The Sources of Controversy In the New *Restatement of Products Liability*: Strict Liability Versus Products Liability

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In June 1997, the American Law Institute adopted the *Restatement (Third) of Torts: Products Liability*. This *Restatement* attempts to organize, clarify and restate thirty years of case law decided under a single provision, section 402A of the *Restatement (Second) of Torts*. Section 402A was itself an attempt to consolidate in one all-encompassing provision numerous product liability concepts that had been developing during the first two-thirds of the Twentieth Century. Since section 402A's adoption in 1965, courts have decided thousands of product liability cases. Many involved issues not addressed in section 402A, and others revealed developing conflicts with key concepts in section 402A. Thus, in recent years, section 402A began to appear incomplete and inadequate, and a new *Restatement* of product liability law seemed desirable.

This symposium addresses a few selected topics addressed in this *Restatement*. The audience consisted primarily of judges, most of whom have already had considerable exposure to product liability law. The speakers were a diverse group representing plaintiff practice, defense practice, industry and academia. All had considerable experience in the field of products liability, and many had participated in the drafting of the *Restatement*.[1] Because the format permitted each speaker only limited time to address an issue, speakers were forced to assume audience familiarity with the background and context of the various *Restatement* provisions and proceed quickly to their main points on the core issues.

This article seeks to provide some background for the symposium. Part I will include some observations on the background and development of modern product liability law in an attempt to provide some explanation of the controversy surrounding key provisions in the *Restatement*. Part II will comment briefly on the sections of the new *Restatement* discussed at the symposium and provide a brief explanation of the nature of the controversy.

I. Strict Liability Versus Products Liability: The Unresolved Conflict in Section 402A and the Controversy in the new *Restatement*

A. The Historical Developments Leading to Section 402A

At the beginning of the century, persons injured by defective products had rather bleak prospects for recovery of compensation. Technically, they had access to two primary legal theories, tort and contract. Negligence and breach of implied warranty provided a remedy for products having a defective condition, and fraud, negligent misrepresentation, and breach of express warranty provided a remedy for misrepresentation concerning a product's actual condition or quality. Yet, regardless of the specific cause of action, the injured user or consumer had to confront a variety of formidable barriers before any recovery was possible.

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In the first two-thirds of the century, courts and commentators were preoccupied by three basic impediments to recovery by injured product users and consumers: the privity requirement, undue burdens in proving negligence, and other contract barriers such as notice, disclaimer and limitations of remedy. Finally, in 1965 section 402A swept these barriers aside and recognized a new streamlined cause of action imposing strict liability on commercial sellers of defective products.

Today, a recitation of these traditional barriers strikes most casual observers of products liability law as a mundane and insignificant historical curiosity. Yet, it is important to appreciate that courts, attorneys, and commentators expended substantial time and effort in the struggle to overcome those barriers.[2] As a result, little effort during this time was devoted to consideration of what exactly was expected of this new cause of action that eventually became section 402A.[3]

1. The Privity Requirement

At the beginning of the century the absence of privity of contract between the injured user or consumer and the manufacturer of the product would bar recovery in both tort and contract causes of action. Simply stated, this meant that a user or consumer injured by a defective product could not sue the manufacturer of the product unless the user or consumer had purchased the product directly from the manufacturer. Yet, by this time manufacturers were already distancing themselves from the users and consumers of their products. Increasingly, products were mass-produced by remote manufacturers and distributed to users and consumers through networks of independent wholesalers and retailers.[4]

The privity requirement in negligence actions was based on the fear of a flood of litigation if injured product users could maintain negligence actions against remote manufacturers of defective products.[5] Yet, privity was an illogical requirement in negligence actions where liability depends on the foreseeability of risk, not on a contractual relationship between the parties. Early in the century, courts began to recognize an injured consumer's right to bring a negligence action against a remote manufacturer.[6]

The privity requirement was more logical in contract actions because a contract is supposed to reflect an agreement between the parties. Accordingly, the erosion of privity in implied warranty actions was a slow and laborious process that proceeded through a series of stages.[7] The earliest decisions allowed a personal injury action against a remote manufacturer of products intended to be taken internally into the body, such as food and drugs. This category was soon expanded to products that were intended to be applied to the body, such as cosmetics, hair preparations, and detergents. The case law then took a slight detour to encompass property damage caused by defective animal feed supplements and serums. Eventually, courts simply recognized a right to maintain a breach of implied warranty action against any remote manufacturer whose product, if defectively made, would be unreasonably dangerous to users or consumers of the product.

At about the same time, courts also began to abolish the privity requirement in actions for breach of express warranty.[8] Privity was a particularly harsh requirement in express warranty cases. The manufacturer would induce pur-

chases of the product by express warranties contained in advertising aimed at the remote user or consumer. Yet, the lack of privity barred the user or consumer from maintaining an action for breach against the remote manufacturer, and an action against the immediate retail seller would fail because the retailer did not make or endorse the manufacturer's express warranty.

2. Unfair Problems of Proof

Even if the plaintiff successfully circumvented the privity barrier, recovery was by no means assured. In negligence actions, the plaintiff had the burden of proving the seller's fault, and courts eventually came to view some aspects of this burden as unfair to injured plaintiffs. Two specific problems of proof were common in products liability cases.

First, the plaintiff might be able to show that the product was defective, but then was unable to prove that the defect was the result of negligence by the manufacturer.[9] The injured plaintiff often lived far from the place of manufacture. The plaintiff's lawyer was more likely than not a sole practitioner with limited resources to pursue a distant manufacturer. Rarely was any direct evidence available to show negligence in the manufacturing process or in the subsequent testing or inspection of the finished product.

Second, products increasingly consisted of various raw materials and component parts supplied by other producers. The plaintiff had the burden of proving which product supplier was the negligent party. Yet, even though the plaintiff could prove a defect existed in the finished product, he was often unable to prove which supplier created the defect. For example, if a bottle of soda suddenly exploded in the consumer's hand in the course of normal use and handling, the consumer had to prove whether the defect was in the bottle supplied by the bottle manufacturer or in the filling of the bottle with carbonated beverage by the bottling company.[10] These practical barriers to recovery were often as daunting as the legalistic barrier of privity.

Problems with privity, personal jurisdiction or just the expense of trying to litigate in a distant forum often forced injured users and consumers to look to the immediate retail seller for redress. Yet, negligence actions for product defects were usually unsuccessful against retailers. The retailer sold the defective product to the user or consumer. However, the retailer rarely had any involvement in the design of the product or in the formulation of the warnings and instructions accompanying it, and to this day the law imposes on a retail seller a duty to test or inspect products for defects only in the most limited of situations.[11]

Courts attempted to alleviate some of these burdens by the imaginative use of many legal doctrines. Where plaintiff lacked direct evidence of a product defect, courts often allowed a liberal use of circumstantial evidence or *res ipsa loquitur* to provide an inference of negligence. Where plaintiff lacked direct evidence of which party in the chain of supply and distribution was the negligent party, courts allowed a liberal use of *respondeat superior* and other agency doctrines to attribute any negligence in the case to the seller who was a defendant in the case. These efforts were not always successful, and courts began to refer to these difficulties of proof as unfair problems or burdens of proof. Justice Traynor elevated these unfair burdens to the status of a major policy consideration in

favor of strict liability in his famous concurrence in *Escola v. Coca Cola Bottling Company*.[12] The burden of proving negligence was viewed as unfair because the manufacturer was deemed an expert with respect to the product while the user or consumer was assumed to have little, if any, ability to discover product defects or to avoid their harmful consequences.

What constituted an unfair burden of proof was never carefully defined. However, two points should be noted. First, the problems discussed above relate primarily to manufacturing defect cases in which the plaintiff has the burden of proving the identity of the party who created the defect and whether the defect was the result of negligence. Second, in the period prior to section 402A virtually all the defective product cases involved either manufacturing defects or warning defects. Design defects had not emerged as a meaningful category of product defect litigation prior to section 402A, perhaps because courts did not allow either negligence or implied warranty actions in cases involving obvious dangers.[13] In negligence, the burden of proving a defect in the manufacturer's warnings or instructions would not impose any unfair burden of proof because product warnings and instructions are invariably available in written form to be examined for errors or omissions.

3. Other Contract Barriers to Recovery

One solution to both privity and proof problems lay in the action for breach of the implied warranty of merchantability. Because the action sounded in contract, not tort, the issue was not whether the defective condition resulted from the seller's negligence, but simply whether the defective condition rendered the product unfit for its ordinary purposes. Fault was irrelevant to breach of implied warranty, and thus the liability was strict. Moreover, the action applied to any commercial seller, including the retailer, thereby circumventing not only the privity problem, but also any problems concerning personal jurisdiction or the expense of litigation in a distant forum.

Yet, this strict liability was simply unavailable in many cases because any seller, including the retail seller, still had the protection of a variety of contract-based limitations on warranty liability. Any breach of warranty action might only be available to the actual buyer of the product. In some states, the action might also be extended to so-called third party beneficiaries of the buyer, but generally they were restricted to members of the family, household or guests. Third party beneficiary status was denied to employees, tenants, and other foreseeable users of the product. Failure of the injured user or consumer to give notice of the breach of warranty to the seller within a reasonable time barred any action for the breach. The statute of limitations ran from the date of sale and did not provide for a discovery rule, thereby barring an action before any injury occurred or before the fact of injury was discovered. In any event, the seller might disclaim all liability or, in the alternative, limit the remedy to repair or replacement of the defective part, a remedy of little value to one who has suffered severe personal injuries. Early in the century courts vigorously upheld the freedom to contract, and courts did not lightly permit any circumvention of these contract barriers.[14]

Only limited erosion of these contract barriers occurred in the first half of the century. In the late 1940's, the drafting of the Uniform

Commercial Code (UCC) ensured the continued vitality of these barriers. Each was a sensible and proper mechanism for pure commercial transactions, and amelioration of these barriers in the UCC was limited to making them somewhat more accommodating to warranty actions involving in personal injuries.[15] The UCC's retention of these contract barriers to recovery in warranty actions may have provided some additional incentive for the development of a strict liability action to deal with the problem of product-related injuries.

C. The Emergence of Strict Liability in Tort: Section 402A

Decades of frustration from grappling with these barriers in defective product cases caused courts and commentators to look with increased favor on strict liability in tort as the answer. First, the focus on unfair burdens of proof on the injured plaintiff shifted from the difficulties encountered in finding evidence to prove negligence to the need to prove fault at all once the product was shown to be defective.[16]

Second, there was a growing recognition that in the context of personal injuries implied warranty sounded more in tort than in contract. Courts began applying in implied warranty cases the tort statute of limitations running from the date of injury rather than the contract or UCC statute of limitations running from the date of sale.[17] In 1960, the New Jersey Supreme Court,[18] using a consumer protection rationale, held a disclaimer of implied warranty protection void as against public policy. In the same year, Dean Prosser demonstrated in a landmark article that implied warranty without privity was in reality strict liability in tort.[19] Three years later the California Supreme Court adopted this position in *Greenman v. Yuba Power Products, Inc.*[20] Section 402A followed in 1965, and over the next two decades nearly all states adopted section 402A or a variation of it.

In hindsight, the rush to embrace section 402A may have reflected a consensus more about what courts and commentators were against than about what they were for. They were against unfair burdens of proof and against barring recovery on the basis of privity and other narrow contract doctrines. Section 402A addressed these areas of concern. It imposed liability on any commercial seller of a product that was "in a defective condition unreasonably dangerous to the user or consumer, or to his property."[21] Liability was strict and would exist even if the seller exercised all reasonable care.[22] The requirement of privity was expressly abolished,[23] and the comments made clear that contract-based restrictions such as disclaimer, limitation of remedy and notice were also inapplicable.[24] Because section 402A is a tort action, courts have consistently applied the tort statute of limitations, including a broad discovery rule. Nevertheless, this era commenced without clear expectations about exactly what section 402A was supposed to accomplish.

II. The Conflict Between "Strict Liability" and "Products Liability" Inherent in Section 402A

In the years following the adoption of section 402A, a steady flow of litigation constantly tested the boundaries of product liability law. The controversies that arose reflected in part the simple recognition that this area of tort law, freed from many of its historical restrictions,

now involved a great amounts of money. The economic reality intensified when shortly after its adoption, section 402A became the driving force behind an explosion of design defect litigation that had not been contemplated during the formulation of section 402A.

But money was not the sole explanation of the controversy. Section 402A contained inherently conflicting expectations. Originally, section 402A was a "strict liability" cause of action that dealt with the traditional barriers to recovery: privity, unfair burdens of proof and contract limitations. Yet, before long section 402A became in the eyes of many an all-purpose and all-encompassing cause of action to deal with the whole field of products liability. "Strict liability" and "products liability" have different meanings, but courts and commentators have not always been careful to distinguish between the two.

A. Section 402A as a "Strict Liability" Cause of Action

Strict liability is tort liability without proof of fault. In products liability cases, strict liability means that the seller is liable simply upon proof that its product was defective and the defect caused the plaintiff's injury. Proof that some fault of the seller created the defect would not be necessary. Thus, section 402A imposed liability on a commercial seller of "any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for harm thereby caused..."

Strict liability is well suited to manufacturing defects. Theoretically, an occasional flaw in a unit of production will occur despite the most carefully developed system of production and will avoid discovery despite the most carefully planned and implemented system of testing and inspection. In such a case, the manufacturer would sell a defective product but would not be considered negligent. In a pragmatic sense section 402A strict liability is appropriate in such cases. If the manufacturer has truly been careful, few defects will slip through and cause harm. Therefore, the economic consequences of strict liability are minimal. If many defects slip through the manufacturer's system, the inference is that the manufacturer has not exercised reasonable care. The economic consequences may now be significant, but they are appropriate because they result from the manufacturer's negligence.

Design and warning defects are less susceptible to strict liability. In a warning defect case, the manufacturer is negligent for failure to adequately warn or instruct unless the danger is unforeseeable. Because a manufacturer is deemed an expert as to its product, a danger is rarely unforeseeable unless it is also unknowable. Strict liability occurs when a manufacturer is held liable for failing to warn about an unknowable danger.

Similarly, in a design defect case, there would be negligence if the manufacturer failed to adopt a reasonable alternative design that would eliminate or reduce an existing danger to the user or consumer. Strict liability occurs when a manufacturer is held liable for failing to adopt a design that was not technologically feasible at the time of manufacture and sale.

The final possibility for strict liability involves retailers, wholesalers, and other non-manufacturing distributive parties. These parties normally have no involvement in the manufacturer's product design, warnings or instructions, and no duty to inspect the product under ordinary circumstances. Strict liability occurs when a non-negligent distributive party is held

liable for selling a product that, unknown to the seller, contains a defect created by an upstream seller.

Courts have all agreed that strict liability should apply to manufacturing defects and to the sale of any defective product by a non-manufacturing commercial seller of the product. The majority of courts have not applied true strict liability to either warning or design defect cases. In essence, the strict liability imposed by section 402A has been quite limited and would suggest that section 402A is a member of the supporting cast for the primary products liability theory, negligence.

B. Section 402A as a "Products Liability" Cause of Action

The other view is that section 402A is an all-encompassing products liability cause of action. By the phrase "products liability," I refer to the overall problem of personal injuries and other harms caused by defective products in a modern and complex society. The emphasis is not on the choice between strict liability and negligence as the theory of liability or even between tort and contract as the controlling discipline. Rather, the focus is on the mass-manufactured nature of products in the modern world, the distribution of those products through various networks of intermediary distributors, the great disparity of knowledge between manufacturers and users or consumers about the dangers inherent in products, the relative inability of the ordinary users or consumers to protect themselves from increasingly complex products, and the large number of personal injuries and other harms caused by defective products.[25]

Many of the developments experienced under section 402A are in fact a response to products liability rather than strict liability. For example, "products liability" and not "strict liability" explains the abrogation of the obvious danger rule. This rule assumes that the user's awareness of an obvious danger posed by unguarded moving parts of a machine is sufficient to protect the user from that danger. Requiring a simple and inexpensive safety guard to eliminate an obvious danger is a recognition that the user's awareness of the machine's danger does not necessarily, under traditional risk-utility analysis, make the machine reasonably safe.[26] The obligation to redesign the product to eliminate or minimize an obvious danger does not impose on the manufacturer any novel burdens in acquiring new information or skills. The manufacturer knows and can do everything necessary to prevent injury. In such cases, enlargement of the seller's liability results from an expanded use of negligence, not strict liability.

Similarly, the policies underlying "products liability" when courts impose liability for failure to provide a post-sale warning about dangers discovered subsequent to sale of the product,[27] to protect against the dangers arising from the substantial alteration of a machine,[28] to warn about dangers inherent in the disposal of a known dangerous product,[29] and to foresee a danger that had previously been labeled "unforeseeable" in product defect cases.[30]

These developments are but a few examples of the many situations in which courts have relaxed restrictions on the scope of negligence liability in order to promote accident avoidance policies of products liability. Courts have tended to refer to these issues in the context of a

"strict liability cause of action" under section 402A. Giving the phrase "strict liability" the new and additional meaning of "an all-encompassing product liability cause of action" has only interjected unnecessary confusion into a body of law that is already confusing enough.

C. Section 402A Hybrid Situations With Both "Strict Liability" and "Products Liability" Characteristics

Some confusion of both terminology and policy may be unavoidable in hybrid situations involving both "strict liability" and "product liability" characteristics. A recurring theme in modern product liability law is the advocacy of expanded "deep pocket" liability of parties having some nexus with a product defect. Thus, the issue is regularly raised whether liability should apply to a bulk seller whose downstream intermediary -- a retail seller -- does not adequately pass on the bulk seller's warnings, or to a supplier whose component is incorporated as a component part into a manufacturer's finished product in a manner that makes the finished product defective, or to a successor who purchases the assets that a predecessor used previously to manufacture and sell a defective product.

Each of these issues has both a "strict liability" and "products liability" component. Each involves strict liability to the extent that liability is not necessarily based on any fault. Yet, the liability is "strict" not in the sense that the party sold a defective product. The bulk seller and component supplier both sold a product that was not defective when it left the supplier's control, and the successor never sold a product at all. Liability is more in the form of vicarious or derivative liability and explained more on the basis of "product liability" considerations.

III. Strict Liability Versus Products Liability and the Controversy Surrounding the New *Restatement*

By adopting a negligence standard for design defects and warning defects, the new *Restatement* shifts away from a rigid "strict liability" view of section 402A and more toward the "products liability" view. Yet, a number of issues may be affected to some extent by the lingering confusion between "strict liability" and "products liability" and the debate concerning the "hybrid liability" situations. This symposium will discuss issues concerning design defects in section 2(b), warning defects in section 2(c), circumstantial evidence in section 3, component parts in section 5 and successor liability in section 12. Both design and warning defects will raise the "strict liability" considerations. Design defects and circumstantial evidence issues will raise "product liability" considerations. Warning defects, component supplier liability, and successor liability will raise "hybrid liability" considerations.

A. Defectiveness Generally

Section 2 makes three major departures from the approach to defectiveness in section 402A. First, in lieu of section 402A's "one size fits all" single test of defectiveness, section 2 breaks defectiveness into three categories: manufacturing defects, design defects and warning defects. Second, in lieu of section 402A's consumer expectations test of defectiveness, section 2 adopts the risk-utility test and reduces consumer expectations to a factor in the risk-utility test. Third, in lieu of section 402A's strict liability for all product defects, section 2

adopts a negligence standard for both design defects and warning defects.

The division of defectiveness into manufacturing, design and warning defects should not be viewed as a radical departure from the single standard for defectiveness in section 402A. These categories of defect are not novel. The *Restatement (Second) of Torts* had separate rules for the three categories of defect in negligence cases.[31] Indeed, most courts and commentators regularly refer to these categories when analyzing defectiveness under section 402A.

The more serious criticism is directed at the abandonment of the consumer expectations test of defectiveness. Section 402A defined "defective condition" as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[32] It then defined "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[33]

Most of the criticism concerning the consumer expectations test has concerned three problems.[34] First, the test caused confusion about *whose* expectations should control in cases in which the expectations of an injured child, patient, employee or bystander who used the product differed significantly from the expectations of the parent, doctor, employer or owner who purchased or prescribed the product. Second, the test seemed inadequate in complex product cases in which the consumer simply did not have any well-defined expectations about product safety in various accident scenarios. Third, the consumer expectations test did not permit liability in obvious danger cases.

The irony is that the consumer expectations test would have been adequate to serve the "strict liability" function of section 402A, but not its "products liability" function. It is a test that works reasonably well for latent manufacturing defects, the primary category for "strict liability."[35] The expectations of an *ordinary* consumer should be adequate to deal with the non-buyer plaintiff cases when the defect is a latent manufacturing defect. Problems concerning complex products and obvious dangers invariably involve design defect issues that do not lend themselves to a consumer expectations analysis. Yet, neither category involves any issue of strict liability, and each is more properly left to negligence and the policies of "products liability."

The demise of the consumer expectations test parallels the demise of the "strict liability" view of section 402A. The new *Restatement* abandons the pretext that all issues are governed by "strict liability." Recognition of a negligence standard governing design and warning defect cases can be viewed as an open admission of its "product liability" function.

1. Design Defects

To date, the most criticized provision in the new *Restatement* has been the standard for design defects set forth in section 2(b).[36] It provides that 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 reasonable alternative design renders the product not reasonably safe.

The controversy surrounding section 2(b) has concentrated on two specific issues that directly flow from the requirement of a reasonable alternative design: the retreat from strict liability[37] and the abandonment of generic risk liability.[38] Neither controversy can be properly understood without a backward glance at the treatment of defectiveness under section 402A.

As a practical matter, this provision probably eliminates any possibility of strict liability for design defects. Under section 402A, courts using risk-utility analysis for design defects purported to impute knowledge of the risk to the seller. Section 2(b) now requires that the risk be foreseeable. A few courts have imposed limited strict liability for design defects by requiring only that the technology necessary for an alternative design be available as of the date of trial. Section 2(b) now requires that the alternative design be reasonable, and "reasonable" will in all likelihood mean available at the time of manufacture.

It is doubtful that the demise of strict liability in design defect litigation will affect any significant number of cases. Courts that permit strict liability limit it to cases in which the alternative design is available at the time of trial. The case law simply does not contain many examples of technology that was unavailable at the time of manufacture suddenly being available at the time of trial.

The more intense controversy over section 2(b) involves the requirement of a reasonable alternative design. Technically, this requirement would eliminate any liability in the so-called inherent or generic product risk cases. These cases involve products such as cigarettes and other tobacco products, alcoholic beverages and inexpensive handguns that arguably cause death or injury to large numbers of users, consumers or bystanders, but provide few countervailing benefits or utility. In brief, plaintiffs argue that these products are so dangerous they should be *per se* defective despite the absence of a safer alternative design. To date, courts have shown little support for generic risk liability,[39] although some commentators have been quite supportive.[40] The compromise in the ALI was comment *e* to section 2, which held open the possibility that sometime in the future courts might consider generic risk liability.

The generic risk issue is a "products liability" issue, not a "strict liability" issue. All that is necessary for negligence liability is already known about these products, i.e., they kill and injure large numbers of people arguably without providing commensurate benefit or utility.

2. Warning Defects

"Warning defect" is a shorthand reference to an inadequacy in the information accompanying a product and encompasses defects in both the instructions about the safe and proper use of the product and the warnings about the dangers posed by the product. Section 2(c) provides that a product:

> (c) 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.

The controversy surrounding section 2(c) focuses on (1) the apparent retreat from strict liability and (2) the scope of a seller's duty to warn in certain specific situations.

Criticism that section 2(c) is a retreat from strict liability is a based to a large extent on a false premise. That premise is that the single all-purpose test of defectiveness in section 402A imposed strict liability on sellers of defective products without regard to the category of defect and specifically in warning defect cases. In fact, most warning defect cases involved dangers known to the manufacturer, and the issue was usually the adequacy of the warning given by the manufacturer. These cases did not involve any question of true strict liability. True strict liability became an issue only when there was a product danger was not only unknown, but also unknowable or undiscoverable. In these cases, a failure to warn could not constitute negligence and any liability would truly be strict.

Over the years, courts have divided on whether negligence or strict liability governs warning defects. Most courts hold that warning defects were governed by negligence.[41] These courts either adopted negligence as the proper standard or did so indirectly by concluding that strict liability does not differ from negligence in warning defect cases. A few courts have held that section 402A does not differentiate among categories of defects and therefore strict liability applies to warning defects.[42]

This division in the cases continued to exist up to the time when section 2(c) was adopted. By expressly limiting liability for failure to instruct or warn to situations involving foreseeable product risks, section 2(c) provides that negligence, not strict liability, governs defects in instructions and warnings. This limitation has been quite controversial. One could view it simply as a recognition of a wide spread reality and a common sense limitation on the scope of products liability, while others view it as an unmerited and unnecessary retreat from strict liability and consumer protection.

One of the "hybrid" issues in section 2(c) involves a product seller's duty to warn or instruct in bulk sales transactions. A bulk seller may be either a supplier providing a raw material or component part in bulk to a finished product manufacturer or a manufacturer of a finished product selling in bulk to a downstream distributor. In either case the seller has no package on which to attach warnings or instructions, and the bulk seller cannot feasibly provide warnings or instructions directly to the ultimate user or consumer. Generally, the bulk seller's duty is satisfied if the bulk seller provides adequate warnings and instructions to a competent and reliable intermediary. If the intermediary fails to pass them on to the user or consumer, the intermediary is liable, but not the bulk supplier. Generally, courts have not held the bulk seller liable in these cases unless there has been some negligence in the selection of the intermediary or some inadequacy of the warnings and instructions given to the intermediary, but section 2(c) takes no firm position on this issue.

Finally, a difficult issue involves the determination of when the manufacturer may satisfy its duty by merely warning of a product danger

and when the manufacturer must design the danger out of the product. The issue simply does not lend it self to any simple answer. At one extreme, complete deference to warnings would immunize the manufacturer in many cases where a simple and inexpensive design change could eliminate a highly unreasonable danger. At the other extreme, insistence that the manufacturer design the safest possible product and rely on warnings only for dangers that cannot be designed out of the product would eliminate too much consumer choice among products. Perhaps there is one design of vehicle would be deemed the safest, but we prefer to have a choice between large cars or pick-up trucks and small economy cars or sports cars, between cars and motorcycles, and between sedans and convertibles. The *Restatement* has recognized the impossibility of any bright-line rule and has simply urged courts to be aware of the problem and the competing considerations.[43]

3. Circumstantial Evidence to Prove Defectiveness

Section 3 of the new *Restatement* is the product liability equivalent of so-called *res ipsa loquitur*. It adopts the common sense proposition that in an appropriate case circumstantial evidence may establish that a harm was caused by a product defect:

> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:
> (a) was of a kind that ordinarily occurs as a result of product defect; and
> (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

For example, an inference of product defect arises when a car crashes because it suddenly and inexplicably loses its brakes or steering. The inference of a defect is stronger when the car is new, the road conditions excellent, and the driver experienced and cautious.[44] The inference weakens to the point of a likely directed verdict when the car is old, the road conditions dangerous and the driver inexperienced or imprudent.[45] As such, section 3 should be primarily a fact-driven provision free of any significant controversy.

It should be noted that section 3 does not require proof of an reasonable alternative design or contain any other specific requirement that would shift the analysis from strict liability to negligence. Undoubtedly, this reflects the common sense view that nearly all cases arising under section 3 will involve manufacturing defects for which strict liability is appropriate. A reasonable alternative design requirement would make no sense in manufacturing defect cases where the issue is simply whether the product measured up to the manufacturer's own design and specifications for the product. If the product had a design defect, the condition of other units of production would normally provide evidence of the specific condition in the product that caused the accident.

Nevertheless, the law of unintended consequences may be flirting with section 3. Advocates of generic liability suggest that section 3 might provide a means of circumventing the reasonable alternative design requirement

in those cases where plaintiffs are unable to prove the existence of an alternative design. Nothing in the comments to section 3 suggests that this section would be an appropriate vehicle for cases involving generic risk or other cases in which a reasonable alternative design did not exist at the time of the accident.

B. Component Part Sellers

The plaintiff in any tort litigation needs a solvent defendant capable of paying the damages. One hybrid issue relates to the limited liability of the seller of a component part. Courts have consistently held that sellers of product components that are incorporated into another seller's finished product may be held liable for harms caused by a defect in the product component itself.[46] This rule is contained in section 5(a) and is not controversial. Both the manufacturer of the finished product and the injured plaintiff have an interest in this rule. The manufacturer of the finished product benefits because it may seek contribution or indemnity from the supplier of a defective component. The injured plaintiff benefits because the supplier of the defective component becomes another party from whom the plaintiff might seek satisfaction of a judgment.

The problem arises when a product component is not itself defective, but is integrated into a finished product in a manner that makes the finished product defective. Courts have divided on when to impose liability on the product component seller. A few courts considered knowledge of a defect in the finished product sufficient to trigger the product component seller's duty to warn the user or consumer.[47] The substantial majority of courts, however, require some level of participation by the component supplier in the design of the finished product or in the incorporation of the component into the finished product.[48]

Section 5(b) adopts a variation of the majority rule. The supplier of a nondefective product component may be liable for a defect in the finished product only if:

> (b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and
> (2) the integration of the component causes the product to be defective, as defined in this Chapter; and
> (3) the defect in the product causes the harm.

"Substantial participation" is a term of art that does not seem to have any self-applying characteristics. At one extreme, this rule should protect from liability those component suppliers who only answer routine inquiries about their components and provide routine services to their buyers. What is unclear is the amount of involvement beyond the purely routine necessary to satisfy the "substantial participation" standard. Courts will have to develop its meaning on a case by case basis.[49]

The controversy is not merely theoretical. Those commentators who find section 5(b) too restrictive support liability when the component supplier simply acquires knowledge of the manner in which the manufacturer intends to incorporate the component into the finished product. The stereotype of small suppliers providing components to large manufacturers is not always accurate. For example, large chemical companies often supply critical compo-

nents for products which are made by small companies, but which have the potential to adversely affect large numbers of ordinary consumers.[50] The concern is that section 5(b) might provide a road map for these suppliers to immunize themselves from liability.

Nevertheless, the supplier of a non-defective component should not become a "deep pocket." Knowledge without some significant control over or participation in the design of the finished product seems an insufficient basis for imposing liability. The end result might well be the supplier's reluctance to communicate routine information to the manufacturer or refusal to sell to certain manufacturers.

C. Successor Liability

Another "hybrid" issue relating to the search for a solvent defendant involves successor liability. The traditional rule is that a successor's purchase of the assets of a predecessor does not expose the successor to liability for the obligations of the predecessor in the absence of an agreement to do so, fraud to escape the predecessor's debts, or a merger, consolidation or continuation of the predecessor's business. The explosion of product liability litigation in the 1970's led to a judicial reexamination of the successor liability rule. A manufacturer of defective products could sell its manufacturing assets to a successor, go out of business, and leave plaintiffs without a solvent defendant to provide compensation for the injuries caused by the predecessor's defective products.

In response some courts adopted more liberal rules of successor liability. Therefore, a few courts have held the successor liable for harms caused by defects in products manufactured and sold by predecessor when the successor purchases substantially all the assets relating to the manufacture of a specific line of products[51] or continues the enterprise or basic business activities of the predecessor.[52] These theories of successor liability simply sought a nexus between the successor and the defective product sufficient to justify the successor's deep pocket liability.

Section 12 of the *Restatement* reverses this trend and returns to the traditional business-law rules governing successor liability. Liability is limited to cases in which the acquisition of the assets:

> (a) is accompanied by an agreement for the successor to assume such liability; or
> (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
> (c) constitutes a consolidation or merger with the predecessor; or
> (d) results in the successor becoming a continuation of the predecessor.

Section 12 recognizes a more liberal rule of successor liability (a) had he support of only a few states, (b) would probably introduce inefficiencies into the sale of assets, such as forcing the sale of assets piece-meal, and (c) would benefit only a very limited number of persons injured by a predecessor's product.

IV. Conclusion

Only time will tell if the new *Restatement (Third) of Torts: Products Liability* proves successful. I believe it positive that it breaks away from the single all-inclusive strict liability

cause of action approach originally used in section 402A and recognizes its "products liability" function. Too many important product liability issues are governed by negligence principles. It is arrogant to treat negligence as some form of second-class cause of action and confusing to analyze all product liability issues under "strict liability" terminology. It is also positive that the new *Restatement* refrains from imposing "hybrid" deep pocket liability on parties who sell nondefective products, but who have some minimal nexus with the manufacturer or seller of the defective product. Most of all, it adopts a sensible middle ground that will generate respect for the work product, provide useful guidance for the vast majority of cases, and yet not stand in the way of future advances in doctrine when their time comes.

Notes

1. Two of the speakers are Professors James Henderson and Aaron Twerski, the reporters who guided this *Restatement* through the laborious ALI process. They deserve considerable praise not only for their Herculean efforts as the reporters for this *Restatement*, but also for doing so in the face of constant, often heated and occasionally personal criticism of various provisions in the drafts of the *Restatement*. Their good grace and humor in responding to this criticism provided all at this symposium with a glowing example of the professionalism so critical to the legal community.

2. For an exhaustive list of the scholarship on point in this period, *see* Cornelius W. Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 128-30 n. 39 (1957).

3. Virtually all the legal scholarship during this period was devoted to analysis and criticism of privity and other barriers to recovery. Prior to 1950 articles only rarely suggested strict tort liability as a remedy. *See, e.g.*, Lester W. Feezer, *Tort Liability of Manufacturers and Vendors*, 10 MINN. L. REV. 1, 15-18 (1925). Judicial support for strict tort liability was equally rare. *See* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436 (Cal. 1944) (Traynor, J., dissenting). Finally, in the period after 1950 some commentators began to consider strict liability. *See, e.g.*, Fleming James, Jr., *Products Liability (Part II)*, 34 TEX. L. REV. 227-28 (1955); William L. Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

4. *See, e.g.*, Andrew J. Russel, *Manufacturer's Liability to the Ultimate Consumer*, 21 KY. L. J. 388, 404 (1933).

5. This rule originated a *dictum* in an 1842 English contract law decision, *Winterbottom v. Wright*, 10 Mees. & W. 109, 11 L.J. Exch. 415 (1842).

6. The seminal case was *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). The *MacPherson* rule was adopted almost universally throughout the United States. *See* Carter v. Yardley & Co., 64 N.E.2d 693, 695-97 (Mass. 1946).

7. For detailed discussion of the erosion of the privity barrier, *see generally* Prosser, *supra* note 3, at 1103-14 (1960).

8. The seminal case was *Rogers v. Toni Home Permanent, Inc.*, 147 N.E.2d 612 (Ohio 1957).

9. *See, e.g.*, Lindsey R. Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134, 139- 43 (1937).

10. *See, e.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944).

11. *See* Dix W. Noel, *Products Liability of Retailers and Manufacturers in Tennessee*, 32 TENN. L. REV. 207, 208-09 (1965).

12. 150 P.2d 436 (Cal. 1944).

13. In many states a negligence action was barred if the product was properly made and had a warning about any latent dangers. *See, e.g.*, Campo v. Scofield, 95 N.E.2d 802 (N.Y. 1950). An implied warranty never arises because when an obvious condition cannot render the product different than the buyer expected it to be. According to the maxim, "a buyer's eye is his merchant when the defect is obvious." THOMAS AQUINAS, SUMMA THEOLOGICA, ETHICUS II, Question LXXVII, Art. 4.

14. For discussion of these contract barriers to warranty recovery, *see generally* Prosser, *supra* note 3, at 1127- 34 (1960).

15. Uniform Commercial Code ("UCC") § 2-318 provided that in personal injury cases certain designated parties could be third party beneficiaries of the buyer's warranty. Comments 4 and 5 to UCC § 2- 607 recognize that what

constitutes notice in a reasonable time for notice may be more lenient for ordinary consumers than for sophisticated business buyers. UCC § 2-719(3) makes prima facie unconscionable any limitation of remedy that excludes damages for personal injury in the sale of consumer goods, but not in the sale of business equipment. Weakening a contract barrier rather than eliminating it simply left it as "booby trap for the unwary" injured product user or consumer. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900 (Cal. 1963).

16. *See generally* Prosser, *supra* note 3, at 1114- 19 (1960).

17. *See* R. D. Hursh, Annotation, *What Statute of Limitations Governs Cause of Action for Personal Injuries Against Retailer, Manufacturer, and the Like Based on Breach of Implied Warranty*, 37 A.L.R.2d 703 (1954).

18. Henningsen v. Bloomfield Motors Co., 161 A.2d 69 (N.J. 1960).

19. *See generally* Prosser, *supra* note 3, at 1099 (1960).

20. 377 P.2d 897 (Cal. 1963).

21. RESTATEMENT (SECOND) OF TORTS § 402A(1).

22. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a).

23. RESTATEMENT (SECOND) OF TORTS § 402A(2)(b).

24. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. m.

25. Ironically, many of these considerations are woven into the quintessential strict liability opinions in *Escola v. Coca Cola Bottling Company*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) and *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

26. *See generally* Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 44, 51-53 (1955).

27. *See, e.g.*, Patton v. Hutchison Wil-Rich Mfg. Co., 861 P.2d 1299 (Kan. 1993).

28. *See, e.g.*, Marois v. Paper Converting Mach. Co., 539 A.2d 621 (Me. 1988).

29. *See, e.g.*, High v. Westinghouse Elec. Corp., 610 So.2d 1259 (Fla. 1992).

30. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916). *MacPherson* can be viewed as an early "product liability" decision. The privity rule was based on a fear excessive liability if all injured users and consumers could sue remote manufacturers in negligence. *MacPherson* simply expanded the scope of negligence liability commensurate with the risk posed to ordinary users and consumers of products.

31. *See* RESTATEMENT (SECOND) OF TORTS § 388 (warning), § 395 (manufacturing) and § 398 (design).

32. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g.

33. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i.

34. *See generally* Mary J. Davis, *Design Liability: In Search of a Standard of Liability*, 39 WAYNE L. REV. 1217, 1236-37 (1993).

35. Note that the consumer expectations test is retained for cases involving hidden harmful substances found in food products, which is a subcategory of latent manufacturing defect. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 7 (1998).

36. For the flavor of the debate, *see, e.g.*, Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism?* 61 TENN. L. REV. 1105 (1994); Jerry J. Phillips, *The Proposed Products Liability Restatement: A Misguided Revision*, 10 TOURO L. REV. 151 (1993); Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995).

37. *See, e.g.*, Howard C. Klemme, *Comments to the Reporter and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173 (1994) (regretting the reintroduction of nineteenth-century fault concepts into modern products liability law).

38. *See, e.g.*, Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429 (1994).

39. Only a couple rare cases properly fit within the generic risk category. *See, e.g.*, Halphen v. Johns-Manville Sales Corp., 484 So.2d 110 (La. 1986) (asbestos); Kelley v. R.G. Industry Inc., 497 A.2d 1143 (Md. 1985) ("Saturday Night Special" handgun).

40. *See, e.g.*, David G. Owen, *The Graying of Product Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241, 1253-57 (1994).

41. *See* M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221, 242-50 (1986).

42. *See, e.g.*, Jerry J. Phillips, *The Proposed Product Liability Restatement: A Misguided Revision*, 10 TOURO L. REV. 151, 160-63 (1993).

43. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. l.

44. *See, e.g.*, Stackiewicz v. Nissan Motor Corp., 686 P.2d 925 (Nev. 1984).

45. *See, e.g.*, Walker v. General Elec. Co., 968 F.2d 116

(1st Cir. 1992).

46. *See, e.g.*, d'Hedouville v. Pioneer Hotel Co., 552 F.2d 886 (9th Cir. 1977).

47. *See, e.g.*, Gryc v. Dayton Hudson Corp., 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921, 101 S. Ct. 320, 66 L.Ed.2d 149 (1980).

48. *See* Lee v. Butcher Boy, 215 Cal. Rptr. 195, 199 (Cal. App. 1985) ("We have found no case in which a component part manufacturer who had no role in designing the finished product and who supplied a nondefective component, was held liable for the defective design of the finished product").

49. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5, cmt. e.

50. *See, e.g.*, Apperson v. E.I. du Pont de Nemours & Co., 41 F.3d 1103 (7th Cir. 1994) (Teflon supplied by DuPont to a small manufacturer of temporomandibular joint implants).

51. *See, e.g.*, Ray v. Alad, 560 P.2d 3 (Cal. 1977).

52. *See, e.g.*, Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich. 1976).

Restatement (Third) of Torts: Products Liability
Is it a Reasonably Safe Product?

Part I

The Restatement Process and Major Changes in the *Restatement (Third)*

Featuring:

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