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Products Liability Law Restated

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ESSAY

PRODUCTS LIABILITY LAW RESTATED

DAVID OWEN*

For most of the late twentieth century, section 402A of the *Restatement (Second) of Torts*, the fountainhead of modern products liability law, ruled supreme. With approval by the American Law Institute¹ of the *Restatement (Third) of Torts: Products Liability*² in May 1997, section 402A of the *Second Restatement* was effectively repealed.³ In its place now sits an entire new *Restatement* dedicated solely to the topic of products liability law.⁴ This essay briefly traces the history of

* Carolina Distinguished Professor of Law, University of South Carolina, and Editorial Adviser, *Restatement (Third) of Torts: Products Liability*. This essay is adapted from a paper delivered at a conference in London, England, held on September 23, 1997 by Nottingham Law School and the University of Sheffield. The European Journal of Consumer Law plans to publish a European version of the paper. Thanks to James Henderson and Aaron Twerski, Reporters for the *Products Liability Restatement*, Elena Cappella and Michael Greenwald, Deputy Directors of the American Law Institute, and Jerry Phillips, a member of the Consultative Group for the *Restatement*, for their comments on earlier versions of this paper, and to Sarah Berry and Anne Kears for their editorial assistance. Not a member of the ALI, Pat Hubbard did not participate in the new *Restatement* project.

1. The American Law Institute (the "ALI" or "Institute") was formed in 1923 to clarify, simplify, and improve the common law of this nation. See generally William Draper Lewis, *How We Did It*, in ALI, *RESTATEMENT IN THE COURTS: HISTORY OF THE AMERICAN LAW INSTITUTE AND THE FIRST RESTATEMENT OF THE LAW 1* (perm. ed. 1945). With an elected membership of somewhat more than 3,000 of the nation's nearly one million practicing lawyers, judges, and law professors, the ALI's "Restatements" of various fields of law command broad respect. For commentary on the *Restatement* process, see The Honorable Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WIS. L. REV. 1, 17 n.60 (citing N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 60-65 (1990)); Leon Green, *The Torts Restatement*, 29 ILL. L. REV. 582, 591-92 (1935); Hans Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 840, 844 (1994); Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995); Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185 (1968).

2. In conformity with its standard practice, the ALI entitled the new *Restatement* the *Restatement of the Law Third, Torts: Products Liability*. Note, however, that the full citation form for the *Restatement* used in this paper generally follows the uniform Bluebook citation form. Assuming that the new *Restatement* is published on schedule in 1998, its uniform Bluebook citation form will be, for example, *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* § 2 cmt. e, illus. 5 (1998) [hereinafter *PRODUCTS LIABILITY RESTATEMENT*]. See *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* § 12.8.5, at 85 (16th ed. 1996).

3. The development of the *Second Restatement of Torts* section 402A, is briefly chronicled in Part I.C, below.

4. At its annual meeting in Washington, D.C., on May 20, 1997, the ALI membership voted to adopt the *Proposed Final Draft of the Products Liability Restatement*, subject to editorial revision and

the law of products liability, describes the process by which the law in this area was "restated" by the American Law Institute, outlines the structure of the new *Restatement*, and describes the basic liability tests and various limitations on liability for defects in manufacture, design, and warnings as set forth in the new *Restatement*.

I. A BRIEF HISTORY OF PRODUCTS LIABILITY LAW

A. Negligence Actions

The history of the law of products liability is conveniently traced to *Winterbottom v. Wright*,⁵ the 1842 English decision which established the principle that a person injured by a defective chattel could not maintain a negligence action against the chattel's supplier in the absence of privity of contract. As the Industrial Revolution rolled across the American continent, the various states embraced the rule of *Winterbottom*, limiting negligence liability for selling defective products with an enthusiasm reflecting the new nation's individualistic spirit and its desire to protect its infant industry. In products liability negligence actions, the privity doctrine reigned throughout this nation until 1916 when Judge Benjamin Cardozo handed down the landmark decision in *MacPherson v. Buick Motor Co.*⁶ Involving a claim against a remote manufacturer for a defect in a car, *MacPherson* repudiated the privity bar to actions brought in negligence by injured persons with no direct contractual dealings with defendant manufacturers.⁷ As the *MacPherson* holding spread across the nation during the first half of the twentieth century, negligence doctrine opened up as the primary basis of liability for products liability claims.⁸

amendments debated and approved at the May 20 meeting.

5. 152 Eng. Rep. 402, 403-04 (Ex. 1842).

6. 111 N.E. 1050 (N.Y. 1916).

7. Judge Cardozo reasoned:

Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go 50 miles an hour. Unless its wheels were sound and strong, injury was almost certain. It was as much a thing of danger as a defective engine for a railroad. The defendant knew the danger. It knew also that the car would be used by persons other than the buyer. . . . The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day.

Id. at 1053.

8. It took some time for the *MacPherson* doctrine to take root. Lingering on in some states longer than others, the privity bar to negligence actions was not finally repudiated in the last state, Maine, until 1982. See *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 938-39 (Me. 1982).

B. Warranty Actions

Early products liability law developed to a large extent through the law of warranty.⁹ Even today warranty law plays a significant, if secondary, role in defining this field of law.¹⁰ During the first half of the nineteenth century, the doctrine of *caveat emptor* dominated sales law in the United States, except in South Carolina which had always embraced the contrary doctrine of *caveat venditor*.¹¹ During the latter part of the nineteenth century, a number of state courts began to reverse the doctrine of *caveat emptor* in the sale of goods by judicially implying a warranty of quality ("merchantability") into most such sales. After the turn of the twentieth century, following the example of Great Britain,¹² thirty-seven American jurisdictions¹³ eventually codified the law of sales by adopting the Uniform Sales Act, which provided for an implied warranty of merchantability in certain sales of goods.¹⁴ With the promulgation of the Uniform Commercial Code in the late 1950s and early 1960s,¹⁵ the implied warranty of merchantability was legislatively incorporated into the law of every state.¹⁶ While liability for breach of the implied warranty of merchantability is undoubtedly a form of strict products liability (in contract),¹⁷ warranty responsibility is weakened as a consumer protection device by

9. See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

10. This proposition is illustrated emphatically by *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995), which held that the design of a Ford Bronco II sport utility vehicle which rolled over could be held to breach the implied warranty of merchantability even though the design was not "defective" for purposes of strict liability in tort. *Id.* at 733-35. The practice of including warranty law under the "products liability" umbrella differs from the practice in England, where the scope of the "product liability" category excludes the law of warranty. See JANE STAPLETON, *PRODUCT LIABILITY* 9 (1994) (in England, the "product liability" term commonly refers only to *tortious* liability).

11. Under the rule of *caveat venditor*, a sale "raises an implied warranty (against latent defects) from the fairness and fullness of the price paid, upon this clear and reasonable ground, that in the contract of sale, the purchaser is not supposed to part with his money, but in expectation of an adequate advantage, or recompense." *Champreys v. Johnson*, [3 S.C.L. (2 Brev.) 268, 272 (1809)]. "Selling for a sound price raises an implied warranty that the thing sold is free from defects, known and unknown (to the seller)."

Lane v. Trenholm Bldg. Co., 267 S.C. 497, 503, 229 S.E.2d 728, 730 (1976) (citation omitted). See generally DAVID G. OWEN, JOHN E. MONTGOMERY & W. PAGE KEETON, *PRODUCTS LIABILITY AND SAFETY* 21 n.* & 102 (3d ed. 1996) [hereinafter *PRODUCTS LIABILITY AND SAFETY*].

12. See *Sale of Goods Act*, 1893, 56 & 57 Vict., ch. 71, in RALPH SUTTON & N.P. SHANNON, *CHALMERS' SALE OF GOODS ACT*, 1893, at 1 (12th ed. 1945).

13. This includes thirty-six states and the District of Columbia.

14. Promulgated in 1906, the Uniform Sales Act (predecessor to the Uniform Commercial Code) provided, in section 15(2), for an implied warranty of merchantability in sales by description. See UNIF. SALES ACT § 15(2) (superceded by U.C.C. § 2-314 (1962)), 1 U.L.A. 7 (1950).

15. Although the Official Draft of the U.C.C. is dated 1962, several states adopted its preliminary provisions in the late 1950s.

16. U.C.C. § 2-314.

17. It is "strict" because it is a "no-fault" form of liability by which a seller may innocently

various contract-law defenses—notably disclaimers,¹⁸ the privity requirement,¹⁹ and the buyer's duty to notify the seller promptly of breach.²⁰ Despite these rather onerous defenses, however, claimants have pursued many thousands of products liability claims under Article 2 of the U.C.C., and many such claims have been successful.²¹

C. *Strict Liability in Tort*

In 1960, Justice Francis of the Supreme Court of New Jersey rendered the decision in *Henningsen v. Bloomfield Motors Inc.*,²² an implied warranty of merchantability case in which the wife of the purchaser of a new automobile was injured in a collision caused by a defect in the car. Rejecting the manufacturer's defenses based on the plaintiff's lack of privity and on a contractual disclaimer of liability, the New Jersey court allowed the plaintiff to maintain her claim.²³ Three

become subject to liability for breach.

18. U.C.C. § 2-316.

19. U.C.C. § 2-318.

20. U.C.C. § 2-607(3)(a).

21. It should be noted that the ALI and the National Conference of Commissioners on Uniform State Laws presently are collaborating on a revision of Article 2. Preliminary drafts of the provisions affecting products liability claims materially alter existing doctrine. See UNIFORM COMMERCIAL CODE: REVISED ARTICLE 2. SALES (*Discussion Draft*, Apr. 14, 1997).

22. 161 A.2d 69 (N.J. 1960).

23. The *Henningsen* court concluded, with respect to the *privity* defense (which had theretofore been abandoned only in food cases):

We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.

Id. at 83. In the immortal words of Dean Prosser, *Henningsen* marked the "fall of the citadel of privity." William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

With respect to the *disclaimer* defense, the court observed:

Under the law, breach of warranty against defective parts or workmanship which caused personal injuries would entitle a buyer to damages even if due care were used in the manufacturing process. Because of the great potential for harm if the vehicle was defective, that right is the most important and fundamental one arising from the relationship. . . . The draftsmanship [of the disclaimer] is reflective of the care and skill of the Automobile Manufacturers Association in undertaking to avoid warranty obligations without drawing too much attention to its effort in that regard.

Henningsen, 161 A.2d at 92-93. Reasoning that "the legislative will has imposed an implied warranty of merchantability as a general incident of sale of an automobile by description," the court observed that the disclaimer amounts to "a studied effort to frustrate that protection." *Id.* at 95. Thus, concluded the court, "the disclaimer of an implied warranty of merchantability . . . [is] violative of public policy and void." *Id.* at 97.

years later, relying in part on *Henningsen*, Justice Roger Traynor of the Supreme Court of California authored *Greenman v. Yuba Power Products Inc.*,²⁴ the first case explicitly to adopt the doctrine of strict liability in tort. By stripping contract-based defenses from contract-based strict liability claims, reasoned Justice Traynor, *Henningsen* and other cases had essentially moved liability from contract law to tort law. Better to be forthright, opined Justice Traynor, and call the new products liability doctrine what it was in spirit if not yet in name: "strict liability in tort."²⁵

When Justice Traynor issued the *Greenman* decision in 1963, the American Law Institute was in the midst of revising the tort law *Restatement*, from the *First Restatement* to the *Second*, and Dean William Prosser of the University of California, Berkeley, was the Reporter for the project.²⁶ Relying substantially on *Henningsen* and *Greenman*, Dean Prosser prepared the final draft of section 402A of the *Second Restatement* as a broad-based doctrine of strict liability in tort for the sale of defective products.²⁷ Section 402A defined the heart of the liability standard—"defective condition unreasonably dangerous"—in terms of the expectations (contemplations) of the ordinary consumer.²⁸ The American Law Institute endorsed the new principle of strict liability in tort for the sale of defective products by adopting section 402A in 1964 and promulgating it by formal publication in 1965.²⁹

From the mid-1960s to the mid-1980s, section 402A's doctrine of strict products liability in tort for the sale of defective products spread like wildfire from state to state, as one court after another, and an occasional state legislature, "adopted" the new doctrine.³⁰ With the increasing social and govern-mental

24. 377 P.2d 897 (Cal. 1963) (en banc).

25. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 900.

26. Dean Prosser may best be known for his tort law treatise, published in four editions from 1941 through 1971, the year before his death. The treatise has been continued posthumously. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS (5th ed. 1984).

27. For a review of section 402A's broadening coverage in successive *Tentative Drafts* of the *Second Restatement* between 1961 and 1964, see *Putman v. Erie City Mfg.*, 338 F.2d 911, 918-19 (5th Cir. 1964) (Wisdom, J.).

28. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) (defining "defective condition" as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him"); *id.* cmt. i (defining "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer").

29. See generally Prosser, *supra* note 23; Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

30. As of 1998, all states except Delaware, Massachusetts, Michigan, North Carolina, and Virginia have adopted the doctrine of strict products liability in tort. The most recent adoption was in Wyoming. *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986). The legislatures of Maine, Oregon, and South Carolina each adopted section 402A essentially verbatim. Also adopting some form of strict products liability by statute were Alabama, Arkansas, Georgia, Indiana, Louisiana, Oklahoma, and Washington. See PRODUCTS LIABILITY AND SAFETY, *supra* note 11, at 165, 172.

conservatism of the 1980s, however, judicial (and legislative) enthusiasm for section 402A's "pro-consumer" doctrine began to falter. During this time, judicial and scholarly attention began to shift away from examining why and how the new products liability doctrine should be *expanded* toward why and how the doctrine should be *curtailed*.³¹

This new conservatism in products liability law is illustrated, in design defect cases, by some courts' replacement of the contract-based consumer expectations test with a cost-benefit ("risk-utility") test based on tort law's principles of balance.³² In this and other ways, many courts have begun to reconsider how the liability standards should be defined, and some have questioned whether a doctrine of "strict" products liability in tort is appropriate at all in certain contexts where experience suggests that negligence principles may be preferable. So, while nearly all states still nominally embrace a doctrine of products liability in tort that they still call "strict,"³³ many courts today are reexamining the doctrine's inner nature and the boundaries that define its outer edge.

II. THE RESTATEMENT PROCESS

With the termination of its overly ambitious "enterprise responsibility" project in 1991,³⁴ the American Law Institute sensibly proceeded instead to restate the law of torts in more conventional form. Because the sprawling area of tort law had grown so large and cumbersome, the ALI decided for *Restatement* purposes to subdivide the law on this topic into various components. Due to the explosive expansion of products liability law after the promulgation of section 402A in the *Second Restatement of Torts* in 1965, the ALI announced in 1991 that the first of the new tort law *Restatements* would be the *Restatement (Third) of Torts: Products Liability*. In 1992, two law professors³⁵ were appointed Reporters for the

31. As chronicled in Gary T. Schwartz, *The Beginning and Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 683-99 (1992), and David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 705-10 (1992) [hereinafter *The Fault Pit*].

32. See, e.g., *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 674 (Ga. 1994) (adopting the risk-utility standard for design defect cases); *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 254-56 (Miss. 1993) (same).

33. See *supra* note 30.

34. Initially entitled "Compensation and Liability for Product and Process Injuries," the Enterprise Responsibility for Personal Injury Project results were published in 1991 in the form of a "Reporters' Study" which was never submitted to the ALI membership for approval. See ALI, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991). The project was in various respects a fiasco on which many observers scathingly, perhaps not unfairly, heaped their scorn. See, e.g., Jerry J. Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 241 (1993).

35. Professor James Henderson, Cornell Law School, and Professor Aaron Twerski, Brooklyn Law School.

project, and so began the process of converting a single section, section 402A, of the *Second Restatement* into an entire *Restatement* of its own.

Throughout the *Products Liability Restatement* project, the Reporters regularly met with and were advised by the ALI Council.³⁶ The Reporters also periodically met with and obtained advice from various groups and persons interested in the *Restatement* project, including a group of lawyer, judge, and academic Advisers,³⁷ a Consultative Group of interested members of the Institute,³⁸ and various interest groups representing a wide variety of defense, claimant, academic, and other interests. Over the course of the project, beginning with *Preliminary Draft No. 1* in 1993, the Institute circulated drafts of various portions of the *Restatement* for comment and critique.³⁹ Beginning with *Tentative Draft No. 1* in 1994, the full ALI membership⁴⁰ debated and voted on *Tentative Drafts* of various provisions at each of its annual meetings until the Institute's final debate and adoption of the *Proposed Final Draft* in May 1997. Although debates on successive drafts at each of these four ALI meetings were vigorous and occasionally contentious, the membership's final vote to adopt the *Proposed Final Draft* was unanimous.

After the 1997 annual meeting at which the ALI voted to adopt the *Proposed Final Draft*, the Reporters folded in amendatory language from the final meeting,⁴¹ and the *Restatement* as finally revised was reviewed for technical correctness and stylistic consistency.⁴² To assure that the final amendatory revisions remained faithful to the approval vote of the ALI membership, the final revisions were

36. Roughly sixty prominent lawyers, judges, and law professors comprise the ALI Council.

37. Nineteen lawyers, judges, and law professors comprise the basic Adviser group. In addition, one law professor, the author, served as Editorial Adviser.

38. Roughly three hundred lawyers, judges, and law professors who are members of the ALI comprise the Consultative Group.

39. Prior to publication of the final version of *Restatement (Third) of Torts: Products Liability* in 1998, the ALI published a total of twelve drafts of various portions of the work: *Preliminary Draft No. 1* (April 20, 1993); *Council Draft No. 1* (September 17, 1993); *Council Draft No. 1A* (January 4, 1994); *Tentative Draft No. 1* (April 12, 1994); *Preliminary Draft No. 2* (May 19, 1994); *Council Draft No. 2* (September 2, 1994); *Tentative Draft No. 2* (March 13, 1995); *Preliminary Draft No. 3* (May 18, 1995); *Council Draft No. 3* (November 15, 1995); *Tentative Draft No. 3* (April 5, 1996); *Proposed Final Draft (Preliminary Version)*, Volumes I & II (October 18, 1996); and the *Proposed Final Draft* (April 1, 1997).

40. The American Law Institute holds annual meetings in May for the principal purpose of debating and voting on drafts of Institute projects, including the various *Restatements of the Law*. Several hundred members attended the annual meetings from 1994 through 1997 at which the *Products Liability Restatement* drafts were considered by the Institute, and, typically, some 200 to 300 members were present and voting on issues put to the membership. The Institute each year publishes an edited transcript of the annual meeting proceedings.

41. During final debate on the *Products Liability Restatement* at the 1997 annual ALI meeting, the *Proposed Final Draft* was amended in various relatively minor respects. Some amendments were by formal vote while others were directed by the Director or agreed to by the Reporters to resolve problematic phraseology, mostly in the comments.

42. Final technical proofing was conducted by the Reporters, the Editorial Adviser, and Institute staff.

reviewed by several designated members of the Institute. The *Restatement (Third) of Torts: Products Liability* is scheduled for publication in mid-1998.

III. THE *RESTATEMENT* STRUCTURE

The *Products Liability Restatement* is divided into four broad chapters, some of which are further divided into sub-topics, for a total of twenty-one black-letter sections. The centerpiece of this new *Restatement* is Chapter 1, Topic 1, entitled "Liability Rules Applicable to Products Generally," which delineates the basic liability standards and methods of proof. The first two sections within Topic 1 concern the basic principles of liability, based on the concept of defectiveness, that apply to products generally. Section 3 describes a circumstantial evidence doctrine, akin to the doctrine of *res ipsa loquitur*, for establishing defectiveness where the manner in which the accident occurred renders it likely that the accident was caused by a product defect. Section 4, the final section in Topic 1, describes the effect of a product's violation of or compliance with governmental standards of product safety.

Sections 5 through 8 set forth principles governing the liability of sellers of particular types of products: component parts, prescription drugs, food, and used products. Sections 9 through 14 address other special duty issues: misrepresentation, post-sale duties to warn and recall, and responsibilities of successor enterprises. Sections 15 through 18 address causation issues and affirmative defenses based on user misconduct and contractual disclaimers. The final sections, 19 through 21, define "product," "seller," and "harm."

Sections 1, 2, and 3 define the fundamental rules of defectiveness theory and proof applicable to most products liability cases.⁴³ Grounding the *Restatement*, section 1 provides the overarching general principle of modern products liability law—that commercial enterprises are liable for harm caused by defects in products that they sell:

§ 1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.⁴⁴

Basing liability on whether a product is "defective," section 1 is bound together with section 2, which defines the three ways in which a defect may occur:

43. The great bulk of products liability law is loaded into the official Comments and Reporters' Notes to these three initial sections, particularly section 2.

44. *PRODUCTS LIABILITY RESTATEMENT*, *supra* note 2, § 1.

§ 2. Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

- (a) 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) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) 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.⁴⁵

The three liability standards in section 2 provide the foundation for most modern products liability law.⁴⁶

Finally, section 3 provides a default method for establishing defectiveness, useful primarily when the specific kind of proof contemplated by the section 2 definitions has been destroyed in the accident or is otherwise practicably unavailable. In such cases, proof of defect under section 3 is allowed when the very circumstances of the accident themselves suggest, more probably than not, that the accident was caused by a product defect rather than something else:

§ 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 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.⁴⁷

45. *Id.* § 2.

46. The Comments to section 2 canvass most of the central issues in products liability law, and the Reporters' Note provides a wealth of case, statutory, and secondary authority on these issues.

47. PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 3.

Section 3, roughly adapted from the *res ipsa loquitur* provision of the *Second Restatement of Torts*,⁴⁸ might fairly be termed a principle of *defect ipsa loquitur*. This section adopts the so-called "malfunction doctrine" which a small number of states have explicitly adopted, and which many implicitly apply, to accommodate problems of proof that sometimes plague plaintiffs when direct evidence of a specific defect is unavailable.⁴⁹ While plaintiffs *ordinarily* must prove their cases under the section 2 defectiveness provisions, section 3 provides a default mechanism for establishing liability in special cases where logic and fairness suggest that a plaintiff's inability to establish a specific defect according to conventional proof requirements should not preclude the claim.

IV. THE BASIC LIABILITY TESTS

A. *Trifurcating Defectiveness*

When Dean William Prosser crafted section 402A of the *Second Restatement of Torts* in the early 1960s, products liability law was in its infancy.⁵⁰ At this very early stage in the development of the law, the defect concept was only roughly understood and conceived of quite naively as a *unitary* concept: products were either too dangerous (defective) or safe enough (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.⁵¹ During the third of a century since section 402A was adopted by the ALI, the need to develop different doctrinal approaches to the problems in these three very different contexts has become a well-accepted premise of products liability law.

Although section 1 of the *Products Liability Restatement* sets the doctrinal stage somewhat deceptively, by establishing a single principle of liability for selling "defective" products, section 2 decisively splinters the notion into the three separate forms of defect.⁵² Because the general principle of section 1 is rooted in

48. This section is drawn from section 328D of the *Second Restatement of Torts*; see PRODUCTS LIABILITY RESTATEMENT § 3 cmt. a.

49. See generally PRODUCTS LIABILITY AND SAFETY, *supra* note 11, at 53-57.

50. Much of Part IV draws from David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743 [hereinafter *Defectiveness Restated*], and David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241 (1994).

51. On the now-conventional nature of this tripartite classification, see PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 1 cmt. a, Reporters' Note.

52. This form of segregation by type of defect continues in various contexts throughout the

the notion of a "defective product" rather than fault, it might appear simply to restate the no-fault doctrine of "strict liability" that has dominated products liability doctrine for the last three decades. However, apart from cases involving manufacturing flaws, the language of defectiveness is merely a cloak for a standard of design and warning "defect" liability that is grounded in fault. Indeed, the primary reason for trifurcating defectiveness in section 2 is to provide separate vessels for separate liability standards: subsection 2(a) defines liability for manufacturing defects in terms that are truly "strict," whereas subsections 2(b) and (c) define liability for design and warnings defects largely in terms of negligence principles, notwithstanding the strict-sounding language of "defectiveness" in which the definitions are cast.⁵³ In short, liability in section 2 of the new *Restatement* truly is strict for manufacturing defects but is based in negligence for design and warnings defects.⁵⁴

B. Manufacturing Defects

The new *Restatement* defines the standard of liability for manufacturing defects in the strict liability manner of the law of contract.⁵⁵ Thus, as seen above, a product is deemed defective in manufacture under section 2(a) "when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."⁵⁶ Although only a small number of courts have explicitly used this type of deviation-from-blueprints form of definition,⁵⁷ it is plainly implied by the word "defective" when applied to the manufacturing flaw context. Not troubling to define the straight-forward notion of a manufacturing defect, courts probably have simply assumed this kind of commonsense definition.

The *Restatement's* standard of liability for manufacturing defects, quite explicitly stated to be strict, was noncontroversial during the ALI debates on the

Restatement, as in section 6, which separately defines the various duties of sellers of prescription drugs and medical devices by type of defect.

53. The reasoning behind this move is explained in section 1, comment a. *See generally Defectiveness Restated*, *supra* note 50, at 747-51.

54. Comment a to section 2 provides in part: "The rules set forth in this Section establish separate standards of liability for manufacturing defects, design defects, and defects based on inadequate instructions or warnings." The comment explains that subsection (a) imposes "[s]trict liability without fault," and further provides: "Subsections (b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objectives as does liability predicated on negligence." It is important to note, however, that a retailer's liability under subsections 2(b) and 2(c), in contrast to the liability of a manufacturer, is truly strict. *See* PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 1 cmt. e and § 2 cmt. o.

55. *See Defectiveness Restated*, *supra* note 50, at 750-53.

56. PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 2(a).

57. *See* PRODUCTS LIABILITY AND SAFETY, *supra* note 11, at 245 n.2.

Restatement and for nearly two decades of debate in Congress over scores of products liability bills. Because of the special significance of the user's expectation interests in manufacturing flaw cases, grounded in philosophic principles of equal freedom,⁵⁸ contract law's strict-liability principle is plainly proper in this context. In short, true strict liability in this context is both logical and fair.

C. *Design and Warnings Defects*

The liability standards for design and warnings (and instructions) defects are formulated in parallel fashion in section 2, as seen above. Neither liability standard is stated in traditional strict liability or negligence terms. Instead, both are formulated in terms of the availability of some "reasonable alternative" design or warning. The Reporters chose this rather peculiar, "functional"⁵⁹ method of refashioning the basic liability tests because of the schizophrenic nature of design and warnings liability law which, in doctrine, speaks the language of "strict" liability but which, in practice, bespeaks the law of negligence.⁶⁰ Products liability judicial opinions are simply stuck in a no-man's-land somewhere between negligence and true strict liability.

As a way around this doctrinal dilemma, the Reporters focused on the type of proof courts require to establish a design or warnings defect case. What their research revealed, although hotly contested,⁶¹ was that courts in these cases generally require the plaintiff to establish that the defendant reasonably could have adopted some alternative design or warning that would have prevented the plaintiff's harm.⁶² Thus, in both design and warnings cases, liability is defined functionally in terms of whether the manufacturer reasonably could have provided

58. The policy reasons supporting strict liability in this context are summarized in the *Products Liability Restatement* in section 2 comment a. The reasons in moral theory are developed in David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 467-68 (1993) [hereinafter *Moral Foundations*].

59. The Reporters aptly characterize their definitional approach as "functional," and cite widespread authority therefor. See section 1 comment a and section 2 comment n, and the Reporters' Note thereto.

60. See *Defectiveness Restated*, *supra* note 50, at 747-51.

61. See, e.g., Howard C. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group*, *Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173 (1994); Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1413-18 (1994); John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996) (comprehensive survey of the states).

62. For an extended discussion of this point, see the *Products Liability Restatement Reporters' Note* to section 2 comment d.

a safer product. Stripping the rather cumbersome *Restatement* language to its essentials, the standard of liability under subsections 2(b) and (c) for design and warnings defects may be translated⁶³ as follows:

A product is defective if its foreseeable risks of harm could have been reduced by the adoption of a reasonable alternative design (or warning) the omission of which renders the product not reasonably safe.

Converted to the active voice, the *Restatement's* liability standard for design and warnings defects reduces essentially to this:

A product is defective if the seller could have reduced its foreseeable risks of harm by adopting a reasonable alternative design (or warning) the omission of which renders the product not reasonably safe.

The requirements of "foreseeability" and "reasonableness" in subsections 2(b) and 2(c) effectively reconvert the products liability standard for these types of cases to one of negligence—a rather remarkable retreat from section 402A's explicitly "strict" standard of liability of the *Second Restatement* that most courts boldly purported to apply to design and warnings cases for thirty years. Thus, while reaffirming the doctrine of strict tort liability for manufacturing defects in subsection 2(a), subsections 2(b) and 2(c) of the *Third Restatement* abandon the strict liability concept and employ negligence principles in design and warning cases.⁶⁴ This point is clearly made in comment a to section 1:

[The strict liability] rule developed for manufacturing defects is inappropriate for [design and warnings claims]. These latter categories of cases require determinations that the product could have reasonably been made safer by a better design or instruction or warning. . . . [The definitions of defect in these cases] rely on a reasonableness test traditionally used in determining whether an actor has been negligent.⁶⁵

Thus, the *Products Liability Restatement* grounds liability for design and warnings defects in the reasonableness-balancing-negligence concepts that properly

63. The *Restatement's* liability formulations are linguistically deconstructed in *Defectiveness Restated*, *supra* note 50, at 766-76.

64. Design and warnings claims comprise the bulk of products liability causes of action. Together, such claims were found to comprise 60% of all claims in one study and 71% in another. In a study of large claims (in excess of \$100,000) in which strict liability was the main theory of liability, defective design was the theory in 75% of the claims, and warning defects was the theory in 18%. *PRODUCTS LIABILITY AND SAFETY*, *supra* note 11, at 22-24.

65. *PRODUCTS LIABILITY RESTATEMENT*, *supra* note 2, § 1 cmt. a. See *supra* note 54.

dominate the law of tort.⁶⁶ Particularly in the context of design dangers, most courts have come to employ a "risk-utility" test for ascertaining whether such dangers were excessive or acceptable.⁶⁷ In most cases, this determination is based upon a cost-benefit analysis of the manufacturer's choice to forego a safety improvement that the plaintiff claims was necessary to render the design reasonably safe.⁶⁸ This reasonable-safer-design concept lies at the heart of the new *Restatement's* definition of design defectiveness in subsection 2(b).

Consumer expectations remain entitled to important respect in evaluating design and warning defect claims, but the comments to section 2 unceremoniously relieve consumer expectations of their elevated status as the *test* of liability under section 402A.⁶⁹ Instead, the new *Restatement*, following the approach of most courts,⁷⁰ relegates consumer expectations to the balancing calculus.⁷¹ Many commentators vociferously complained of these definitional changes to the basic liability tests in subsections 2(b) and (c) (and related comments), fearful that these provisions in the new *Restatement* would jettison decades of consumer protection progress in this area of the law.⁷² Nevertheless, by shifting from "strict" liability to negligence principles, the *Products Liability Restatement* "restates" what most courts have long been doing if rarely saying.

It long has been an open secret that, while purporting to apply "strict" liability doctrine to design and warnings cases, courts in fact have been applying principles that look remarkably like negligence.⁷³ That is, most courts in most contexts have

66. The moral propriety of these principles is explained elsewhere. See David G. Owen, *Philosophical Foundations of Fault in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 201 (David G. Owen ed., 1995); *The Fault Pit*, *supra* note 31; *Moral Foundations*, *supra* note 58.

67. For surveys of how different states define the risk-utility test, see the *Products Liability Restatement* Reporters' Note to section 2 comment d (concluding that most courts use risk-utility test), David G. Owen, *Risk-Utility Balancing in Design Defect Cases*, 30 U. MICH. J. L. REFORM 239 (1997) [hereinafter *Risk-Utility Balancing*] (same), and Vargo, *supra* note 61 (questioning this conclusion).

68. How the cost-benefit test is and should be formulated is closely examined in *Risk-Utility Balancing*, *supra* note 67, and David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEXAS L. REV. 1661 (1997).

69. See *supra* note 28 and accompanying text.

70. But see *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997) (retaining consumer expectations test in name, but defining it oddly in cost-benefit terms).

71. Risk-utility balancing normally is used only in design cases. See *PRODUCTS LIABILITY RESTATEMENT*, *supra* note 2, § 2 cmt. f. While it applies somewhat to warnings cases, such cases are by their nature more fundamentally based on the frustration of expectations. Nevertheless, for a variety of good reasons, negligence principles properly govern warnings cases, too. See generally *Moral Foundations*, *supra* note 58, at 465-67.

72. See, e.g., Joseph W. Little, *The Place of Consumer Expectations in Product Strict Liability Actions for Defectively Designed Products*, 61 TENN. L. REV. 1189 (1994); Shapo, *supra* note 1.

73. See, e.g., Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 601 (1980); Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1238-48 (1993); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty*

been basing the defectiveness determination in both design and warnings cases on the risk-utility principles of balance, reasonableness, and foreseeability. Except in certain limited instances, the courts have rejected efforts to make manufacturers guarantors of product safety, requiring only that manufacturers (1) make their products as safe as they are reasonably able to do, and (2) warn of foreseeably material risks, by methods that are reasonably available and reasonably likely to be effective.⁷⁴ This is negligence, pure and simple, in fact if not in name. Consequently, by grounding liability for design and warnings defects in the principles of negligence, the new *Restatement* truly "restates" the law—no doubt quite differently from how most courts have *stated* the law to be, but in fact quite closely to how most courts functionally have *applied* the law in litigation.

V. THE BASIC LIMITATIONS ON LIABILITY

In the jurisprudence of products liability law, the basic *limitations* on liability have proved at least as significant, and their contours have been litigated at least as frequently, as the basic definitions of defectiveness. A review of the law in this area would be incomplete without at least mentioning four of the most important boundary issues of products liability law: foreseeability, obvious dangers, product misuse and alteration, and inherent product dangers.

A. Foreseeability

Whether manufacturers should or should not be responsible in "strict" products liability for unforeseeable risks is an issue that has long divided courts and commentators.⁷⁵ Prior to the mid-1980s, most courts and many commentators assumed that the "strictness" of liability under section 402A precluded a defense based on the unforeseeability of the risk.⁷⁶ But two decisions in the mid-1980s, the

Shell of Failure to Warn, 65 N.Y.U. L. REV. 265, 277-78 (1990); *Defectiveness Restated*, *supra* note 50, at 749; William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639. This divergence between illusory strict liability doctrine and actual liability principles is diagrammatically portrayed in *The Fault Pit*, *supra* note 31, at 706.

74. In addition, of course, manufacturers must not misrepresent the safety of their products.

75. This issue variously has been posed in terms of "undiscoverable dangers" or of whether the discoverability of the risk was within the "state of the art." See generally PRODUCTS LIABILITY AND SAFETY, *supra* note 11, at 499-547.

76. From the initial adoption of the doctrine of strict products liability in tort during the mid-1960s, courts routinely made this point. But, in cases where liability was established, negligence or warranty doctrine typically was sufficient for liability on the facts, for there were usually fairly simple steps that the manufacturer reasonably could have taken to prevent the harm. The first noteworthy decision to emphasize and explain the "strictness" of strict tort liability for selling defective products, on facts where liability turned on the foreseeability of the risk, was *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982).

first in New Jersey⁷⁷ and the second in California,⁷⁸ boldly renounced the illogic and unfairness of holding pharmaceutical manufacturers liable for harm they could neither anticipate nor prevent, and the California court subsequently expanded this fault-based principle to producers generally.⁷⁹ In recent years, while an occasional court still clings tenaciously to the notion that strict liability for defective design and warnings should not depend upon the foreseeability of the risk,⁸⁰ most courts squarely confronting the issue have shielded manufacturers from liability for harm caused by unforeseeable product risks.⁸¹ The new *Restatement's* explicit limitation of liability to foreseeable risks of harm in section 2, based on logic and fairness, thus in fact restates the law applied by most courts.⁸²

B. Obvious Dangers

Courts also hold that manufacturers should be protected, at least to some extent, from responsibility for accidents attributable to dangers that are obvious.⁸³ Almost all courts agree that manufacturers have no duty to *warn* of obvious dangers for the simple reason there is no need to inform people further of dangers

77. *Feldman v. Lederle Lab.*, 479 A.2d 374 (N.J. 1984) (restricting *Beshada*, 447 A.2d 539, an asbestos case, to its facts).

78. *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988). To some extent, the California court backtracked doctrinally from *Brown* in *Carlin v. Superior Court*, 920 P.2d 1347 (Cal. 1996).

79. The California Supreme Court extended its rejection of true strict liability beyond prescription drugs to other products in *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991) (asbestos). *But cf. Carlin*, 920 P.2d 1347 (reaffirming the strict liability label).

80. *See Sternhagen v. Dow Co.*, 935 P.2d 1139, 1142-45 (Mont. 1997) (knowledge of danger, whether or not discoverable, is to be imputed to manufacturer; state-of-the-art evidence is not admissible to show that manufacturer could not have known of danger). *Cf. Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1348-49 (Conn. 1997) (manufacturer's conformance to state of the art relevant to, but not conclusive on, liability).

81. Even the recent California decision reaffirming the doctrine of "strict" products liability, *Carlin v. Superior Court*, 920 P.2d 1347 (Cal. 1996), limits liability to risks which are foreseeable.

82. Comment a to section 2 provides in part:

For the liability system to be fair and efficient, most courts agree that the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution. . . . [M]anufacturers may persuasively ask to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform. For these reasons, Subsections (b) and (c) speak of products being defective only when risks were reasonably foreseeable.

PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 2 cmt. a; *cf. id.* § 2 cmt. m (text below in note 87). For the propriety of this approach in moral theory, see *Moral Foundations*, *supra* note 58, at 465-67, 483-84, 490-92.

83. *See* PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 2 cmt. j. *See generally* PRODUCTS LIABILITY AND SAFETY, *supra* note 11, at 423-40. In addition to dangers that are *obvious*, most of the same limiting principles apply to dangers that generally are *known*.

that a product on its face already displays.⁸⁴ The proper role of a danger's obviousness in determining defectiveness in *design* is far more difficult and subtle. Although the old no-duty rule for obvious dangers is now properly defunct as an independent doctrine in the great majority of jurisdictions, courts that test a product's design defectiveness according to consumer expectations are logically compelled to shield manufacturers from design liability in cases where the danger is apparent on the product's face.⁸⁵ As discussed above, however, most courts now ascertain a design's defectiveness according to some form of risk-utility balancing of the costs and benefits of adopting a proposed alternative design. Within this calculus, obviousness of danger is properly considered to be an important—but not necessarily decisive—factor in the ultimate balance that determines product defectiveness. The new *Restatement* adopts these widely accepted limitations that courts place on recovery for injuries from dangers that are obvious.⁸⁶

C. *Product Misuse and Alteration*

When people choose to use and abuse products in ways that are unforeseeable and unreasonable, courts generally relieve manufacturers of at least partial responsibility for resulting harm.⁸⁷ Products can hardly be designed to do all things safely for all people, and so product misuse and alteration provide important limitations on liability for the sale of defective products. While courts widely hold that manufacturers have a duty to adopt reasonable precautions against uses, misuses, and alterations that in fact are reasonably foreseeable, in general there is no duty to protect against uses and abuses that are not foreseeable.⁸⁸ Moreover, the doctrine of proximate cause may apply to cases of third party misuse, barring

84. "When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence." PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 2 cmt. j.

85. Manufacturers are not liable in such cases because purchasers and users can hardly expect a product to be free of danger that is apparent for all to see. *See, e.g., Vincer v. Ester Williams All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794 (Wis. 1975) (young child climbed ladder and fell into above-ground swimming pool not equipped with simple self-latching gate at top of ladder).

86. For the warnings context, see PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 2 cmt. j, which provides in part: "In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk avoidance measures that should be obvious to, or generally known by, foreseeable product users." For the design context, see *id.* § 2 comment d, which provides in part:

Subsection (b) does not recognize the obviousness of a design-related risk as precluding a finding of defectiveness. The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff.

87. "Product sellers . . . are not required to foresee and take precautions against every conceivable mode of use and abuse to which their products might be put. Increasing the costs of designing and marketing products in order to avoid the consequences of unreasonable modes of use is not required." PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 2 cmt. m.

88. *See generally* PRODUCTS LIABILITY AND SAFETY, *supra* note 11, at 471-87.

liability altogether if the misuse was unforeseeable,⁸⁹ and principles of comparative responsibility generally reduce a manufacturer's responsibility proportionate to the user's own fault for putting a product to an improper type or extent of use.⁹⁰ The *Products Liability Restatement* adopts these widespread views on the role of product alteration and misuse.⁹¹

D. Inherent Product Dangers

A perplexing issue in the law of products liability is whether manufacturers should be held responsible for injuries resulting from inherent product hazards that are incapable of being designed or warned away. Many products, from simple kitchen knives and matches to complex chemicals and aircraft, may be classified as possessing such inherent dangers. In most such cases, however, the product's benefits so clearly outweigh its risks that liability for the product's general inherent risk is never litigated. Of late, however, courts and commentators are beginning to reevaluate whether manufacturers of certain unavoidably dangerous products should be liable for the harm they inevitably cause.⁹² Surely the most notorious product of this type today is the cigarette, but alcoholic beverages, cheap handguns, and certain other products all might be viewed as inherently defective because they arguably cause more social harm than good.

Producers of such generically dangerous products argue that they are merely providing goods that consumers demand and, accordingly, they should not be held accountable for harm from danger that is unavoidably part and parcel of the demanded product design. Some consumer advocates argue to the contrary that, while products of this type (say, cigarettes or cheap handguns) may be "demanded" by consumers, such "goods" are inherently bad (defective) if the aggregate social harm they produce exceeds their aggregate benefit.⁹³ At bottom, this debate involves fundamental questions of separation of powers between the legislative and judicial branches of government, for arguably the decision of whether the harm from cigarettes should be paid for by cigarette manufacturers is properly a legislative or administrative rather than a judicial decision, if properly a govern-

89. See generally *id.* at 613-37.

90. See PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 2 cmt. p.

91. See *id.* § 2 cmts. m (foreseeability of risk), p (misuse, modification, and alteration); *id.* § 15 (legal causation); *id.* § 17 (apportionment of responsibility). Damages apportionment, treated generally in section 17 as an issue of comparative responsibility, is addressed thoroughly in its own *Restatement* which is currently in progress. See, e.g., RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (Council Draft No. 2, 1997).

92. See, e.g., *Emery v. Federated Foods, Inc.*, 863 P.2d 426 (Mont. 1993) (5-2) (marshmallow stuck in young child's throat; summary judgment for supplier reversed and case remanded for trial). See generally PRODUCTS LIABILITY AND SAFETY, *supra* note 11, at 440-71; Symposium, *Generic Products Liability*, 72 CHI.-KENT L. REV. 3 (1996).

93. See generally Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 8-9 (1995).

mental decision at all. Attitudes and the law are presently in substantial flux on responsibility for cigarette-caused harm,⁹⁴ but the courts historically have almost universally shut their doors to claims arising from generic product dangers which unavoidably inhere in a product's design.⁹⁵ Yet, this area of products liability law is in ferment, and it is difficult to predict how courts and legislatures will resolve this issue in particular contexts in the years ahead. On this intriguing issue, the *Restatement* adopts the prevailing view that, except in extreme cases,⁹⁶ and putting aside the special case of cigarettes, the courts have no business legislating the overall desirability of necessarily dangerous but widely-consumed products.⁹⁷

VI. CONCLUSION

The *Restatement (Third) of Torts: Products Liability* puts a new face on the law of products liability. But this compendium of legal principles generally only

94. See, e.g., Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. (forthcoming Mar. 1998); Tucker S. Player, Note, *After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation*, 49 S.C. L. REV. 311 (1998).

95. In the rare instances where courts have allowed liability in these cases, legislatures generally have overturned the judicial decisions. See PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, § 2 cmt. d Reporters' Note.

96. Extreme cases involve products of "manifestly unreasonable design." PRODUCTS LIABILITY RESTATEMENT, *supra* note 2, 2 cmt. e. Such a product may be ruled defective because "the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product." *Id.*

97. Comment d to section 2 of the *Proposed Final Draft* provides in part as follows:

Common and widely distributed products such as alcoholic beverages, tobacco, firearms, and above-ground swimming pools may be found to be defective only upon proof of the requisite conditions in Subsection (a), (b), or (c). If such products are defectively manufactured or sold without reasonable warnings as to their danger when such warnings are appropriate, or if reasonable alternative designs could have been adopted, then liability under sections 1 and 2 may attach. Absent proof of defect under those Sections, however, courts have not imposed liability for categories of products that are generally available and widely used and consumed, even if they pose substantial risks of harm. Instead, courts have concluded that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (*Proposed Final Draft*, Apr. 1, 1997) § 2 cmt. d. Shortly before the ALI voted to approve the *Proposed Final Draft* at the May 1997 meeting, a member moved from the floor to strike "tobacco" from inclusion in the comment, and, over the objections of the Reporters, the membership narrowly voted in favor of the motion. *ALI Membership Grants Final Approval to Influential Product Liability Treatise*, 25 Prod. Safety & Liab. Rep. (BNA) No. 21, at 509 (May 23, 1997). Accordingly, the final *Restatement* takes no position on whether sellers should be liable for the inherent dangers in tobacco products.

"restates" the substance of existing law, so that it truly alters only the face—and not the body—of most aspects of this area of the law. Yet this *Restatement*, perhaps more than others, boldly formulates the liability tests and certain other rules of law in functional rather than doctrinal form. *Restatements of the Law* speak with the considerable authority of the American Law Institute and, over time, they tend to influence significantly the development of the law, especially in states where the law is less developed or in flux. Time will tell how willing courts will be to accept the new *Restatement's* functionally restated liability standards. There is little doubt, however, that the *Products Liability Restatement* will play a significant role in helping shape the law of products liability for the twenty-first century.