The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement

David G. Owen
University of South Carolina - Columbia, dowen@law.sc.edu

Follow this and additional works at: https://scholarcommons.sc.edu/law_facpub

Part of the Torts Commons

Recommended Citation
THE GRAYING OF PRODUCTS LIABILITY LAW:
PATHS TAKEN AND UNTAKEN IN
THE NEW RESTATEMENT

DAVID G. OWEN*

With the approval in principle of the first portion of the new products liability Restatement in 1994, the American Law Institute effectively repealed section 402A of the Restatement (Second) of Torts. In its place, an entire new Restatement dedicated solely to the topic of products liability is in the process of being formulated. While the products liability Restatement project is scheduled to be in progress for several years, the central and most important provisions—defining the basis of manufacturer liability and affirmative defenses based on user misconduct—are set forth in Tentative Draft No. 1.

The centerpiece of this first tentative draft and the whole new Restatement is Topic 1, "Product Defectiveness," which delineates the basic definitions of liability. The first two sections within this topic concern the basic principles of liability, grounded in the concept of defectiveness, that apply to products generally. Defenses based upon the plaintiff's conduct are treated generally in section 7 of Topic 3, "Affirma-

* Byrnes Research Scholar and Professor of Tort Law, University of South Carolina. B.S. (Wharton), 1967; J.D., 1971, University of Pennsylvania. Member, ALI Consultative Group for the Restatement (Third) of Torts: Products Liability. Concerned that Pat Hubbard might not understand the piece, I asked instead for comments on a draft from Jerry Phillips, who claims to have read and understood it, and who presumably agrees with all of it. Any mistakes are his.

1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 1, 1994) [hereinafter Tentative Draft]. The Reporters are James A. Henderson Jr. and Aaron D. Twerski. Until the products liability Restatement project is completed sometime in the late 1990s, the numbering of topics and sections and the precise formulation of the language, especially in the Comments and Reporters' Notes, are subject to change as a result of an ongoing process of refinement. Unless otherwise noted, all references are to the black letter and comments in Tentative Draft No. 1. References to § 402A are to the RESTATEMENT (SECOND) OF TORTS (1964).

2. Floor debate was heated and extensive, and time ran out before all issues could be debated and an adoption vote taken. Consequently, President Charles Alan Wright asked the ALI membership only for a "sense of the House" vote on whether the general approach taken in Tentative Draft No. 1 was acceptable. On May 19, 1994, the membership voted to approve the broad structure and general approach of Tentative Draft No. 1. A vote on "final" approval was postponed to the next meeting in May 1995, at which time Tentative Draft No. 2 will be before the Institute.

3. Tentative Draft, supra note 1, §§ 1-4, at 1-105.

1241
tive Defenses." Topic 2, "Causation," links the two responsibility-based topics together and thereby completes the basic doctrine applicable to ordinary products liability cases.

This essay examines certain basic choices made (including alternative approaches that were rejected) in setting the fundamental rules of liability in sections 1 and 2 as well as the basic misconduct affirmative defense in section 7 of the new Restatement on products liability. First to be considered are the central issues of liability, the formulations of the liability standards that apply to all types of products. Rather than attempting to define liability in global terms, as did section 402A of the Restatement (Second), the new Restatement isolates and particularizes the issues according to the particular type of product defect. Consumer expectations and negligence are rejected as overarching tests of liability, and the new Restatement further shuns the classification of entire categories of products as defective in design. The limitations on defectiveness that help define its borders—the doctrines that concern obvious dangers, product misuse, and state of the art—are defined cautiously toward middle ground, away from extremes on either side. Finally, the new Restatement takes a middle-ground, damages apportionment position on defenses based on consumer misconduct. All in all, the new Restatement has staked out positions on the important issues of products liability doctrine near the center of where the courts and legislatures have traveled over the last three decades.

If one were to characterize modern products liability law as having a color, the color would be gray. The grayness of the modern law is captured well in the new Restatement. From the birth of products liability law in the early 1960s, through the 1970s and even into the 1980s, the courts in products liability cases experimented with black-and-white approaches to a wide range of doctrinal problems in ways that were extreme. During this developmental period, as the law in this area was searching for its identity

4. Id. §§ 7-8, at 143-57.
5. Id. §§ 5-6, at 105-43.
7. See infra Part I(A).
8. See infra Part I(B)(1).
9. See infra Part I(B)(2).
10. See infra Part I(B)(3).
11. See infra Part II.
12. See infra Part III.
13. For examples of such approaches across the range of products liability issues, see generally W. PAGE KEETON, DAVID G. OWEN, JOHN E. MONTGOMERY & MICHAEL D. GREEN, PRODUCTS LIABILITY AND SAFETY—CASES AND MATERIALS 158-81 (2d ed. 1989) [hereinafter PRODUCTS LIABILITY AND SAFETY].
GRAYING OF PRODUCTS LIABILITY

and proper boundaries and was experiencing its initial growth, courts and legislatures tried out global all-or-nothing approaches on numerous issues of products liability law. In recent years, however, the law in this area has been evolving more toward middle ground and compromise, away from the starker approaches of its youth.

The evolution of products liability law, mirrored in the new Restatement, thus may be viewed as a progression from the blacks and whites of early years to a modern blend of boring grays—"reasonable," perhaps, from a variety of perspectives, but devoid of the lively clash of claims of right and wrong that marked the early years. In this essay's journey along certain paths of products liability law taken and others that were left untrod, principle will be seen to have been sacrificed in one doctrinal area after another in exchange for balance, efficiency, convenience, and expediency. This journey toward the center may well mark the maturation of the law of products liability, but one might question at the start whether this graying of products liability law is entirely for the good.

I. THE LIABILITY TESTS

A. The Chosen Path: Particularizing Doctrine by Type of Defect

When Dean William Prosser crafted section 402A of the Restatement (Second) of Torts in the early 1960s, products liability law was in its infancy. At this very early stage in the development of the law, the defect concept was only roughly understood and was conceived of quite naively as a unitary concept; products were either too dangerous, i.e., "defective," or safe enough, i.e., "nondefective." As courts in the 1960s and 1970s applied the principles of section 402A to an ever-widening array of products in an ever-widening range of contexts, the disparities among the various forms of product dangers increasingly revealed themselves.

Today, most courts and commentators accept as axiomatic the fundamental distinctions between three very different forms of product defect: (1) manufacturing flaws, (2) design inadequacies, and (3) insufficient warnings of danger and instructions on safe use. In the thirty years since the ALI adopted section 402A, the need for developing separate doctrinal approaches to the problems in these three very different contexts has become a well-accepted premise of products liability law.

Accordingly, in sections 1 and 2 and the comments, the new Restate-
ment distinguishes the three types of defect from the very start by defining each separately. Section 1 of the products liability Restatement sets the stage by first establishing a uniform touchstone of liability for selling "defective" products, but then splintering the notion into the three separate forms of defect:

§ 1. Commercial Seller's Liability for Harm Caused by Defective Products

(a) One engaged in the business of selling products who sells a defective product is subject to liability for harm to persons or property caused by the product defect.

(b) A product is defective if, at the time of sale, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.15

Section 1(a) thus sets forth the basic rule which purports to impose "strict" liability on sellers for harm from defective products, while section 1(b) proceeds to trifurcate defectiveness into three entirely separate concepts.

The disaggregation of the defect notion in section 1(b) provides the basis for the black letter definitions of the standards of liability in section 2:

§ 2. Categories of Product Defects

For purposes of determining liability under § 1:

(a) A product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced by the adoption of a reasonable alternative design by the seller or a predecessor in the commercial chain of distribution and the omission of the alternative design renders the product not reasonably safe;

(c) A product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced by the provision of reasonable instructions or warnings by the seller or a predecessor in the commercial chain of distribution and the omission of the instructions or warnings renders the product not reasonably safe.16

15. Tentative Draft, supra note 1, § 1, at 1.
16. Id. § 2, at 9.
The primary reason for splintering defectiveness in section 1 is thus to provide separate vessels for distinct liability standards to be defined in section 2; liability is defined in terms that are truly “strict” for manufacturing defects in section 2(a), whereas liability is defined largely in terms of negligence principles in sections 2(b) and (c) and the comments, albeit cloaked in the strict-sounding language of “defectiveness.” In a nutshell, sections 1 and 2 of the new Restatement define liability as strict for manufacturing defects, but base liability for design and warnings defects in negligence.

The test for manufacturing defects in section 2(a) turns on whether the product unit that caused the injury deviated from the manufacturer’s design specifications—the long-accepted definition of this type of defect. Few would question the fact that this liability test is “strict,” and few would question the propriety of a truly strict standard of liability in this context. On the other hand, many would question the proposed abandonment of section 402A’s strict liability concept in both design and warnings cases in exchange for a test of liability explicitly based on principles of negligence. Nonetheless, just such an exchange is precisely what many...
(probably most) courts have been doing in substance for many years. While generally not admitting the essence of their rulings in so many words, most courts in most contexts have been grounding the defectiveness determination in both design and warnings cases on risk-utility principles of balance, reasonableness, and foreseeability. Except in certain limited instances, the courts have rejected efforts to make manufacturers the guarantors of product safety, requiring only that manufacturers (1) make their products as safe as they reasonably are able to do, and (2) warn of foreseeably material risks through methods that are reasonably available and reasonably likely to be effective. This is negligence pure and simple, in fact if not in name. The new Restatement defines both design and warnings defects, strict in name, according to these principles of the law of negligence. This is the approach that most courts have been following for some time, of calling a pig a mule.

B. Paths Untaken: Rejecting Global Approaches

By rejecting section 402A’s approach of defining defectiveness in a single way for all three types of defect, the products liability Restatement obviated the need for a global test of liability based on some traditional liability touchstone such as consumer expectations or negligence. Another form of global defectiveness rejected in the new Restatement is “product category defectiveness.” Such liability is based on the design defectiveness of entire types of product, such as alcoholic beverages or trampolines, which contain substantial inherent dangers that cannot be designed away. Much in principle is sacrificed at the altar of expediency by the new Restatement’s abandonment of consumer expectations and negligence as formal tests of liability, and in its almost complete rejection of the idea of product category defectiveness. Nevertheless, the practical advantages of switching to functional standards of liability, on the one hand, and the avoidance of major areas of contentious litigation over politically charged issues, on the other, help explain (yet only very partially to justify) these choices made in the new Restatement.

21. Of course, manufacturers have an additional duty not to misrepresent the safety of their products. As with the duty to sell products free from manufacturing defects, the duty to sell products free from safety misrepresentations is properly truly strict as well. See Moral Foundations, supra note 19, at 462-65.
22. See Tentative Draft, supra note 1, § 2 cmt. a, at 10.
1. Consumer Expectations as the Liability Test

The very definition of defectiveness in section 402A was explicitly rooted in consumer expectations. In both its halves, the section's core language of "defective condition unreasonably dangerous"24 was defined in the comments in consumer contemplation terms,25 reflecting the section's heritage in the law of warranty.26 The fundamental expectational value rests on the central importance of truth to individuals attempting to make intelligent choices in exercising their free wills.27 Protecting expectations is thus a vitally important function of the law.

As a general and independent "test" of liability, however, the consumer expectations standard has not served well in providing compensation to consumers for unexpected accidents. Instead, manufacturers have often used the test as a deadly sword against consumers to bar recovery in cases involving obvious dangers or where a consumer's expectations were necessarily undeveloped or cynically realistic. It is difficult to define the relevant expectations of bystanders put at risk, and courts have generally been forced to rely on the expectations of employers, parents, and doctors whose expectations and interests are often quite different from those of the persons in their charge.28

Truth and consumer expectations lie at the heart of the representational duties of manufacturers, and they underlie the duty to provide adequate warnings and instructions.29 Consumer contemplations also play a significant role in proper design decision-making, but the new Restatement is probably correct in defining the liability standards "functionally" instead, by type of defect. In defining design defectiveness, the new Restatement includes consumer expectations as a factor to be considered in balancing a variety of mostly risk-utility factors.30 Under section 2(b), courts may thus continue to view consumer expectations as a particularly important factor—that sometimes will be controlling—in rendering design defectiveness determinations. By planting the consumer expectations tree in a design defectiveness forest comprised mostly of risk-utility vegetation, the new Restatement provides necessary shelter to victims of accidents resulting from obvious product risks that, cheaply and feasibly, could and should have been designed away.

25. See id. cmts. g (defective condition) & i (unreasonably dangerous).
27. See generally Moral Foundations, supra note 19, at 439-41.
28. See Tentative Draft, supra note 1, § 2 cmt. e, at 23, and § 2, Reporters' Note to § 2 cmt. c; see generally PRODUCTS LIABILITY AND SAFETY, supra note 13, at 190-210.
29. See generally Moral Foundations, supra note 19, at 462-68.
30. See Tentative Draft, supra note 1, § 2 cmts. c, d, and e, at 15, 19, 23.
Safety expectations of product users may thus effectively be taken into account by redirecting the doctrinal inquiry away from the consumer's perceptions toward the kinds of specific shortcomings in the product that could and should have been corrected by the manufacturer. Such a direct focus on the product, with the resultant indirect focus on the manufacturer provides (1) a more balanced and workable standard for courts and juries attempting to apply the liability test in specific cases, (2) a more comprehensible guide for manufacturers, and (3) more effective protection for victims of certain types of product accidents. Ironically, consumer expectations may thus be best protected by first abandoning them as a general and independent "test" of liability and then incorporating them into liability standards tailored to the defect categories.

While the consumer expectations test may work poorly as a general test of liability for defectiveness, there are special contexts where the test should probably be retained. One such situation involves the presence of "natural" dangers in certain kinds of food, such as a fish bone or shell in seafood chowder. Here, the new Restatement explicitly retains the consumer expectations test, rejecting the largely discredited "foreign/natural" distinction formerly employed by many courts.31 Another situation may be the "product malfunction" type of case in which a product suddenly and catastrophically fails, destroying all evidence of defectiveness—a new automobile's steering or brakes suddenly fail to work, causing the car to crash into a tree; Christmas tree lights inexplicably catch fire, causing them to be consumed; or a person is suddenly and severely sickened while eating food, but all evidence of contamination disappears in the victim's stomach and thence elsewhere. Despite the absence of direct evidence of product defectiveness is such cases, it is sometimes clear as a matter of circumstantial evidence that such a malfunctioning product was quite probably defective in one way or another. The doctrine of res ipsa loquitur often is unable to help in such cases for the simple reason that proof of defectiveness generally falls far short of establishing the supplier's negligence. This is where the consumer expectations test may come to the rescue, in a kind of default capacity, by placing liability on the suppliers of malfunctioning products that probably were defective. Liability thus may be grounded in the frustration of the user's safety expectations rather than in impossible proof of the specific mechanisms that first caused the product to fail and then destroyed all evidence of causation.

Section 3 of the new Restatement adopts a helpful "malfunction" basis of liability, a form of defect ipsa loquitur, for situations in which a product unexpectedly malfunctions.32 By its very terms, however, the malfunction rule as formulated in Tentative Draft No. 1 was limited to cases involving

32. See Tentative Draft, supra note 1, § 3, at 80.
manufacturing defects. Yet some malfunction cases, albeit less frequent ones, involve defects in design and so lie outside the protection of the rule as formulated in the earlier version of section 3. No doubt, proof of design defectiveness may often be available in such cases from an examination of similar units of the product. Yet sometimes the precise mechanisms that caused a particular product to fail are not readily discoverable by examining or even testing similar products that have not yet failed. Moreover, the cost of expert testing and proof in such instances may put all but the most serious cases of this sort outside the practical realm of the justice system. There thus appears to be no good reason to attempt to undercut the ability of accident victims to obtain relief in cases involving probable design defects—or, more commonly perhaps, in cases involving the probability of some kind defect, but only speculation as to the particular form of defect.

Finally persuaded by the logic and fairness of arguments such as these, the Reporters have broadened the malfunction principle in section 3 to include cases that involve the probability of any form of defect. Section 3 now provides as follows:

§ 3. Circumstantial Evidence Supporting Inference of Product Defect

It may be inferred that the harm sustained by the plaintiff was caused by a product defect, without proof of the specific nature of the defect, when: (a) the incident resulting in harm was of a kind that ordinarily would occur only as a result of product defect; and (b) evidence in the particular case supports the conclusion that more probably than not: (1) the cause of the harm was a product defect rather than other possible causes, including the conduct of the plaintiff and third persons; and (2) the product defect existed at the time of sale or distribution.

33. As it appeared in Tentative Draft No. 1, § 3 provided as follows: When a product fails to function as a reasonable person would expect it to function, and causes harm under circumstances where it is more probable than not that the malfunction was caused by a manufacturing defect, the trier of fact may infer that such a defect caused the malfunction and plaintiff need not specify the nature of the defect.

Id.

34. Id. cmt. b, at 82-83.

35. Advanced by Bill Wagner, Richard Wright, and myself, among others.

36. This is how the Reporters have formulated § 3 as this essay goes to press in January 1995, and as they presently contemplate including it in Tentative Draft No. 2 for distribution to the ALI membership in April 1995 preparatory to the Institute's annual meeting in May. See Memo from the Reporters to the ALI Council (October 11, 1994), with modifications as described and explained to me by Aaron Twerski in various conversations in late 1994 and early 1995. In the coming months, I shall be seeking to have (1) the phrase "ordinarily would occur" in § 3(a) converted to something like "probably would occur" or "is likely to occur," and (2) the phrase "including the conduct of the
This expansion of the malfunction (circumstantial evidence) section is a vital improvement in the doctrine of the new Restatement. Manufacturers thus are to be held strictly accountable, under section 3, for certain product accidents involving the most severe violations of consumer expectations which, whether for practical problems of proof or other reasons, otherwise would be excluded from coverage under the liability definitions of section 2. This broadening of the malfunction principle in section 3 effectively and properly closes what might well have been the largest liability-restricting loophole in section 2. One might well also anticipate the possibility that other untoward liability-restrictive loopholes, as yet unforeseen, may lurk dormantly in section 2’s functional definitions of defectiveness. Consequently, prudence suggests that courts should retain a limited, residual role for the consumer expectations test (or should be prepared to adopt some functional equivalent thereof) for future use in whatever narrow categories of cases prove incapable of fair resolution under the section 2 tests of product defect.

2. Negligence as the Liability Test

While plaintiffs may decry the abandonment of consumer expectations as the explicit test of liability in the new Restatement, defendants surely would have wished for a more complete return to negligence as the explicit test of products liability. For manufacturing flaws, of course, such a return would not have been appropriate because both law and attitudes have evolved in this context to the point where the risk of injury from such true "mistakes" is properly seen to lie upon the manufacturer. In the case of design and warnings defects, however, much may be said for calling a pig a pig and defining liability in the terms as well as the principles of the law of negligence. Yet this kind of explicit recognition of a negligence test of liability flies squarely in the face of what courts have been saying since section 402A of the Restatement (Second) of Torts first stormed across the nation now long ago.

Just why have the courts insisted in these cases on calling a pig a mule, by denoting liability as "strict" while applying the fault-based principles of the law of negligence? A number of factors in combination help explain why so many courts, in defining liability for dangers in design and from inadequate safety information, have distorted reality so much for so long.

The first explanation lies in the way in which section 402A was formulated. Prior to the current version of section 402A as it finally was
adopted by the ALI in 1964, Dean Prosser had, over a period of years, put the section through several drafts. Increasingly expanding the doctrine’s scope, he was attempting to stay ahead of the liability theory curve that he then perceived to be in a state of fundamental and rapid flux from negligence to “strict” accountability for harm from product defects. There were only a few relevant cases at that early stage in the law’s development, and they mostly involved manufacturing defects. As alluded to above, the reasons for imposing true strict liability in manufacturing defect cases are quite compelling, and the central term used to define strict products liability—“defect”—is immediately comprehensible in the manufacturing context, and only there. Thus, at the time Dean Prosser formulated a global rule of “strict” liability in tort for harm caused by product defects, the focus was squarely on manufacturing defects for which strict liability seemed eminently appropriate.

Moreover, abroad in the early 1960s were swells of popular interest in consumer protection and in the harnessing of corporate power. Strict products liability to the consumer—as first announced in the warranty context in 1960 by Judge Francis in Henningsen v. Bloomfield Motors, Inc., and as then converted to the law of torts in 1963 by Judge Traynor in Greenman v. Yuba Power Products, Inc., and in 1964 by Dean Prosser in section 402A of the Restatement (Second) of Torts—seemed a natural part of the broader populist march toward ultimate freedom of common men and women striving to take control of their destinies by shaking off the final yokes of exploitation by big business. Strict products liability in tort for defective products thus seemed to be an inevitable legal development within this exciting and historic social movement.

As the courts began to apply the new “strict” liability doctrine to design and warnings cases, however, they ran into a rather solid wall. The consumer expectations test served the strictness function well enough. As discussed above, however, it contained such inherent difficulties as a “test” of liability that courts were often bound to search elsewhere for a meaningful and workable standard to distinguish designs and warnings that were bad from those that were safe enough. What they found for design cases, of course, was the risk-benefit (or “risk-utility”) standard rendered famous by Learned Hand in his celebrated liability formula in the Carroll Towing case. Balancing the risks and benefits of various

38. See generally Products Liability and Safety, supra note 13, at 166-68, 223-25.
39. See supra note 19 and accompanying text.
41. 377 P.2d 897 (Cal. 1963).
43. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)
designs, most particularly the design of the accident product as compared to the alternative design proposed by the plaintiff's experts, was increasingly perceived as the most workable and rational method for answering in concrete design cases the perplexing question: How much safety is enough? In the warnings context, the most significant question turned out to be whether the foreseeability principles of negligence law should be used to protect manufacturers from strict liability for failing to warn consumers about unanticipated risks of harm. After a dramatic turnaround in New Jersey in the 1980s, the foreseeability limitations on liability finally won the day as applicable to determinations of strict liability for warnings defects.

In adopting the $B<PL$ test for design cases, and the foreseeability limitation for warnings cases, the courts had to confront the conceptual difficulty and practical embarrassment of reverting to the law of negligence for the definition of "strict" liability. Quite understandably, the courts did not rush to admit their error by explicitly repealing their adoption of "strict" liability for design and warnings cases, for that would have seemed to reject as well the ideals of the consumer movement which still, in concept, retained much power. Instead, they simply applied the principles of negligence law under the umbrella of "strict" liability. In other words, they called a pig a mule.

Although the courts in this way locked themselves into pig-is-a-mule liability tests for design and warnings defects, the ALI could have tried to correct the problem in the new Restatement and redefined the pig as truly a pig by returning to negligence as the explicit black letter test for liability. Much would have commended this type of forthright approach, which would have gone a long way to correct the mistake of the Restatement (Second) of globally defining defect in consumer expectation terms. Yet persuasive arguments point as well the other way.

(expressing the risk-benefit concept in algebraic terms, such that negligence is implied if $B<PL$, where $B$ is the burden or cost of avoiding accidental loss, $P$ is the increase in probability of loss if $B$ is not undertaken, and $L$ is the probable magnitude or cost of such loss).

44. In fact, three separate balances must properly be struck in rendering design defect decisions. See Defectiveness Redefined, supra note 6.


46. The correctness of New Jersey's holding in this respect in the Feldman case, 479 A.2d 374, was certified by the California court in Brown v. Superior Court, 751 P.2d 470 (Cal. 1988) (prescription drugs), and Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549 (Cal. 1991) (asbestos, extending the use of negligence principles in warnings cases to all products).
Both society and the law have evolved considerably since 1964. For a variety of reasons, most other industrial nations have since then switched to a purportedly "strict" standard of responsibility for product safety. Moreover, the courts in this nation, having deluded themselves with the pig-is-a-mule liability standard for three decades, by now have probably really begun to think of the standard as "strict" in fact as well as name. In other words, over the years the very meaning of the word "strict" has gradually shifted in the products liability context to mean something other than its classical definition of liability without fault. To many courts and lawyers, "strict" liability for design and warnings dangers has come to mean something along the lines of liability for product dangers that reasonably could and should have been designed or warned away. This form of "strict" liability may do violence to rarefied academic models of tort theory, as it does somewhat to logic and common language, but the meaning of the term has evolved according to its twisted real-world application.

This is not to say that courts should abandon considering the possibility of purifying the law by shifting back to negligence as the explicit standard of liability in design and warnings cases. Courts, lawyers, jurors, and manufacturers all would find in such a move a refreshing return to honesty and common understanding in legal doctrine. Yet to a large extent the law is what the law says, and the ALI was hardly "wrong" in restating liability as the courts have come to state it. Consequently, there is no longer a need even to state the issue starkly in black or white as "strict liability versus negligence," for the law has moved inward from both extremes toward a not-too-satisfying but realistic tone of gray.

3. Product Category Defectiveness

Another global approach to a products liability issue rejected by the new Restatement is the idea that entire categories of products—perhaps cheap handguns, cigarettes, alcohol, trampolines, above-ground swimming pools, and three-wheel all-terrain vehicles (ATVs)—may be inherently defective in design.47 The claim of defectiveness in such cases is based upon the idea that some such products may contain excessive inherent danger that cannot be designed or warned away. For example, cheap handguns may kill too many victims of criminal and family assaults. Alcohol and cigarettes, addictive to millions of Americans, may cause more suffering than the perversely addictive "pleasure" they provide. Finally, above-ground pools, trampolines, and three-wheel ATVs may cause more injuries than they are worth. Such products thus may be inherently

defective in design, and categorically so, because they fail the basic cost-
benefit test: their accident costs exceed the benefits they provide. If the
risk-utility calculations are correct, then such products are on balance
simply bad; they generate for society a net disutility, more harm than value,
more bad than good. This is the concept of product category defectiveness
implicitly rejected in section 2(b)'s requirement that the plaintiff establish
a reasonable alternative design in virtually every case. 48

Courts indeed have only infrequently held a product to be defectively
designed in the absence of a reasonable alternative design. 49 One may
fairly question the appropriateness of product category-wide liability on
grounds of judicial competency, on whether courts may properly decide for
the public that certain types of products consumers want are simply bad in
law. Put this way, a judicial declaration that a certain product type wanted
by consumers is "illegal" looks somewhat like judicial prohibition and quite
like paternalistic arrogance by the courts. The problem with category
defectiveness, then, is that it authorizes courts and juries to interfere with
consumer freedom of choice on the supposition that a court (or jury) knows
better than consumers what is good for them. 50

It just may be, however, that courts do sometimes know what is better
for consumers than consumers themselves, or at least that they may

---

48. Product category defectiveness is explicitly rejected in comment c:
The requirement in § 2(b) that plaintiff show a reasonable alternative design applies
even though the plaintiff alleges that the category of product sold by the defendant is
sufficiently dangerous that it should not have been marketed at all. Thus common and
widely distributed products such as alcoholic beverages, tobacco, small firearms, and
above-ground swimming pools may be found to be defective only upon proof of the
requisite conditions in § 2(a), (b), or (c).

Tentative Draft, supra note 1, § 2 cmt. c, at 17-18. In Council Draft No. 1A, the Reporters
opened a "toy gun" window for product category defectiveness—allowing liability in the
case of a toy pellet gun that could injure children—which, upon objections by the Council,
the Reporters thereupon closed in Tentative Draft No. 1.

On motion and argument by Robert Habush of Milwaukee, and after vigorous debate, the
Institute voted in May 1994 to amend comment c by readopting the toy gun exception to the
general rule against product category defectiveness. At issue during the spirited debate on
this issue was whether the toy gun exception will be seized upon by courts to expand the
concept beyond its terms. As of late 1994, the Reporters plan to set out the Habush
Amendment separately, as comment d to § 2, in Tentative Draft No. 2. One may hope that
courts are indeed emboldened by this exception and that it will be broadened as warranted
by particular cases.

49. So far, the most celebrated decision along these lines is probably Kelley v. R.G.
Indus., Inc., 497 A.2d 1143 (Md. 1985) (utility of cheap handguns exceeded by the harm
they cause), which was subsequently overruled by the state legislature. See Tentative Draft,
supra note 1, Reporters' Note to § 2 cmt. c, at 52.

50. A related process problem concerns the difficulty of principled adjudication of
such politicized issues involving broad cost-benefit calculations of values that may be
incommensurable.
sometimes be better positioned to render fair and rational “legislative” type decisions on the balance of risks and benefits in certain types of products. Imagine, for example, a case of a father pestered successfully by his 10-year-old daughter to buy a trampoline for backyard use. Assume further that the daughter thereafter bounces off the trampoline onto her head and is paralyzed for life. Before purchasing the trampoline, the father (unless a public safety epidemiologist for the Consumer Products Safety Commission) probably would have had no meaningful appreciation of the product’s balance of trade-offs between fun and danger. Even if the literature accompanying the trampoline fully detailed the numbers, types, and severity of risks from different types of trampoline use and misuse, the father, even as so “informed,” probably never could have truly understood the real balance of risks and benefits presented by the trampoline, either to society in general or to his family in particular. Nor, of course, was the daughter ever in a position to make any kind of rational cost-benefit decision for herself.

Although a trial court may serve poorly as a legislature or an agency for rendering macro-social determinations on the net value of home trampolines, it provides a better forum for an injured claimant than none at all. After all, courts are the traditional and generally the only forums for rendering compensation decisions for consumers after accidents have occurred. While compensation is appropriate only for harm from products that are “defective,” what could be more defective than a product that causes more harm than good? It is easily forgotten that ruling such a product as defective does not ban it altogether, but simply taxes to the manufacturer (and thus indirectly to its shareholders and consumers) the true extent of the product’s accident costs. It may well be that many courts will want to retain the power to decide that certain high-risk products fairly should be priced to include their excessive costs: costs that consumers are unable to comprehend or avoid, costs inevitably and involuntarily inflicted upon other persons, such as children, passengers in other cars, and the victims of violent crimes. When a product’s excessive risks of harm cannot fully and effectively be appreciated and thus dealt with rationally by the persons put at risk, the courts should want to make themselves available to force the manufacturer to internalize the costs of injuries.

Why should not the price of a pack of cigarettes or a can of beer reflect the enormous costs of lung cancer and drunk-driving injuries that are very often borne by innocent third parties and by the public at large through


52. And so “externalized,” in the parlance of economists.
private and public health care insurance mechanisms? To argue that consumer freedom or legislative deference precludes the courts from requiring these costs to be included in the price of certain high-risk products of dubious utility—especially those that are addictive—seems to miss the point. If the product in fact is addictive, the issue might be characterized more fairly not as whether to deprive consumers of their freedom, but as whether to protect consumers from duress. Moreover, if a legislature or administrative agency actually makes a full and fair determination that a particular type of dangerous product is worth the risks, as Congress may have done with the Swine Flu vaccine in the 1970s and as the National Highway & Traffic Safety Administration arguably did with the various passive restraint alternatives to automotive air bags in the 1980s, then the judiciary should stay its hand. Unfortunately, however, the legislatures are institutionally incapable of addressing the vast majority of product safety problems. Additionally, the various product safety agencies have limited jurisdictions, limited budgets, and often limited skills and wills to address in an effective manner the great majority of product risks. On balance, then, the new Restatement’s general rejection of the concept of product category defectiveness may reflect an unduly conservative point of view on judicial competency that many courts may choose to reject as an outright rule.

Finally, while it certainly is true that courts infrequently predicate liability on the global disutility of a product, courts have long defined defectiveness in just this global manner, often stating (generally and without qualification) that products are defective if their risks exceed their benefits. In applying this conventional cost-benefit definition of defectiveness, surely the great majority of cases involve products that could have been designed more safely in a variety of alternative ways. The theory of product category defectiveness simply is not relevant to such ordinary product cases in which plaintiffs will quite properly be required to show a reasonable design alternative. For example, automobiles are involved in the deaths of some 40,000 persons, and the maiming of millions of others, in this nation every year. Nonetheless, one would have to search long and hard to find a judge or jury willing to hold that the costs of automotive accidents exceed the many benefits to society that cars provide. By contrast, the benefits of cheap handguns, cheap alcohol, cheap cigarettes, and cheap home trampolines may not on balance fairly be worth their enormous risks. In

54. See generally PRODUCTS LIABILITY AND SAFETY, supra note 13, at 810-15.
55. See generally id. at 1-12.
56. Accordingly, plaintiffs in automotive design cases must appropriately establish feasible alternative designs. See generally id. at 791-806.
fact, their low prices may encourage excessive use. Thus, most courts may not wish to tie their hands by outlawing product category defectiveness altogether, but may rather decide to leave this design defectiveness approach within the arsenal of products liability theories as a useful and important tool for special use in certain limited types of cases.58

II. LIMITATIONS ON LIABILITY

So far, the inquiry has focused on defectiveness at its definitional core. Like all law, there are important limits to the reach of defectiveness which help to give it proper definition at its borders. The three principal limiting factors in this regard concern the issues of obvious dangers, product misuse, and state of the art.59 Each of these factors, at least theoretically, may either be accorded a decisive role in liability determinations or, alternatively, folded into a calculus of factors for a broader form of decisionmaking. As has been true with the basic definitions of liability, the role of these three liability-limiting issues has evolved from the exuberantly extreme approaches of the early days of products liability law into a mid-life state of gray.

When modern products liability law was getting off the ground in the 1960s, the patent danger doctrine ruled the land, product misuse was a concept that bewildered courts and commentators, and few had thought about whether the state of the technological art should play a role in the new doctrine of strict products liability in tort as promulgated in section 402A of the then new Restatement (Second) of Torts.60 As the decade of the 1970s opened its doors, the patent danger doctrine was still entrenched but beginning to show a little wear, and the courts had begun to experiment in a variety of ways with the doctrines of both product misuse and state of the art. As for misuse, many courts were applying it as a broad and

57. Low relative to the harm they cause since, if product category defectiveness is not allowed, their prices will artificially exclude their arguably excessive accident costs which are instead externalized to a large extent on other persons.
58. That courts have left themselves an opening for such special types of cases is noted in the Reporters' Notes to Tentative Draft § 2 cmt. c, at 53: "[T]he importance to note that a number of courts have suggested in dictum that in rare instances where the product has low social utility and very high risk that they might be willing to impose liability without proof of a reasonable alternative design." A court adopting the definitions of defectiveness in § 2 might do well to leave room for such special cases by treating the availability of a reasonable alternative design as a presumptive (rather than conclusive) requirement in § 2(b).
59. See generally PRODUCTS LIABILITY AND SAFETY, supra note 13, at 360-463; Defectiveness Redefined, supra note 6.
60. Yet the state of the art issue was anticipated in warnings cases, RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1964), and in the prescription drug context, id. cmt. k.
complete defense,61 barring liability altogether for any use that was not in fact "intended" by the manufacturer. Other courts went to the other extreme, allowing juries to find highly unusual and entirely unreasonable types of product abuse as "foreseeable" and therefore within the realm of manufacturer responsibility. In the case of the "state of the art defense" and "state of the art evidence," courts went every which way. Some held that manufacturers were protected under section 402A from having to apply technology in any manner other than how manufacturers generally were applying it at the time of manufacture. Other courts defined liability according to the "Wade-Keeton test," which held manufacturers accountable for excessive product harm whether or not that harm could have been foreseen or prevented under scientific or technological techniques knowable at the time.62

As products liability law matured in the 1970s and 1980s, courts increasingly abandoned extreme approaches to each of these three limiting issues and generally moved instead toward middle ground.63 Eventually repudiated in almost every jurisdiction, the patent danger doctrine was broadly replaced during this period with a rule that factored the obviousness of a product hazard into the broader design calculus of risks and benefits and into the affirmative defenses based on user fault. Quite properly, however, the great majority of courts have continued to rule that it is generally nonsensical to require warnings of dangers that are truly obvious. What to do with product misuse has remained a problem issue that continues to haunt some courts, but most quite properly hold manufacturers accountable for failing to take reasonable steps to guard against harm from uses (or "misuses") that fairly may be classified as "reasonably foreseeable." Conversely, most courts protect manufacturers altogether from liability for harm from misuse that is unforeseeable—on grounds of nondefectiveness, the absence of proximate cause, or as an affirmative defense. Finally, the state of the art issue in recent years seems largely to have faded from judicial debate, probably because of the widespread acceptance of the appropriateness of negligence principles in design and warnings cases. Certifying the propriety of such balanced, modern approaches to the border liability issues in products liability, the new

61. I use the term "defense" loosely and advisedly, since many courts require the plaintiff to prove the absence of misuse as part of the prima facie case. See generally PRODUCTS LIABILITY AND SAFETY, supra note 13, at 390-92 n.4.

62. At least this was the theoretical import of the test. Until Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539 (N.J. 1982), however, the Wade-Keeton test appears never to have been applied by an appellate court in a manner holding a manufacturer liable for failing to guard against a risk claimed by the defendant to be unknowable or technologically unavoidable.

63. The legislatures, caught up in the politics of products liability and general tort "reform," have not always been so temperate in their approaches to these issues.
Restatement restates the law on obvious dangers, product misuse, and state of the art on comfortable middle ground.

III. DEFENSES BASED ON USER MISCONDUCT

On the other side of a products liability case from defectiveness lies the matter of the victim's misconduct in using a product improperly—as by failing to inspect a candy bar for worms, using a power circular saw on an old two-by-four riddled with nails, sticking one's hand under an operating power lawn mower, or driving a car into a tree while in a drunken stupor. Consumer misconduct very probably accounts for more product accidents than does defectiveness.

In the early years of modern products liability law, most courts applied an all-or-nothing approach to defenses of this type—either none of the defenses applied and the user won the case, collecting all his damages, or one or more of the misconduct defenses did apply, and the user lost the case entirely. Comment n to section 402A provided support for the early all-or-nothing approach, stating that a consumer who negligently fails to inspect a product for defects, as in the wormy candy bar example, should be recompensed for all of his losses. On the other side of the misconduct issue, the comment further stated that a person who knowingly and unreasonably exposes himself to product risks, as by attempting with his hand to clear away clumps of grass from an area near the moving blade of a power lawn mower, should bear the consequences of the misconduct entirely himself. As the doctrine of comparative fault spread like wildfire across the meadows during the 1970s and 1980s, most courts began to replace the all-or-nothing approach to consumer misconduct in products liability cases, as in other forms of tort litigation, with the principles of damages apportionment.

The overriding general issue in products liability cases involving consumer misconduct, then, is whether the harm in such cases should be allocated decisively and altogether to the manufacturer or to the user, or whether it should instead be divided between the parties. As with the defectiveness issues discussed above, many courts and the new Restatement have rejected the black-and-white approach to consumer misconduct, opting

---

64. See Tentative Draft, supra note 1, § 2 cmts. c, h, at 15, 27.
65. The comments on misuse are generally to this effect but at some points are quite muddled. Compare the approaches to the issue in § 2 cmts. c, i, l, at 15, 28, 33.
66. See Tentative Draft, supra note 1, § 1 cmt. a, at 1; § 2 cmts. a, c, i, at 10, 15, 28; § 4 cmt. g, at 95.
67. "[O]ver 2/3 of all injuries related to consumer products have nothing to do with the design or the performance of the product. They relate to the misuse or abuse of the product." Mary Fisk, An Interview with John Byington, TRIAL, Feb. 1978, at 25. Byington was at the time chairman of the Consumer Product Safety Commission.
instead for the “gray” approach of comparative fault in allowing liability but
dividing damages. Yet the issue here is not quite so clear and simple as it
might at first appear, and lurking within the broader issue are a variety of
natty problems that confront the courts.

The first such problem concerns the division of authority between the
courts and legislatures and hence the underlying power of a court to apply
rules of consumer misconduct as the court sees fit. Although different
legislatures have enacted various types of products liability reform statutes
treating defectiveness issues in a variety of ways, there has probably been
no area of legislative reform affecting products liability law so widely as
the general tort legislation on comparative fault. In addressing consumer
misconduct issues of the types described above, therefore, courts first need
to apply faithfully the language of applicable comparative fault statutes.
Determining whether a legislature intended to include “strict” products
liability, assumption of risk, or product misuse within the ambit of a statute
that speaks only of allocating “fault” or “negligence” between the parties
involves important preliminary issues of legislative interpretation. The
difficulty of the question of whether such a statute applies to “strict”
products liability is now compounded by the new Restatement’s express
assertion that design and warnings defectiveness are both based on
principles of negligence. There is no evident right or wrong approach to
such interpretive problems. All that can be asked of courts in such cases is
that they fairly attempt to apply the proper rules of legislative interpreta-
tion—not by any means an easy task, but not really a special problem of
products liability theory.

Once a court decides that it has the power to render a decision between
the all-or-nothing rules of absolute affirmative defenses and the damages
apportionment rules of comparative fault, it must then decide whether to
treat this issue as a global one, or whether instead to divide damages in
some types of cases while applying all-or-nothing rules in others. The new
Restatement has adopted the former, global approach to comparative fault
(originally with one important exception), whereas many courts have
adopted some form of the latter, selective approach to damages division.
That is, many courts applying comparative fault to products liability cases
have retained one or more of the total-bar or total-recovery rules. Thus,
even under a general comparative fault scheme, many courts continue to
allow consumers to recover all of their damages if their only fault lies in
failing to discover a product defect. A number of courts also allow a
plaintiff to recover all of his damages if his negligence in encountering a
danger—sticking his hand in the operating area of a punch press—is the
very risk that the manufacturer could and should have designed out of the
product in the first place. And some courts refuse to reduce the damages
suffered by a drunk driver that are attributable to a defective seat belt.
Many courts also continue to apply all-or-nothing rules the other way,
against the plaintiff, if he knowingly and unreasonably exposes himself to a product risk, as in the hand-in-the-power-mower example.68

Section 7 of the new Restatement throws all forms of consumer misconduct into the comparative responsibility damages-division hopper on grounds of the inefficiency and impracticality of defining the borders of the all-or-nothing categories and the difficulty of applying such rules in cases involving third parties.69 Efficiency and practicality probably do suggest such a compromise approach, but the law is based as well on principles of fairness and corrective justice.70 Whether manufacturers and ultimately other consumers should be "taxed" for the injuries suffered by a person who cuts his hand while clearing away clumps of grass from beneath his mower, or whether such a person instead should be required to insure himself against this kind of risk at his own expense, is an issue that many courts may choose to continue to resolve as an all-or-nothing issue based on principle rather than practicality. At the other side of the issue, when a person chomps down on a candy bar in a darkened movie theater only to encounter a mouthful of squiggling worms and eggs embedded in webbing,71 many courts may decide to continue to rule that principle rather than expediency should dictate a rule of full recovery.

The one exception to section 7's general rule of comparative fault in Tentative Draft No. 1 concerned the crashworthiness issue, addressed in section 6. In arguing that a driver in such cases should be entitled to the full recovery of all his damages, undiminished by some amount reflecting his fault in causing the accident, comment f to section 6 reasoned that "if the risks created by plaintiff's conduct are within the range that justifies crashworthiness protection, plaintiff's conduct creates the very situation in which the plaintiff has a legitimate right to expect the automobile to provide reasonable protection. This is so regardless of the nature of the plaintiff's conduct."72 This argument makes some sense for a rule of undiminished recovery in crashworthiness cases, but it is virtually the same argument the Restatement rejects as a general principle in comment d to section 7. There, the comment notes that some

68. The doctrinal source for this defense lies in RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1964), which provides in pertinent part: "If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery." The philosophic source for the rule lies in the ethic of equality. Moral Foundations, supra note 19, at 476.
69. See Tentative Draft, supra note 1, § 7 cmt. d, at 146.
70. See generally Moral Foundations, supra note 19.
72. Tentative Draft, supra note 1, § 6 cmt. f, at 121.
decisions hold that apportionment of liability is inappropriate where the product lacked a safety feature that would protect against the risk that resulted in the injury in question. The premise is that liability should not be diminished when the plaintiff engages in the very conduct that the product design should have prevented.\textsuperscript{73}

Why crashworthiness cases should be excluded from the general damages apportionment rule of comparative fault is difficult to fathom. The principle of full recovery for a manufacturer’s failure to design into its products protection for users against their own carelessness would appear to stand or fall regardless of the category of case. Moreover, isolating crashworthiness cases for special treatment in section 6 conflicts quite starkly with section 7’s thesis that “plaintiff fault should not be separated into discrete categories.”\textsuperscript{74} Fortunately, in response to considerable criticism of comment f, and based upon a well-briefed motion by a member of the \textit{ALI},\textsuperscript{75} the Reporters withdrew most of their support for the version of comment f to section 6 in Tentative Draft No. 1, and the ALI voted to reject this aberration from the global rule of comparative fault.

The trend over the last three decades toward a general rule of comparative fault applied broadly to accident cases has much to commend it in terms of common sense and practicality. It minimizes difficult line drawing between legal categories and the need for routine judicial review of this especially fact-sensitive issue on the particular facts of particular cases. Nevertheless, the mellowing of accident law in this respect involves some quite pronounced sacrifices of principle in the law and throws important problems of responsibility to juries without oar or rudder. Whether the “law” of products liability should join league in this respect with the compromising trend of accident “law” in general, by admitting an inability to craft fair and workable all-or-nothing rules for particular categories of problems, is a move that most courts should be reluctant to make without careful deliberation.\textsuperscript{76} Although the \textit{Restatement} may have extended the doctrine of comparative fault in section 7 further than have most courts, its move in this direction most certainly reflects the general graying of products liability law on claimant fault.

\begin{flushright}
\textsuperscript{73} Tentative Draft, \textit{supra} note 1, § 7 cmt. d, at 146.
\textsuperscript{74} \textit{Id.} at 147.
\textsuperscript{75} Hildy Bowbeer of Minneapolis.
\textsuperscript{76} The following admonition might be on point:

The principle of comparative fault apportionment of damages is veritably sweeping the land, gobbling up much traditional tort doctrine as it goes. Courts need to be cautious not to become caught up by the sheer momentum of the movement, and with the facile simplicity of the doctrine, but instead should apply deliberate thought to each new call for its further extension.

\end{flushright}
IV. Conclusion

Products liability law has mellowed. At its conception in 1964 in section 402A of the Restatement (Second) of Torts, the concept of “strict” liability for the sale of “defective” products was conceived of as a unitary and global concept that reflected the triumph of consumer freedom over oppressive exploitation by manufacturers. As products liability law explored its limits in the years that followed, it experimented with various extremes, most of which proved in time to be too far one way or the other, too expansive or too restrictive. During this time of maturation, the law of defectiveness mellowed, at both its center and its borders, as courts and commentators began to appreciate the complexities and nuances of the competing values in this burgeoning area of the law. The defenses based on user misconduct mellowed also as they participated in the onward march of accident law’s general principles of damages apportionment based upon comparative fault. So now stands the law of modern products liability as it quite faithfully is captured in the new Restatement (Third) of Torts: Products Liability:

Products liability law has grayed. Its exuberance of adolescence now a faint remembrance of the past, products liability law in recent years has increasingly shunned black-and-white solutions for those of gray. It has attempted compromise instead of confrontation, sought out middle ground instead of borderland extremes, and chosen practicality, convenience, and efficiency over principles of right and wrong.77 One might well argue that these developments are the inherent design characteristics of middle age, inevitable conditions of a mature system of legal principles serving equally the aggregate best interests of the various constituencies governed by the law. Surely the wheels of justice now turn more easily, worn down by age and lubricated by practicality and convenience. But a certain melancholic shadow drapes across the picture of these now fast-whirring wheels, as the glimpses of justice at the center fade ever dimmer in the blur.

77. For a critical early look at such developments in tort law generally, see James A. Henderson Jr., Expanding the Negligence Concept: Retreat from the Rule of Law, 51 IND. L.J. 467 (1976).