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Proximate Cause, the Proposed Basic Principles Restatement, and Products Liability

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PROXIMATE CAUSE, THE PROPOSED BASIC PRINCIPLES RESTATEMENT, AND PRODUCTS LIABILITY

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I. INTRODUCTION

No subject separates torts scholars from practitioners more than proximate cause. It seems to compete with the rule against perpetuities as the primary bane of first year law students' existence,[1] and most practicing lawyers are even less able to coherently discuss its twists and turns than they were as students. Coherence is likely too generous a word to describe torts scholars' renditions of proximate cause, but at least we enjoy discussing it. Most practitioners would prefer not to think about it[2] except in the rare cases confronting them where it is actually at issue. And when it is at issue, a practicing attorney's encounter with the doctrine is intensely practical. Her bottom line is far removed from angels and pinheads; rather she is

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* Professor of Law & Associate Dean, Academics, Pepperdine University School of Law. I would like to thank Professor James Gash for his helpful comments on an early draft of this Essay. Responsibility for errors is of course mine alone. Participating in a Symposium dedicated to Gary Schwartz is a special honor. My favorite memory of Gary stems from attending a Los Angeles Dodgers baseball game with him a few years ago. I had long been in awe of his scholarship; at the Dodgers game I developed new awe over his knowledge of baseball—it seemed that there were no player or team statistics that were beyond the range of his formidable mind. Over time I also learned that he loved to play tennis, eat good food, and talk about important social issues far removed from tort law. In short, I learned that he was a vibrant, multifaceted, and engaging person. A few months ago one of his long-time colleagues at UCLA nearly cried when talking with me about Gary's death. He will of course be remembered as one of the most prominent torts scholars of our time. He will also be remembered as a sincere and good man.

1. I still remember the shock I experienced when, after having dragged through three weeks of proximate cause doctrinal sludge as a student, my bar review course lecturer spent about three minutes on it, advising us to simply memorize the phrase "reasonably foreseeable" and a list of intervening causes that are generally considered superceding or not superceding.

2. Similar to their preference not to think about traumas experienced in military service, having their heart broken in a failed romance, or clothing that they wore during the mid-1970s.

focused on communicating to the judge and jury in as straightforward a manner as possible why and how the proximate cause element works to her client's advantage.

Recently the American Law Institute (ALI) began its third effort at the daunting challenge of restating proximate cause with the proposed *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*.[3] In this undertaking, the ALI will attempt to accommodate practitioners' needs for clarity and relative straightforwardness with the need often highlighted by scholars for recognition of the doctrine's myriad subtleties and complexities. The *Restatement* should be as simple as possible, but without sacrificing doctrinal accuracy and completeness.

As the ALI struggles with how best to accomplish this delicate balancing, its project is likely to reinvigorate interest and debate regarding tort law's problem child. This Essay seeks to add modestly to the discussion by providing some musings on two facets of the proximate cause puzzle: appropriate language for a black-letter, proximate cause test and how the doctrine may be distinctive when applied to products liability cases. The Essay begins with a few thoughts on the proposed *Basic Principles Restatement*'s formulation of proximate cause and proceeds to address how various products liability doctrines and defenses might uniquely color proximate cause analyses in such cases.

II. RISKY LANGUAGE

The basic principles of proximate cause have not changed much since the 1930s, but the ALI's restatements of it have. Indeed, in each of the three efforts the ALI has made at restating proximate cause, it has employed different approaches. The first, second, and proposed third *Restatements* all seem to agree that the phrase "proximate cause" is undesirable,[4] but they take different paths in seeking to identify appropriate labels and tests. The *First Restatement* adopted the phrase "legal cause" as a substitute for proximate cause language.[5] Although the courts did not respond favorably to this effort,[6] the *Second Restatement* continued utilization of "legal cause" language.[7] The *Second Restatement* introduced some changes to the proximate cause formulation, such as adding language to section 435 indicating that a highly-extraordinary-in-hindsight test is appropriate in determining foreseeability of harm[8]—another concept that has not fared well with the courts. Neither the first nor the second *Restatements* faithfully reflected the language or,

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3. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No.23, 2002) [hereinafter BASIC PRINCIPLES].

4. *See id.* § 29, cmts. a, b; Special Note on Proximate Cause.

5. *See* RESTATEMENT OF THE LAW OF TORTS § 431 (1934) ("Legal Cause; What Constitutes").

6. *See* BASIC PRINCIPLES, *supra* note 3, § 26 cmt. a ("Despite the venerability of the 'legal cause' term in Restatement history, it has not been widely adopted in judicial and legal discourse nor is it helpful in explicating the ground that it covers.").

7. *See* RESTATEMENT (SECOND) OF TORTS § 431 (1965) ("What Constitutes Legal Cause").

8. *Id.* § 435(2) ("The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.").

in some respects, the approaches utilized by the courts, and the *Restatements'* efforts to steer the courts to new language and approaches met with failure.[9]

Thus, the proposed *Third Restatement* is going back to the drawing board for language and conceptualizations that will be more helpful and acceptable to the courts. Rejecting both "proximate cause" and "legal cause" as black letter descriptions, it adopts the chapter title "Scope of Liability" followed by the phrase "Proximate Cause" in parentheses and proposes the following black-letter rule as its basic approach: "An actor is not liable for harm different from the harms whose risks made the actor's conduct tortious."[10] The comments following the proposed rule refer to it as a "risk standard."[11] Other scholars have described it as a "result-within-the-risk" test.[12]

Although some criticisms and concerns are appropriate, the proposed *Third Restatement*'s result-within-the-risk approach is superior to the presentations of proximate cause in previous *Restatements*. The earlier *Restatements* took piecemeal approaches to proximate cause, vaguely addressing it (and sometimes just appearing to be addressing it)[13] in several different and often overlapping sections, and blending it together with the much different issue of factual causation. The proposed *Third Restatement*'s proximate cause for physical harm rule is blessedly succinct, centralized, and clear in comparison.

The value of clarity in a restatement should not be underestimated. I once heard a United States Supreme Court Justice remark to a small group that the high court must struggle to make its rulings accessible and readily comprehensible to the often hurried and harried "Judge Sixpack."[14] Although we might want to find a way to state it more gently, the challenge is the same with restatements. Lawyers and judges look to restatements for an authoritative source on the concrete legal issues confronting their busy lives. If a restatement allows concerns for addressing all contingencies to make it vague and rambling, it risks being ignored. Similarly, if a restatement embraces too much linguistic or doctrinal creativity, when it is possible to instead simply restate the courts' dominant approach to an issue, it risks irrelevance.

Although the proposed *Third Restatement*'s proximate cause section is a vast improvement over earlier *Restatements*, cause for concern arises on this latter point.

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9. BASIC PRINCIPLES, *supra* note 3, § 26 cmt. a.

10. *Id.* § 29. The proposed *Restatement* also provides guidance on other aspects of proximate cause, such as the thin-skull plaintiff rule and the role of intervening causes, but this analysis focuses only on the basic test for limiting liability.

11. *Id.* cmt. f.

12. *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation*, 88 GEO. L.J. 659, 671 (2000); Peter Zablotsky, *Eliminating Proximate Cause as an Element of the Prima Facie Case for Strict Products Liability*, 45 CATH. U. L. REV. 31, 42 (1995).

13. The proposed *Basic Principles Restatement*'s Reporters note, for example, that the substantial factor requirement for legal cause in the first and second *Restatements* has often been understood to address proximate cause, "although that was not the intent of those documents." BASIC PRINCIPLES, *supra* note 3, § 29 cmt. a.

14. Presumably not to be confused with his better-known brother, Joe Sixpack.

The proposed *Third Restatement* is succinct and to the point, but it seeks to lead courts to language they do not, for the most part, presently use. At present, courts typically employ unadorned foreseeability language rather than result-within-the-risk language when analyzing proximate cause.[15] Also, of course, most courts continue to use the phrase "proximate cause," which the proposed *Restatement* relegates to a chapter heading parenthetical.[16]

These changes from the language predominantly used by courts and lawyers raise the time-honored question of when the restatements should follow the courts, and when they should seek to lead them. Stated another way, when should restatements focus on "is," and when should they focus on "ought"?[17]

Except in areas truly crying out for reform, I tend to lean toward the notion that restatements should follow more than they lead. They likely garner more respect, and more relevance, when the legal community senses that the restatements are thoughtful and accurate reflections of the courts' dominant approaches to legal issues. In some instances following the courts is impractical, because the decisions are jumbled or hopelessly confused, and in such situations the restatements need to say what the law ought to be. However, I suspect that the natural desire to make improvements even when the majority approach is relatively clear may sometimes come through too strongly—particularly given that outstanding academics, who excel at critiquing the status quo and searching for creative solutions, typically serve as the restatements' reporters.[18]

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15. The Reporters assert that there is a "trend toward . . . ascendancy" for the result-within-the-risk standard in the courts. BASIC PRINCIPLES, *supra* note 3, § 29 cmt. j. However, they seem to be including within this trend cases using reasonable foreseeability language, which they describe as "its equivalent in negligence cases." *Id.* In fact, courts' use of result-within-the-risk language is relatively rare in comparison with less specific reasonable foreseeability language.

16. *See, e.g.*, Stahl v. Novartis Pharm. Corp., 283 F.3d 254, 265-66 (5th Cir. 2002) ("[T]he plaintiff must show that this failure to warn the physician was both a cause in fact and the proximate cause of the plaintiff's injury."); McGrath v. Gen. Motors Corp., 26 Fed. Appx. 506, 511 (6th Cir. 2002) (stating that under Ohio law, the plaintiff must prove that design "defect was the proximate cause of his injuries").

17. *See, e.g.*, Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WIS. L. REV. 1, 20-24 (addressing history of ALI debate and whether restatements of black-letter law should focus on "is" or "ought").

18. Section 6(c) of the *Restatement (Third) of Torts: Products Liability* provides a recent example of controversy over whether a restatement is providing an "is" or an "ought" with regard to case law. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6(c) (1998) [hereinafter PRODUCTS LIABILITY RESTATEMENT]. Although the Reporters' work on the *Products Liability Restatement* was heroic, the case law supporting section 6(c)'s "reasonable physician test" for prescription product design liability is scant at best, and several writers (myself included) believe that the cases point in another direction. *See* Richard L. Cupp Jr., *The Continuing Search for Proper Perspective: Whose Reasonableness Should Be at Issue in a Prescription Product Design Defect Analysis?*, 30 SETON HALL L. REV. 233, 246-52 (1999) (summarizing scholars' mostly critical analyses of the prescription product design standard crafted in section 6); James A. Henderson, Jr. & Aaron D. Twerski, *Drug Designs Are Different*, 111 YALE L. J. 151, 151 n.2 (2001) (citing mostly critical analyses of the section 6 design standard). However, the Reporters insist that their standard captures the spirit of the case law in the area, and that it "seeks to clarify ambiguities that have haunted this area of law for almost three decades." Aaron D. Twerski, *Inside the Restatement*, 24 PEPP. L. REV. 839, 852-53

One could argue that the proposed *Third Restatement*'s rejection of reasonable foreseeability language and adoption of a result-within-the-risk standard succumbs to this temptation toward undue tinkering, but the evidence is mixed. Certainly the result-within-the-risk standard is not a whole cloth creation; its language is used occasionally by courts[19] and, as the Reporters point out, in most cases it is "essentially consistent" with the reasonable foreseeability test.[20] The Reporters contend that the result-within-the-risk standard is preferable to the substantively similar reasonable foreseeability test because the former "provides greater clarity, facilitates clearer analysis in a given case, and better reveals the reason for it existence."[21]

On one level, these points ring true. "Reasonable foreseeability" is extremely broad, open-ended, and impervious to precise definition. However, reasonable foreseeability does have some intuitive meaning—or, perhaps more accurately, heavy usage by lawyers and judges has over time attached nuanced and useful meaning to the phrase.[22] Uttering the words that "harm must be reasonably foreseeable for plaintiff to recover" certainly does not answer all questions, but inexactness is to some extent unavoidable.[23] Reasonable foreseeability language at least provides a visual[24] and invites further inquiry as to what the standard means in the context of a given case.

The result-within-the-risk approach is more precise and provides more information to a thoughtful listener regarding the reason for its existence. However, the first reaction of most hearers upon being told that liability does not exist if the harm that occurred is different from the harms whose risks made the actor's conduct tortious would be to ask if the phrase could be repeated, and more slowly this time. At first glance—and we should not fool ourselves into thinking that busy lawyers and judges will always be willing to go much beyond the first glance in deciding whether the *Restatement*'s proposed approach is helpful—it is a perplexing, circuitous riddle. The result-within-the-risk standard is like a puzzle that rewards

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(1997).

19. Although courts rarely use the phrase "result-within-the-risk," they sometimes state proximate cause rules in a manner consistent with its meaning. An example highlighted by the proposed *Restatement* is *Marshall v. Nugent*, 222 F.2d 604, 610 (1st Cir. 1955) which describes proximate cause as "[confining] the liability of a negligent actor to those harmful consequences which result from the operation of . . . a risk, the foreseeability of which rendered the defendant's conduct negligent." *See generally* BASIC PRINCIPLES, *supra* note 3, § 29 Reporters' Notes cmt. f.

20. BASIC PRINCIPLES, *supra* note 3, § 29 cmt. k.

21. *Id.*

22. Of course, this nuanced meaning developed through heavy usage by legal professionals is of little benefit to lay people subjected to reasonable foreseeability language in jury instructions.

23. Vagueness and proximate cause have long been the closest of friends. "Having no integrated meaning of its own, [proximate cause's] chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult. . . . No other formula has found so much affection in the chambers of final authority; none other so nearly does the work of Aladdin's lamp." Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471-72 (1950).

24. Pun intended. "[T]here are clear judicial days on which a court can foresee forever . . . ." Thing v. La Chusa, 771 P.2d 814, 830 (Cal. 1989).

the patient with a sense of accomplishment when it is cracked, but inflicts frustration on both the patient and the impatient until then.

This quality of the result-within-the-risk test makes it an effective vehicle for taking lawyers deeper into the soul of proximate cause when they need or desire to make such a journey. Since it focuses "on the particular circumstances that exist[] at the time of the actor's conduct and the risks . . . posed by that conduct,"[25] thoughtful application of the standard would likely lead to appropriate results more frequently than use of unanchored reasonable foreseeability language. However, "thoughtful" is the preceding sentence's bugaboo. When we can avoid it, we generally prefer not to be overly thoughtful. We generally would prefer to use tried and true language that we think we already understand, despite its conceptual warts. The risk, then, is that even though the result-within-the-risk test may be conceptually superior, judges and lawyers will not use it.

Lest this concern seem overly pessimistic, consider the fate of the first and second *Restatements'* attempts to replace the phrase "proximate cause" with "legal cause." Writers seem virtually unanimous in their condemnation of the phrase "proximate cause," and virtually unanimous in believing that calling the doctrine something like "legal cause" makes more sense.[26] However, lawyers and judges became comfortable with proximate cause language, even if scholars and jurors were not, and they refused to budge toward the clearly superior *Restatement* language. Ominously, the argument for preferring "legal cause" over "proximate cause" is much easier to follow than the case for replacing "reasonable foreseeability" with result-within-the-risk language. The precedent of failure where a change seemed more feasible highlights the challenge for acceptance facing the result-within-the-risk test.

Despite these concerns, my criticism of the proposed *Restatement* standard is muted. As noted above, it is much clearer and more helpful than the earlier *Restatement* standards. It does not present major substantive conflicts with the approach used in most cases. When thoughtfully applied, it presents conceptual advantages over reasonable foreseeability language. The greatest cost of adopting the standard is potential irrelevance if courts ignore it, but if one takes the long view, perhaps limited relevance for the next several years may bloom into increasing acceptance and usefulness over time.

Of course, concern over irrelevance could be eliminated by switching the black-letter rule to reasonable foreseeability, and emphasizing result-within-the-risk language heavily in the comments. This approach would ensure usage by lawyers and judges, and would still perform educational and reform functions in explaining how the reasonable foreseeability test should be applied. If the ALI is intent on

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25. *See* BASIC PRINCIPLES, *supra* note 3, § 29 cmt. k.

26. *See supra* notes 4-9 and accompanying text. "Legal cause" can be sensibly used to describe the limits of a defendant's scope of liability for tortious conduct. However, the first and second *Restatements* attempted to apply the term "legal cause" to both cause-in-fact and proximate cause, creating confusion that has been appropriately criticized. *See* BASIC PRINCIPLES, *supra* note 3, § 26 cmt. a (noting that "legal cause" created confusion and was not widely adopted by the courts).

sticking with risk-within-the-result in the black-letter rule, at the least the Reporters should prominently emphasize in the comments the relationship between risk-within-the-result and reasonable foreseeability. Presently it is buried in the eleventh comment to the black-letter rule. The explanation of the rationale for not using the phrase "reasonably foreseeable" should be moved from comment *k* to one of the first comments.[27]

Tentative Draft No. 2's new proposal to add the parenthetical "(Proximate Cause)" after the Chapter's "Scope of Liability" heading would be helpful to lawyers and judges.[28] It strengthens the *Restatement*'s relevance by highlighting that the section addresses what is usually called proximate cause, but it also communicates the point that proximate cause is not the best language available to describe the appropriate analysis.[29] This addition is particularly important given the increasing use of computer search engines in legal research. Adding the parenthetical makes it easier for lawyers and judges who do not know the current *Restatement* terminology but who perform a computer database word search for "proximate cause" to target the basic black-letter rule.

III. STRICTLY SPEAKING, PRODUCTS CASES ARE DIFFERENT

Regardless of whether the proposed *Restatement*'s result-within-the-risk language is accepted, proximate cause analyses are sometimes different in products liability cases than in other tort cases. In light of the proposed *Restatement*, increasing attention is likely to be focused on these differences, and thus this section very briefly addresses some of the more interesting distinctions that sometimes do or may arise.

A. Proximate Cause in Strict Liability Claims

Although some exceptions exist, courts typically do not articulate distinctions between products liability cases and other tort cases in analyzing proximate cause. Perhaps because of this, the *Restatement (Third) of Torts: Products Liability* pays scant attention to proximate cause issues, noting almost in passing that product liability causation is subject to "the prevailing rules and principles governing

27. Presently comment *a* addresses "history" and comment *b* addresses "proximate cause terminology and instructions to the jury." *Id.* § 29 cmts. a, b.

28. I heard this idea suggested at an October 2001 meeting of the ALI Members Consultative Group for the *Basic Principles* project. I do not recall who made the suggestion, but I applaud its addition in Tentative Draft No. 2.

29. Interestingly, prior to drafting the *Products Liability Restatement*, its Reporters expressed support for continued usage of the term "proximate cause," arguing that it will not create confusion if it is properly explained in a comment. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the* Restatement (Second) of Torts, 77 CORNELL L. REV. 1512, 1535-36 (1992).

causation in tort."[30] However, the proposed *Basic Principles Restatement* points out that cases in which strict liability is applied, including manufacturing defect cases, are different from cases based on negligence.[31] In strict liability cases, the Reporters note, liability may attach even if harm was not reasonably foreseeable.[32] For example, the owner of an abnormally dangerous animal is strictly liable even if the owner is justifiably ignorant and believes the animal tame.[33] The Reporters indicate that similar situations arise in manufacturing defect claims based on strict liability.[34]

The Reporters use this distinction as an opportunity to argue for the superiority of the result-within-the-risk approach over the reasonable foreseeability approach.[35] Even if a risk is not readily perceived as reasonably foreseeable, the argument goes, liability may attach under manufacturing defect strict liability by focusing on the risks created by the defect.[36] This avoids having to manipulate the reasonable foreseeability concept where it would be an awkward fit.[37]

This explanation raises a dilemma, although the problem may belong more to the *Products Liability Restatement*, or perhaps to the courts, than to the *Basic Principles Restatement* presently under construction. Under the *Products Liability Restatement*, strict liability is not limited to manufacturing defects—it is theoretically available for design defects and warning defects as well. However, the *Products Liability Restatement* makes clear that in design and warning cases liability only attaches to risks that are reasonably foreseeable.[38] No such limitation is discussed in the *Products Liability Restatement* with regard to manufacturing defects.[39]

This distinction presents questions regarding what strict liability means. If it is truly liability without fault, and liability for manufacturing defects even when harm is not foreseeable is thus acceptable, should the same not apply for the doctrine when it is applied to design and warning defects? The answer is that the *Products Liability Restatement* does not mean to provide much substance when it states that liability without fault may apply to manufacturers in design and warning claims. This is hardly a claim of deception against the *Products Liability Restatement*'s Reporters; they made clear their position that design and warning claims should be treated essentially as negligence actions regardless of the label used, and in effect

30. PRODUCTS LIABILITY RESTATEMENT, *supra* note 18, § 15; *see* Henderson & Twerski, *supra* note 29, at 1535-36 (reporters supporting use of the term "proximate cause" in an earlier law review article).

31. BASIC PRINCIPLES, *supra* note 3, § 29 cmt. k.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. BASIC PRINCIPLES, *supra* note 3, § 29 cmt. k.

38. PRODUCTS LIABILITY RESTATEMENT, *supra* note 18, § 2(b)-(c). The *Basic Principles* Reporters note this requirement. *See* BASIC PRINCIPLES, *supra* note 3, § 29 cmt. k.

39. PRODUCTS LIABILITY RESTATEMENT, *supra* note 18, § 2(a).

limited strict liability for such claims to a "doctrinal label"[40] or "rhetorical preference"[41] with only a few more-or-less technical benefits.

This word game performed by the *Products Liability Restatement* (and perhaps, as the products liability Reporters would likely contend, by the courts) adds complexity to the *Basic Principles Restatement* by requiring it to explain that reasonable foreseeability language does not fit well with strict liability, and that this problem applies to strict products liability, but wait, not to design and warning strict products liability. It highlights the inevitable mayhem caused by attempting to substantively eliminate strict liability from design and warning claims, while continuing to allow them to be called strict liability.

On the opposite end of the spectrum from limiting most strict liability claims to a mere rhetorical preference and applying the proximate cause rule just as it would be applied under negligence, some writers have argued that proximate cause analyses should be eliminated altogether in strict liability claims.[42] Professor Peter Zablotsky reasons that applying the result-within-the-risk test necessitates focusing on foreseeability, that focusing on foreseeability is the hallmark of a negligence action, and that liability cannot truly be strict when it is enmeshed in negligence principles.[43] Under this view, other tools, such as the misuse doctrine,[44] should be utilized to reign in liability if courts are concerned about being overly harsh on defendants—proximate cause should not be part of the vocabulary.[45]

This argument, while interesting and provocative, is distant from the reality in the trenches. The clearest trend in products liability since the 1980s is the erosion of support for strict liability.[46] In the courts, the legislatures, and the law reviews, the star of negligence is on the rise, at least in design and warning claims. Where it has not been expressly rejected, strict liability has been the object of vigorous chipping and whittling. Since history tends to be cyclical, the doctrine will likely

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40. *Id.* § 2 cmt. n ("Regardless of the doctrinal label attached to a particular claim, design and warning claims rest on a risk-utility assessment."). Comment *i*, discussing section 2(c), adopts a reasonableness test for judging the adequacy of product instructions and warnings. *Id.* at cmt. *i*. "It thus parallels Subsection (b), which adopts a similar standard for judging the safety of product designs." *Id.*

41. *Id.* § 1 cmt. a.

42. *See, e.g.*, Diane Carter Maleson, *Negligence is Dead But Its Doctrines Rule Us From the Grave: A Proposal to Limit Defendants' Responsibility in Strict Products Liability Actions Without Resort to Proximate Cause,* 51 TEMP. L. Q. 1, 17 (1978) ("[P]roximate cause is a fault doctrine meaning proximate fault rather than proximate causation. . . ."); Kenneth Vinson, *Proximate Cause Should Be Barred From Wandering Outside Negligence Law,* 13 FLA. ST. U. L. REV. 215, 254-55 (1985) (asserting that proximate cause should be eliminated from strict liability claims and that other doctrinal devices may be used if courts feel the need to soften the severity of strict liability); Zablotsky, *supra* note 12, at 44-46 (stating that applying the proximate cause rule forces a negligence analysis even if strict liability label is used).

43. *See* Zablotsky, *supra* note 12, at 44-46.

44. *See infra* notes 77-95 and accompanying text.

45. *See* Zablotsky, *supra* note 12, at 55.

46. David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 724 (1992) ("The Great Strict Liability Experiment in products liability has mostly proved a failure, and its continuing decline . . . appears inevitable.").

rise again some day with a glory akin to that with which it shone in the 1960s, but that day cannot presently be seen. Given the present antipathy toward the doctrine, it is unlikely many courts will seek to strengthen it anytime soon through eliminating the proximate cause requirement.[47]

In strict products liability's headier days, many jurisdictions undertook to give added teeth to the doctrine by declaring that risks known by the time of trial would be imputed to the seller, regardless of whether the seller reasonably knew of the imputed risks when the product was made or marketed.[48] In courts taking this approach seriously, performing a routine proximate cause analysis may be problematic. Proximate cause's requirement of foreseeable harm clashes with the imputed knowledge of risks test's rejection of foreseeability. If a court accepts the imputed knowledge of risks approach but also requires plaintiff to establish proximate cause, it is likely providing a back door to negligence.[49]

The practical implications of this contradiction are less serious than one might imagine from counting the number of jurisdictions that have seemingly claimed allegiance to the imputed knowledge of risks test in strict products liability cases.[50] Because manufacturers are held to the standard of an expert in the industry in determining what risks are foreseeable, situations where a manufacturer could not reasonably foresee a risk are relatively rare.[51] Further, despite the frequency with which it is invoked in instances where it does not influence the outcome of a case, the imputed knowledge of risks test is seldom used by courts when using it would make a difference.[52] As noted in the *Products Liability Restatement*, "The idea has not worn well with time."[53] As strict liability has declined, the imputed knowledge test seems to have evolved in many jurisdictions from a seemingly powerful tool for

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47. Some courts have rejected the language, but not the essence, of proximate cause in strict liability cases. For example, some courts have preferred to use the phrase "producing cause" rather than proximate cause. *See* William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 669 (noting that some courts have rejected the "proximate cause" terminology in strict liability cases, while still examining foreseeability); BASIC PRINCIPLES, *supra* note 3, § 29 Reporters' Notes cmt. k (citing Texas cases struggling with proximate cause requirement in strict products liability cases).

48. *See* PRODUCTS LIABILITY RESTATEMENT, *supra* note 18, § 2 Reporters' Notes cmt. m (providing critical history of imputed knowledge of risks test).

49. *See* Powers, *supra* note 47, at 669 ("It would be a Pyrrhic victory for a plaintiff to win on the issue of defectiveness, even though the product's risks were unforeseeable, if the unforeseeability of the plaintiff's injury defeated legal causation.").

50. *See* PRODUCTS LIABILITY RESTATEMENT, *supra* note 18, § 2 Reporters' Notes cmt. m (noting that the imputed knowledge of risks test is in decline).

51. *See id.* (quoting 4 FINAL REPORT OF THE LEGAL STUDY, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY 109-110 (1977)). The relatively few cases that involve truly unforeseeable risks generally involve drugs, chemicals, or toxins that interact with the body in an unforeseeable manner. *See* Michael D. Green, *Successors and CERLA: The Imperfect Analogy to Products Liability and An Alternative Proposal*, 87 NW. U. L. REV. 897, 923, 926-27 (1993) (noting that future liability is generally not predictable in cases involving hazardous substances such as drugs and asbestos).

52. *See* PRODUCTS LIABILITY RESTATEMENT, *supra* note 18, § 2 Reporters' Notes cmt. m ("Imputation, in cases where it significantly affects defendants' liabilities, appears to have little support.").

53. *Id.*

plaintiffs to merely part of the word game by which courts pretend to apply strict liability but in truth lean toward negligence.

However, completely dismissing the imputed knowledge of risks test's significance for proximate cause would be a mistake. Despite criticism from scholars and the *Products Liability Restatement*, it is sometimes applied even in cases where a risk might be truly unforeseeable. *Sternhagen v. Dow Co.*[54] is a notable and fairly recent example. In *Sternhagen*, the decedent's estate claimed that exposure to a herbicide manufactured by one of the defendants caused the decedent to develop cancer, resulting in his death.[55] The manufacturer claimed that neither it nor medical science knew or had reason to know that the herbicide caused cancer when decedent was exposed to it.[56]

Since it involved a toxic substance, *Sternhagen* is the type of case in which the risk might be genuinely unforeseeable even under the expert in the industry standard of knowledge.[57] Despite this, the court held that under strict liability, knowledge of all risks must be imputed to the manufacturer, regardless of whether it knew or should have known of them.[58] The court acknowledged that the *Products Liability Restatement* and a number of other jurisdictions had rejected the imputed knowledge of risks test, but it concluded that imputing knowledge is necessary to preserve the core principles underlying strict products liability.[59]

In analyzing the claim, the court rather vaguely noted that causation must be established, without distinguishing between cause in fact and proximate cause.[60] However, after asserting that imputing knowledge of unknowable risks "does not change the requirements of plaintiff's prima facie case,"[61] the court declared that foreseeability has no place in a strict liability analysis.[62] Requiring that risks be foreseeable "would inject negligence principles into strict liability law."[63]

Something has to give in a case like *Sternhagen*, where the court both embraces proximate cause and rejects requiring foreseeability of harm. In such a case proximate cause may either serve as a back door for considering foreseeability or may be given mere lip service and then ignored. The *Sternhagen* court apparently chose the latter option, declining to address how its rejection of foreseeability

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54. 935 P.2d 1139 (Mont. 1997).
55. *Id.* at 1140.
56. *Id.*
57. *See supra* note 51 and accompanying text.
58. *Sternhagen*, 935 P.2d at 1142, 1144-45.
59. *Id.* at 1147.
60. *Id.* at 1143. In referencing the causation issue the court cited *Brown v. North American Manufacturing Co.*, an earlier Montana Supreme Court decision that focused on when contributory negligence prevents plaintiffs from establishing proximate cause. *Id.* (citing Brown v. N. Am. Mfg. Co., 576 P.2d 711, 716 (Mont. 1978)). The *Brown* court held that "[a] showing of proximate cause is a necessary predicate to plaintiff's recovery in strict liability. Strict liability is, of course, not complete 'liability without fault' in the sense that it is completely immune to considerations of plaintiff's conduct." *Brown*, 576 P.2d at 719; *see also infra* notes 74-95 and accompanying text.
61. *Sternhagen*, 935 P.2d at 1143.
62. *Id.* at 1143-44.
63. *Id.* at 1144.

squared with requiring proof of proximate cause. However, despite the *Sternhagen* court's failure to openly confront the issue, requiring proximate cause is problematic whenever a jurisdiction solidly adheres to the imputed knowledge of risk test.

Using a consumer expectations test for analyzing claims of defectiveness—another jurisdictional approach to strict liability—also presents interesting proximate cause issues. Although the *Products Liability Restatement* argues that a risk-utility standard should be used in design and warning cases,[64] some courts instead hold that a product is defective if it does not meet reasonable consumer expectations with regard to safety.[65] Some jurisdictions apply this standard regardless of whether the claim is described as a manufacturing, design, or warning defect.[66]

If a court uses a true consumer expectations defect analysis rather than risk-utility,[67] the proximate cause element holds special importance. When risk-utility is used, foreseeability of harm is part of the defectiveness test. One could argue, then, that under a risk-utility analysis defendants get two bites at the foreseeability apple: one in the defectiveness element and another in the proximate cause element.[68] Thus, if proximate cause were eliminated as an element in strict liability actions in jurisdictions using a risk-utility defectiveness test, the practical consequences might be less than dramatic. As with the duty element in negligence, the defectiveness element in strict products liability could be an alternative outlet for restricting the scope of liability even if proximate cause were not listed as part of the prima facie case.

Using a consumer expectations test places more significance on the proximate cause element because its foreseeability analysis is not redundant—or at least its redundancy is not as obvious. Courts applying the approach focus on "reasonable" consumer expectations, and any standard incorporating a reasonableness requirement cannot be completely divorced from foreseeability. However, the focus in a consumer expectations test is on consumers rather than the seller, and thus at least theoretically its foreseeability component would be one step removed from that employed in a proximate cause analysis. Therefore, proximate cause plays a more important role when consumer expectations is used as a defectiveness test. If arguments that proximate cause should be eliminated in strict liability actions were

64. *See* PRODUCTS LIABILITY RESTATEMENT, *supra* note 18, § 2(b)-(c).

65. *See* Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 666 (1995).

66. *See id.* at 665-67.

67. Some cases appear to treat consumer expectations and risk-utility as functionally equivalent, utilizing consumer expectations rhetoric but applying risk-utility balancing to determine whether reasonable expectations are met. *See* PRODUCTS LIABILITY RESTATEMENT, *supra* note 18, § 2 Reporters' Notes cmt. d(II)(c).

68. *See* Frank J. Vandall, *The* Restatement (Third) of Torts, *Products Liability, Section 2(b): Design Defect*, 68 TEMP. L. REV. 167, 184 (1995) ("By requiring 'foreseeability of risk' (proximate cause) in addition to the balancing of foreseeability that will occur under the risk-utility label, the reporters are asking the judge and jury to answer the scope-of-liability question twice.").

heeded, the effect would be particularly powerful in consumer expectations jurisdictions.

Plaintiffs' challenges in convincing courts to eliminate proximate cause from strict liability cases, to apply a consumer expectations test rather than risk-utility, or to impute knowledge of unforeseeable risks, may be eclipsed by a much more fundamental, yet counterintuitive, difficulty. Plaintiffs should only press for a strict liability standard if it helps them. However, it may in fact hurt them. In many cases plaintiffs may have better results using a negligence theory, even with its strong emphasis on foreseeability.

Although strict products liability was created with the expectation that it would be superior over negligence for plaintiffs, fairly early in its history a debate arose regarding how much it actually helps plaintiffs. In 1974, attorney Paul Rheingold argued that more plaintiffs would prefer to present their products liability cases to jurors with negligence language than with strict liability language.[69] He reasoned that it is easier for a plaintiff to prevail by showing that defendant did something wrong than by showing that there is something technically defective about a product: "In McLuenesque terms negligence is 'hot' and strict liability is 'cold.'"[70] Others have argued to the contrary that strict liability language is more favorable for plaintiffs,[71] but the weight of scholarly opinion, as well as a recently completed empirical study, seem to support Mr. Rheingold's view that negligence language is typically better for plaintiffs than strict liability language.[72]

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69. Paul D. Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 531 (1974).

70. *Id.*

71. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 276 (1990) ("Perhaps the only practical difference between negligence and strict liability cases is that juries occasionally will be harder on defendants when applying a strict liability instruction than they would be when holding them to the standard of an expert in the field."); *see, e.g.*, Randy E. Barnette, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 306 n.152 (1986) (citing authority that the doctrine of strict liability creates a presumption in favor of the plaintiff); Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588 (1998) (stating that the legal criterion for strict liability highly favors plaintiffs); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941 947 (1995) (arguing that particularly in the area of products claims, strict liability favors plaintiffs).

72. *See* Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. (forthcoming 2002) (analyzing study in which 306 jurors were shown videotapes of design defect minitrial; although factually and functionally identical in use of a risk-utility defect test, some jurors' videotapes used strict liability language, and other jurors' videotapes used negligence language; jurors responded more favorably to plaintiff when shown the negligence verison); *see also id.* (describing responses to a question presented to distinguished panelists at a products liability conference regarding whether plaintiffs should prefer negligence or strict liability language); Anita Bernstein, *How Can a Product be Liable?*, 45 DUKE L.J. 1, 10 n.31 (1995) (citing cases in which "courts rejected or ignored strict products liability as a descriptive label yet had no trouble finding in favor of plaintiffs using negligence reasoning"); Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1234 (1990) ("[P]laintiffs' attorneys will attempt to prove fault, if possible on the facts, rather than engage in the niceties of a strict liability case"); William C. Powers, Jr., *The*

Whether this potential psycho/linguistic advantage of negligence outweighs what would be, for plaintiffs, the happy prospect of being able to dump troublesome proximate analyses through pleading strict liability, is open to debate.[73] However, it is at least an added complication to an already uphill argument. The waning of strict liability—perhaps not only with courts and scholars, but also even with plaintiffs' lawyers—makes this basis for distinguishing between products liability and other cases in proximate cause analyses much less powerful than it might have been twenty-five years ago.

B. Misuse and Contributory or Comparative Negligence

Comment *n* of Section 402A of the *Restatement (Second) of Torts*, drafted when contributory negligence was still a complete defense to negligence claims, sought to soften the doctrine by asserting that under strict liability in tort contributory negligence should not bar recovery when the negligence consists solely of failing to discover or guard against the possibility of a product's defect.[74] However, with the rise of comparative liability, the presence of some fault on the part of the plaintiff does not necessarily end the analysis in negligence or in strict products liability. In addition to the possibility of reducing or eliminating plaintiff's recovery as part of the affirmative defense, inquiry now must also be made regarding whether plaintiff's negligence was a superceding intervening cause under the proximate cause doctrine.[75] Interaction between contributory negligence and proximate cause is being addressed, doubtless with exceeding skill and insight, by Professor Michael Green in his contribution to this Symposium,[76] and thus in my Essay I will limit myself to merely noting it.

A related issue arises with regard to the misuse doctrine, and I will provide only a few observations. Courts typically hold that misuse of a product bars recovery if the misuse is not reasonably foreseeable.[77] Several courts have interpreted the

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Persistence of Fault in Products Liability, 61 TEX. L. REV. 777, 808-09 (1983) (asserting that because jurors are less familiar with strict liability concepts than with fault, courts wanting to implement strict liability should do so with doctrinal rules); Frank J. Vandall, *Applying Strict Liability to Professionals: Economic and Legal Analysis*, 59 IND. L. J. 25, 45 (1983) ("[T]here is some feeling that damage verdicts in strict liability cases might be lower than in negligence cases.").

73. Other possible advantages of strict liability, such as being able to sue all of the sellers in the chain of distribution, also play into the mix. For a discussion of the primarily technical potential benefits of strict liability, and citation of authorities discussing these potential benefits, see Cupp & Polage, *supra* note 72.

74. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965); *see also* BASIC PRINCIPLES, *supra* note 3, § 33 cmt. c.

75. *See* BASIC PRINCIPLES, *supra* note 3, § 33 cmt. c.

76. Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103 (2002).

77. *See* David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1, 48 (2001). Professor Owen provides an excellent discussion of the misuse doctrine's background, its vague reliance on reasonable foreseeability, and its relationship to proximate cause. *Id.* at 45-55.

misuse analysis as often being equivalent to a proximate cause inquiry.[78] Professors James Henderson and Aaron Twerski, the *Products Liability Restatement*'s Reporters, argue that this is usually the case.[79] If the misuse is extreme, they assert, the defendant may be able to argue that the product was not defective.[80] However, more commonly the plaintiff is able to establish a defect, and then the question "becomes whether the harm was within the risk created by the defective product. Stated in this way, the issue is that of proximate cause."[81]

Certainly the similarity between the misuse doctrine and the proximate cause requirement in cases involving products that were both defective and misused is striking. But for misuse to be a subset of proximate cause in such cases, the burden of proving an absence of unforeseeable misuse must be on the plaintiff. The plaintiff bears the burden of proving proximate cause, and thus for the doctrines to overlap the plaintiff must maintain the same burden of proof regarding misuse.

Courts are divided regarding whether the burden of proof for misuse lies with the plaintiff or the defendant.[82] Most courts treat misuse as an affirmative defense, requiring the defendant to prove that the product was unforeseeably misused to escape liability.[83] Other courts put the burden on the plaintiff to establish as part of her prima facie case that the product was not unforeseeably misused.[84] In the affirmative defense jurisdictions misuse is less of a friend to defendants than is proximate cause, while in the prima facie jurisdictions it seems to overlap with the proximate cause analysis.[85]

The overlap between proximate cause and unforeseeable misuse has been cited in the arguments for eliminating an independent proximate cause analysis in strict liability cases. Under this view, "ample protection" is provided for defendants

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78. *See, e.g.*, Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 546 (Iowa 1980) (holding that misuse is not an affirmative defense, but rather an aspect of proximate cause and defectiveness analysis). *See generally* Owen, *supra* note 77, at 47 (noting that early decisions were particularly likely to phrase misuse as a proximate cause issue); Zablotsky, *supra* note 12, at 56 (describing the *Hughes* case and its analysis of the relationship between proximate cause and misuse).

79. Henderson & Twerski, *supra* note 29, at 1545-46.

80. *Id.*

81. *Id.*

82. *See, e.g.*, PRODUCTS LIABILITY RESTATEMENT, *supra* note 18, § 2 cmt. p ("Jurisdictions differ on the question of who bears the burden of raising and introducing proof regarding conduct that constitutes misuse, modification, and alteration."). Professor Zablotsky asserts that as of the mid-1990s twenty-nine states had specifically addressed the allocation of burden regarding misuse, and that seventeen of these twenty-nine place the burden on the defendant. He describes placing the burden on the defendant as the "clear trend." Zablotsky, *supra* note 12, at 56-58. Professors David Owen, Stuart Madden, and Mary Davis assert that the burden of proof is at least theoretically on the plaintiff in most states, but note that in all but one of the several states that have enacted statutory reform of misuse, it is defined as an affirmative defense. *See* 2 DAVID G. OWEN, M. STEWART MADDEN, & MARY J. DAVIS, MADDEN & OWEN ON PRODUCTS LIABILITY § 14:4 (3d ed. 2000) [hereinafter 2 MADDEN & OWEN ON PRODUCTS LIABILITY].

83. 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 82, § 14.4.

84. *Id.*

85. *Id.*

against unforeseeable manner of harm by the misuse doctrine, and for this and other reasons[86] proximate cause should not be required under strict products liability.[87]

As noted above, any arguments for strengthening strict liability in tort, through eliminating the proximate cause requirement or through other means, are likely to face a chilly judicial reception given the current trend away from strict liability.[88] But even if courts were more friendly to strict liability, at least two problems confront efforts to focus on the misuse doctrine as an appropriate substitute for proximate cause. The first problem stems from the jurisdictional split regarding the burden of proof on misuse. Jurisdictions treating misuse as an affirmative defense demand more from defendants than is demanded of them under proximate cause.[89] If it were to be viewed as some sort of substitute for proximate cause, it would have to be with the recognition that in these jurisdictions plaintiffs would get a double boost—ridding themselves of a formal and separate proximate cause analysis, and shifting the burden of proof on foreseeability as well.

Second, although when treated as part of the prima facie case, misuse often overlaps with proximate cause, it is only a relatively small region of the proximate cause universe. Courts use the proximate cause element to analyze a wide range of issues, including the foreseeability of the person injured, the foreseeability of the type of injury sustained, and the foreseeability of the manner in which the injury was sustained.[90] Courts also routinely analyze the foreseeability of a wide range of intervening acts to determine whether they should be deemed superceding under the facts of the case presented.[91] Misuse addresses only one of these many facets of proximate cause. Under proximate cause, a plaintiff's contributory negligence is usually analyzed as a type of intervening cause.[92] Further, it should rarely be considered superceding, particularly since the development of comparative liability has provided courts a vehicle for reducing plaintiff's recovery when she is partially at fault rather than eliminating recovery altogether.[93]

Thus, the misuse doctrine overlaps with only a small portion of potential proximate cause issues, and even in that small portion it should only lead to a finding of no proximate cause in a relatively small percentage of cases. In this light, asking misuse to serve as a substitute for proximate cause in strict products liability cases is a tall order.[94]

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86. *See supra* notes 42-45 and accompanying text.

87. *See* Zablotsky, *supra* note 12, at 55.

88. *See supra* notes 46-47 and accompanying text.

89. *See supra* notes 82-85 and accompanying text.

90. *See* Zablotsky, *supra* note 12, at 43-45.

91. *See* BASIC PRINCIPLES, *supra* note 3, § 33 cmt. b.

92. *Id.* at cmt. c.

93. *Id.* ("[E]mploying superceding cause to bar a plaintiff's recovery based on the plaintiff's conduct is difficult to reconcile with modern notions of comparative responsibility.").

94. Of course, that misuse could replace proximate cause in a relatively small percentage of proximate cause cases could serve as one limited argument for eliminating proximate cause in strict products liability—but one would need other and more powerful arrows in the quiver to make the argument convincing.

IV. CONCLUSION

Assuming it is adopted, time will tell whether the proposed *Restatement*'s result-within-the-risk language will clarify thinking about proximate cause or whether it will share the fate of irrelevance suffered by some of the first and second *Restatements*' proximate cause pronouncements. If history is a guide, the outlook is not hopeful, at least in the short term. Among other possibilities, shifting the black-letter rule's language to reasonable foreseeability and emphasizing the result-within-the-risk test in the comments would ensure relevance while still providing education and reform.

Specifically applied to defective products claims, the most interesting proximate cause issues arise in the context of strict liability. Inclusion of the element unquestionably injects a flavor of negligence through its focus on reasonable foreseeability. However, the present trend is to dilute strict liability with more than a mere flavor of negligence, and thus limitations on proximate cause in strict liability are unlikely to be adopted by a large number of jurisdictions anytime soon. Even in manufacturing defect cases, where maintaining strict liability generates the least controversy, courts are likely to continue by and large to apply common-sense restrictions on the scope of liability with the help of reasonable foreseeability language.

Thus, although some arguments for distinctions may be made, from a doctrinal perspective products liability proximate cause is not likely to receive significantly different treatment from the majority of courts in the foreseeable future. However, an important pragmatic distinction may be arising in a narrow range of cases with extremely powerful impact—government-sponsored medical reimbursement lawsuits against product manufacturers. Under any standard, causation was quite remote in the states' medical reimbursement claims against tobacco manufacturers, but the manufacturers still felt compelled to provide what was by far the largest settlement in history.[95] Although the settlement may not have created legal precedent, the amount of money paid and the attention paid to the cases may as a practical matter invite loosening of proximate cause restrictions in the resolution of other large government-sponsored medical reimbursement claims.[96]

Perhaps the treatment of proximate cause in the government tobacco cases provides an appropriate closing illustration of lawyers' decidedly utilitarian approach to the doctrine. In these cases, both sides surely focused much more on simply trying to apply the doctrine in a way that would help them prevail than on mastering its abstract subtleties. The plaintiffs' lawyers presumably were not concerned about theoretical difficulties with proximate cause in their cases,

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95. *See generally* Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J. L. & PUB. POL'Y. 421, 439-43 (1999) (discussing the application of the remoteness doctrine to state attorney general suits against the tobacco industry).

96. *See id.* at 439-40.

provided they could somehow nonetheless prevail and feel that justice was done.[97] Similarly, both under negligence and under strict liability, lawyers might be unconcerned about whether reasonable foreseeability language is theoretically inferior to result-within-the-risk language, provided it continues to be perceived as the most accessible approach to working with proximate cause.

97. It is not my intent to assert unethical conduct by plaintiffs' attorneys in these cases. Of course if they believed there was no good faith argument for proximate cause, they could not ethically pursue the case. However, proximate cause's flexibility would seem to remove a good faith argument for its existence in only the rarest of cases.