidence of this element; and
3. Provide appropriate trial submissions including motions for directed verdict, jury instructions and motions for JNOV

### IV. The Alternative Design and Subsequent Remedial Measures

An important consideration in deciding whether to press the plaintiff to prove a reasonable alternative design is Rule 407 of the Minnesota Rules of Evidence. Rule 407, which deals with subsequent remedial measures, generally precludes the admission of a manufacturers' subsequent modifications to the product unless the evidence is offered to prove ownership, control or feasibility of precautionary measures. Rule 407, should be considered and examined, in the appropriate case, to avoid any potential conflict between an admission of feasibility being construed as a concession of the existence of a reasonable alternative design.

In Kallio, one of the issues presented related to the admissibility of subsequent remedial measures to prove defect in design defect cases. Kallio discussed the basis for the rule which recognizes that public policy is served by encouraging manufacturers to correct design flaws. 407 N.W.2d at 98. The Kallio court believed manufacturers are more likely to improve product design if the changes in the product do not constitute an admission that its predecessors were defective. Recognizing these public policy considerations, the Kallio court indicated a limiting jury instruction must be given that the change in design is not a concession of defect. Id.

In a typical case involving a subsequent remedial measure taken by the defendant, the defendant may admit that other precautionary measures were feasible at the time the product was manufactured. By doing so, evidence of the subsequent remedial measures is generally not admissible absent one of the other exceptions to Rule 407.

In a case in which the defendant manufacturer has changed the design of its product subsequent to the accident in question, defense counsel should carefully review Section 2(b) of the Restatement (Third) prior to admitting feasibility of additional precautionary measures. That Section reads:

> 2. Categories of Product Defect.
>
> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> * * *
>
> (b) 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 alterative design renders the product not reasonably safe;

Restatement (Third) ' 2(b). As a result, a plaintiff may argue the definition of "defective in design" is met when the defendant manufacturer admits the feasibility of other precautionary measures.

In a case in which the defendant has not taken any subsequent remedial measures, the defendant may press the reasonable alternative design requirement. If, however, the defendant has made subsequent remedial measures, care should be taken to avoid an argument that the subsequent design conclusively establishes a "reasonable alternative design" existed, thereby rendering the product at issue defective in design. To do so, the defendant may admit the technological **feasibility** of the alternative design or precautionary measure. The defendant should not, however, admit the alternative design was **reasonable** or safer at the time of manufacture. An example of this tactic being successfully used is provided in Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463 (7th Cir.1984). In that case, the plaintiffs sought to introduce evidence of a subsequent design change in an effort to prove feasibility of precautionary measures against a motorcycle's "wobble" at high speeds. Such evidence was properly excluded, however, because the manufacturer did not dispute the technological feasibility of the precautionary measure. Instead, the manufacturer contended using the precautionary measure against "wobble" actually increased the motorcycle's tendency to "weave." As a result, feasibility was conceded while the overall safety trade-off of the alternative design was challenged. Rule 407, therefore, precluded the plaintiff from offering evidence of the subsequent remedial measures. Id. at 468.

As an example, automobile air bag technology has made the inclusion of safety air bags feasible for several decades. Only relatively recently, however, could such technology even arguably be considered reasonable. High cost, lower reliability and weak consumer demand likely made the air bag an unreasonable alternative design until only recently. Thus, a manufacturer could seek Rule 407's protection by admitting feasibility of the precautionary measure while requiring compliance with Section 2(b) of the Restatement (Third).

## V. Defending the Design Defect Case: What Proof must the Plaintiff Provide of a Feasible Alternative Design?

When considering whether the plaintiff has produced evidence of a reasonable alternative design, several important factors must be considered. First, the plaintiff should be required to prove the proposed alternative design functions and provides the same utility to the consumer as the product design in question. In other words, if the proposed alternative design does not adequately meet the demands of the consumer and the marketplace, the design proffered by the plaintiff is not a reasonable alternative. In addition, the plaintiff must be required to provide evidence the proposed alternative offers at least as much safety as the design in question. Often, plaintiffs will attempt to create an alternative design that provides more protection against the injury suffered by the plaintiff. In doing so, however, the alternative design actually **increases** the likelihood of injury caused by other aspects of the product. Defense counsel should strenuously oppose a characterization of an alternative design that actually increases the potential for injury as being a "reasonable alternative design."

If a plaintiff comes forward with an alternative design, defense counsel should next consider whether the methodology used to develop the alternative passes evidentiary muster. For example, a plaintiff's expert will often submit opinions of a proposed alternative design that he/she has not actually made or tested. By providing such hypothetical opinions, the foundation and admissibility of plaintiff's expert opinions are suspect. As discussed below, defense counsel should carefully consider whether plaintiff's alternative design evidence satisfies Daubert and/or Frye.

### A. Alternative Design

Although the Restatement (Third) does not require a plaintiff to actually produce a prototype of the reasonable alternative design, the plaintiff must provide substantial support for the design. Restatement (Third) ' 2(b). Thus, the plaintiff's expert may not merely provide a blueprint or drawing of the alternative. Evidence and opinions relating to marketing, costs, functionality and safety must also be provided. Comment e to Section 2(b) of the Restatement (Third) lists many of the issues upon which the plaintiff must offer expert testimony:

- The instructions and warnings that might

accompany the reasonable alternative design;
- How the design will satisfy consumer expectations;
- Cost of producing the alternative design;
- The effect of the design on product function;
- The effect of the design on product longevity;
- The aesthetics of the proposed design; and
- The marketability of the design

Restatement (Third) ' 2(b), cmt. e. In addition and quite importantly, the plaintiff must also prove the reasonable alternative design would have eliminated or reduced the harm actually suffered by the plaintiff. Id.

Not surprisingly, the plaintiffs' bar has criticized the requirement the plaintiff provide evidence of the above factors. Ciresi & Wilson, 21 Wm. Mitchell L.Rev., No. 2 at 375-376. The plaintiffs claim placing this burden of proof upon them unfairly requires them to retain design, marketing, economic and other experts when litigating a products liability case. Id. at 376. By making this argument, the plaintiffs' bar apparently wishes to assail a product without providing expert support for the design defect claims they are asserting.

An interesting dilemma arises if the plaintiff's experts merely hypothesize about the proposed reasonable alternative design. If the designs and theories proposed by the plaintiff's experts have not been actually implemented or tested, a defendant may seek dismissal or exclusion of the evidence as not sufficiently reliable under Daubert v. Merrell Dow Pharmaceuticals, 113 S.Ct. 2786, 2795 (1993) and Frye v. United States, 293 F. 1013 (D.C.App.1923). Minnesota has consistently applied the Frye standard and has not yet adopted Daubert. See State v. Klawitter, 518 N.W.2d 577, 578 n.1 (Minn.1994) (recognizing U.S. Supreme Court overruled Frye in Daubert but "express[ing] no opinion on the continued vitality of the Frye rule in Minnesota"). Since Daubert, however, several Minnesota decisions have analyzed expert testimony under both standards using Daubert as an alternative basis. Barna v. Commissioner of Public Safety, 508 N.W.2d 220 (Minn.Ct.App.1993) (citing only Daubert); Wesely v. Alexander, 1996 WL 722084 (Minn.Ct.App.1996); Ross v. Schrantz, 1995 WL 254409 (Minn.Ct.App.1995);

Several decisions provide excellent examples of how defendants have successfully defended design defect cases by arguing the plaintiff's reasonable alternative design was hypothetical and therefore not admissible. For example, in Stanczyk v. Black & Decker, Inc., 836 F.Supp. 565 (N.D.Ill.1993), the plaintiff's expert admitted he had not designed a prototype of the miter saw at issue. Applying a Daubert analysis, the Stanczyk court concluded that the expert's testimony was inadmissible because he had not completed a "testable" alternative design. A similar result was reached in Mistich v. Volkswagen of Germany, Inc., 650 So.2d. 385, 391 (La.Ct.App.1995); but see Kallio,407 N.W.2d 92 (where the plaintiff's expert admittedly had not tested his proposed alternative design).

Applying Frye, Minnesota courts have excluded expert testimony where the testimony is speculative, conjectural and lacking in factual foundation. For example, in Benson v. Northern Gopher Enterprise, 455 N.W.2d 444, 445-46 (Minn.1990), the court excluded an expert's opinion on a hypothetical question because the question was based on tests performed before repairs were done to the system at issue and years before the alleged damage. In Dunshee v. Douglas, 255 N.W.2d 42, 47-48 (Minn.1977), the court excluded expert testimony where the expert had not examined or tested the vehicle, guardrail or road surface in question. Likewise, in Lind v. Slowinski, 450 N.W.2d 353, 358-59 (Minn.Ct.App.1990), expert testimony was not admissible where the expert did not view the accident site, vehicle or photographs and was unaware of the exact conditions of the accident.

In those cases where it is appropriate, the following jury instruction on alternative design has been recommended:

**Decide if the alternative design was feasible**

> In deciding if the suggested alternative design was feasible at the time the product in was manufactured, consider these factors:

> 1. *Technologically feasible*. Was the suggested alternative design technologically feasible? The alternative design was "technologically feasible" if, given the state of technology at the time the product was manufactured, the alternative design was technologically available.
>
> 2. *Safety*. Would the suggested alternative design have been safe? In other words, would the suggested alternative design have provided:
>
> > a. Overall safety as good as or better than the actual design that (the manufacturer) used, and
> >
> > b. Better protection against the particular hazard or risk of injury created by the product?
>
> 3. *Cost*. Would the suggested alternative design have significantly increased the cost of the product?
>
> 4. *Performance*. Would the suggested alternative design have affected the performance of the product?
>
> For the suggested alternative design to have been feasible at the time the product was manufactured, you must find that: (1) the suggested alternative design was technologically feasible, and (2) any increases in the cost or changes in the performance of the product would have been outweighed by the added safety of the suggested alternative design.

4A Minnesota Practice CIV JIG 75.20, Authorities (1999). Consider the factors set out in this proposed instruction. If the plaintiff's expert has not actually built and tested the proposed alternative, should she/he be allowed to testify under Frye or Daubert? A strong argument may be advanced in some cases that the expert's testimony regarding a hypothetical design never built or tested cannot satisfy the reliability requirements of Frye and Daubert.

For example, how does the expert actually know the alternative design is at least as safe as the original product if she/he has never tested the design? How does the expert know the performance of the product would not be affected? Obviously, these may not be an issue in cases involving uncomplicated products. In other cases, however, the comprehensive design and testing process used by the defendant manufacturer will provide excellent evidence of what must be done to satisfy the questions raised in the proposed instruction. In such cases, defense counsel may wish to attack the expert's opinions by contrasting his/her methodology with that of the defendant manufacturer. Often, this provides a persuasive argument the expert's opinions are not reliable and should not be admitted under Frye or Daubert.

A proponent of a scientific test must establish the test is reliable and its administration conformed to the procedure necessary to ensure reliability. Barna, 508 N.W.2d at 221 (citing State v. Dille, 258 N.W.2d 565, 567 (Minn.1977)). Where plaintiff's experts do not build a prototype and do not perform any testing, defense counsel may attack the opinions from several angles. First, the opinions are not the result of an accepted scientific principle or process where virtually no process was used. If, for example, the manufacturer proves reasonable engineers

do not form opinions about a product before a prototype has been designed and tested, the Frye and Daubert tests may support dismissal of the case. Second, the defendant may assail the opinions by assailing the reliability of the nonexistent testing. If no actual testing has been done, defendants should argue cases like Barna and Dille require exclusion of the opinions.

### B. State of the Art

Defendants typically provide evidence rebutting the plaintiffs' design defect claim by relying on industry standard or "state of the art." The Restatement (Third) recognizes this tactic and provides that "state of the art" [H]as been variously defined to mean that the product designed conforms to industry custom, that it reflects the safest and most advanced technology developed and in commercial use, or that it reflects technology at the cutting edge of scientific knowledge. This Section states that a design is defective if the product could have been made safer by the adoption of a reasonable alternative design. If such a design could have been practically adopted at time of sale and if failure to adopt such a design rendered the product not reasonably safe, the plaintiff establishes defect under subsection (b). When a defendant demonstrates that its product design was the safest in use at the time of sale, it may be difficult for plaintiff to prove that an alternative design could have been practically adopted. Defendant is thus allowed to introduce evidence with regard to industry practice that bears on whether an alternative design was practicable. Industry practice may also be relevant to whether the omission of an alternative design rendered the product not reasonably safe. While such evidence of industry practice is admissible, it is not necessarily dispositive.

Restatement (Third) ' 2 cmt. d.

The Reporters of the Restatement (Third) spend a fair amount of time analyzing "state of the art" or "industry standard" evidence. Restatement (Third) ' 2 cmt. c, cmt. d, Illustration 3. Although a manufacturer generally cannot defeat a design defect claim by showing its product complies with industry standard, a plaintiff will have a substantial obstacle to overcome in proving a reasonable alternative design exists which has not been utilized by any manufacturer in the industry. Industry standard evidence should also be highlight by defense counsel as an additional way of defeating a design defect claim under Section 2(b). That is, counsel should argue all (or most) manufacturers in the industry consider the design to be reasonably safe because they too have manufactured products using a similar design. Industry standard evidence may therefore be used to establish: (1) the lack of a reasonable alternative design and (2) that the design used was reasonably safe. By doing so, defense counsel uses industry standard evidence to negate the plaintiff's Section 2(b) design defect claim.

Although the observance of certain standards or customs is not conclusive as to whether the manufacturer exercised reasonable care, it is evidence of what a reasonably prudent manufacturer would do under the same or similar circumstances. Zimprich v. Stratford Homes, Inc., 453 N.W.2d 557 (Minn.Ct.App.1990). However, a negligent act will not be excused by the fact it meets industry standards or is customary. Tiemann v. Ind. School District No. 740, 331 N.W.2d 250, 251 (Minn.1983). Under certain circumstances, the entire industry custom may be negligent. Gryc v. Dayton Hudson Corp., 297 N.W.2d 727 (Minn.1980).

Defense counsel representing a manufacturer whose product was representative of other manufacturers in the industry should highlight this fact. Often, an expert witness currently or formerly employed by a competitor will provide persuasive industry standard testimony. Not only will the expert provide opinions about the product at issue, the expert may provide **firsthand** testimony about the design, manufacture, safety, cost and testing considerations used in the industry. If appropriate, defense counsel may wish to use one expert for only industry custom testimony and another for opinions specific to the defendant's

product. In cases in which the plaintiff's expert has not worked in the industry, the industry custom testimony is often the most persuasive testimony offered by the defense.

### VI. Conclusion

Although its development and adoption created a great deal of discussion and controversy, the significant changes made by the Restatement (Third) have yet to be adopted in Minnesota. Because of its persuasive value and general acceptance in other jurisdictions, the Restatement (Third) should prove helpful to Minnesota defense counsel in representing manufacturers, sellers and distributors of products. Among its strongest points is the alternative reasonable design requirement that should be vigorously advanced by defense counsel.

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[1] Exceptions to this Rule can be found at Comment e to Section 2 for products whose negligible utility is greatly outweighed by their dangerousness, Section 3 dealing with *res ipsa* cases and Section 4 relating to non-compliance with applicable statutes or regulations.

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