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# Foreword: "Products Liability in the 21st Century Substantive U.S. and Foreign Product Liability Law"

## **Abstract**

The idea for this William Mitchell Law Review Symposium on products liability law belongs to Ken Ross, who currently is Of Counsel to Bowman & Brooke. He specializes in products liability law and, as a preventive law specialist representing both domestic and foreign clients, he sees products liability law from a broad perspective that necessitates an understanding of products liability law from both a domestic and international perspective that takes into consideration legislative, regulatory, and common law shifts and trends in the law. This symposium is shaped around those broad interests.

## **Keywords**

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## FOREWARD

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The idea for this William Mitchell Law Review Symposium on products liability law belongs to Ken Ross, who currently is Of Counsel to Bowman & Brooke. He specializes in products liability law and, as a preventive law specialist representing both domestic and foreign clients, he sees products liability law from a broad perspective that necessitates an understanding of products liability law from both a domestic and international perspective that takes into consideration legislative, regulatory, and common law shifts and trends in the law. This symposium is shaped around those broad interests.

Ken Ross is also an adjunct professor of law at William Mitchell College of Law, where he has taught products liability law and business ethics for several years, including a semester as our Distinguished Practitioner in Residence in the spring semester of 1999. He is also a member of the ALI Advisory Committee that drafted the *Restatement*. Ken's idea was to generate a symposium that would provide a broad view of products liability law by lawyers and scholars who would scrutinize the status and future of products liability law from the perspective of their choice. The solicitation of papers has resulted in diverse responses to that broad question, depending on whether the responder is an American, Canadian, Australian, or English lawyer writing about products liability law, a litigator who defends products liability cases, a plaintiff's lawyer who sues them out, in-house counsel, or a preventive law specialist. All those views are represented in this symposium. Collectively, the articles are an eclectic snapshot of products liability law and its current problems, with many predictive insights into its immediate future. Individually, the articles are worth reading for the insights they offer on a variety of complex products liability issues ranging from failure to warn problems, to evidentiary and procedural problems, and the

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potential for expanded use of alternative dispute resolution mechanisms in products liability cases.

This symposium is divided roughly into three main parts, although there is overlap in the content. The first part deals with various aspects of substantive United States and foreign products liability law. The breadth of the articles is an indication of only some of the problems that exist. Given the amount of attention the *Restatement* has received, it is appropriate for the symposium to lead off with an article by Professors Henderson and Twerski, Co-Reporters for the *Restatement (Third) of Torts: Products Liability*.<sup>1</sup> Their article assesses the impact of the *Restatement* on the courts.<sup>1</sup> They conclude that the *Restatement* has been "well-received" by the courts, and, even where criticized, it has helped to sharpen the debate over products liability issues. Stuart Madden in his article focuses on the problem of post-sale failure to warn and related obligations, including the duty to recall or retrofit.<sup>2</sup>

The article by Gary Wilson, Vincent Moccio, and Daniel O'Fallon,<sup>3</sup> trial lawyers with Robins, Kaplan, Miller & Ciresi L.L.P., look at the future of products liability law in America, as do Victor Schwartz, Mark Behrens, and Leah Lorber<sup>4</sup> although from decidedly different perspectives. The first article questions tort reform, including the *Restatement*, while the second advocates it, and questions new initiatives, including government-sponsored products liability litigation, as well as adverse judicial responses to past tort reform legislation.

Articles covering products liability law in Europe, Australia, and New Zealand, as well as Canada and Japan, point out the global nature of products liability law. While relatively few products liability cases have been brought in European Union member states, either under negligence law or the strict liability principle of Directive 85/374/EEC, potential reforms are being considered by the European Commission Christopher J S Hodges characterizes the current situation "as a time of consideration of potential reform on

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1. James A. Henderson, Jr. and Aaron D. Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 WM. MITCHELL L. REV. 7 (2000).

2. M. Stuart Madden, *Modern Post-Sale Warnings and Related Obligations*, 27 WM. MITCHELL L. REV. 33 (2000).

3. Gary Wilson, Vincent Moccio and Daniel O'Fallon, *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85 (2000).

4. Victor E. Schwartz, Mark A. Behrens and Leah Lorber, *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237 (2000).

many aspects which affect the incidence and practice of product liability, stretching from reform of the substantive law to associated issues of access to justice, civil procedure rules and product regulation."<sup>5</sup> Jocelyn Kellam and Bettina Arste note that Australia has legislatively adopted a new products liability theory based on the EEC Directive, along with new class action procedures. They note that the new liability standards have yet to have a significant impact on Australian products liability law, although the class action mechanism is likely to become a major part of products liability litigation.

Canada, traditionally, has looked to the United Kingdom and Australia for guidance, although the courts are increasingly looking to American law. Products liability is in the process of evolving, as Canadian courts face the same substantive law problems the court in the United States have been facing and resolving for decades. The article by David S. Morritt and Sonia L. Bjorkquist<sup>6</sup> highlights the differences in the social and legal environments in Canada and the United States. The authors predict that a recent introduction in Canada of class actions and contingency fees "will lead to more products liability litigation in Canada." However, the Canadian focus on compensatory damages, caps on general damages, and a reluctance to award punitive damages, and punitive damages, and the fact that products liability cases are tried to courts rather than juries, and a lose pays rule for fees, combine to limit products liability litigation to a greater degree than in the United States.

Luke Nottage writes about products liability dispute resolution in Japan.<sup>7</sup> While products liability litigation has increased somewhat in Japan, he notes that there is nothing like the so-called litigation explosion in the United States. He concludes that "contrary to much received wisdom, is that ordinary people in Japan nowadays are *not* reluctant to pursue their claims even through the Courts...[I]n deciding whether to file and maintain suits, potential litigants can be encouraged by the following: (a) ability to claim also their legal fees if successful, in a personal injury action (moreover, a successful *defendant* normally cannot claim *its* legal fees); (b) lower minimum fees that practicing attorneys are required to

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5. Christopher J S Hodges, *Products Liability in Europe: Politics, Reform and Reality*, 27 WM. MITCHELL L. REV. 121 (2000).

6. David S. Morritt and Sonia L. Bjorkquist, *Product Liability in Canada: Principles and Practice North of the Border*, 27 WM. MITCHELL L. REV. 177 (2000).

7. Luke Nottage, *The Present and Future of Product Liability Dispute Resolution in Japan*, 27 WM. MITCHELL L. REV. 215 (2000).

charge, since 1 October 1995; and perhaps the ability to claim in addition to damages a fixed 5% interest rate, compared to current market rates of close to zero in Japan."

Linda S. Svitak and Peter J. Goss, writing of drug and device litigation in the twenty-first century, predict a contentious future, with future litigation focusing not so much on the healthcare product, as the relationships surrounding the product - "between industry and the consumer, between physician and industry, between industry and the FDA, and even between rival healthcare industries."<sup>8</sup>

Melissa Evans Buss, in *Products Liability and Intellectual Property Licensors*,<sup>9</sup> explores the impact of products liability law on trademark licensors, original designers and developers of technology who are not manufacturers, and patent licensors. Her analysis suggests strategies for minimization or avoidance of liability under products liability law.

New law places new pressure on the legal profession to avoid products liability claims. The second part of the symposium focuses on products liability prevention. The multinational nature of products liability issues, as demonstrated in the first part of the symposium, indicates the necessity of incorporating "product safety and product liability prevention" in "the corporate fabric."<sup>10</sup> That theme is repeated in a series of four articles by Randall Goodden,<sup>11</sup> Ken Ross,<sup>12</sup> Andrea Nordaune,<sup>13</sup> and Geoffrey Peckham.<sup>14</sup>

The third part of the symposium deals with a variety of problems that arise in products liability litigation. The issues are covered in articles by (1) Scott Smith and Duana Grage, on federal preemption of state product liability actions;<sup>15</sup> (2) Courtney Syl-

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8. Linda S. Svitak and Peter J. Goss, *Drug and Device Litigation in the 21<sup>st</sup> Century*, 27 WM. MITCHELL L. REV. 271 (2000).

9. Melissa Evans Buss, *Products Liability and Intellectual Property Licensors*, 27 WM. MITCHELL L. REV. 299 (2000).

10. Andrea J. Nordaune, *Sales and Advertising: Keeping the Promises We Make*, 27 WM. MITCHELL L. REV. 361 (2000).

11. Randall Goodden, *The Wave of the Future: Product Liability Prevention Programs for Manufacturers*, 27 WM. MITCHELL L. REV. 331 (2000).

12. Kenneth Ross, *Post-Sale Duty to Warn, A Critical Cause of Action*, 27 WM. MITCHELL L. REV. 339 (2000).

13. Nordaune, *supra* note 10.

14. Geoffrey Peckham, *Product Safety Labeling: Harmonization of U.S. International Standards Is on the Horizon*, 27 WM. MITCHELL L. REV. 373 (2000).

15. Scott A. Smith and Duana Grage, *Federal Preemption of State Products Liability Actions*, 27 WM. MITCHELL L. REV. 391 (2000).

vester, on the right to recover for economic loss in products liability litigation, with a primary emphasis on recent Minnesota developments;<sup>16</sup> (3) Kevin Reynolds and Richard Kirschman, on the "ten Myths" in products liability law, an article that dispels some common potential misunderstandings of products liability law;<sup>17</sup> (4) Hildy Bowbeer, Wendy F. Lumish and Jeffrey A. Cohen, on the failure to warn claim in products liability cases;<sup>18</sup> (5) Sarah Brew, on evidence, focusing on the Supreme Court's recent decision in *Kumho Tire Co. v. Carmichael* in 1999;<sup>19</sup> (6) Jennifer Dinham Henderson, on Rule 23 of the Federal Rules of Civil Procedure, and the protection of Rule 23 class members from unfair class action settlements, with a focus on the Supreme Court's decision in *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*;<sup>20</sup> (7) Arvin Maskin, Konrad Cailteux and Joanne McLaren, on the use of medical monitoring as a remedy in products liability and toxic torts cases where there is a long latency period between exposure to a hazard and actual injury to persons so exposed;<sup>21</sup> (8) C. Paul Carver, on the admissibility of subsequent remedial measures, and an argument for a uniform rule that will resolve the law as it currently exists, with its "confusing array of sometimes contradictory incentives";<sup>22</sup> (9) Paul Dieseth, on the use of the Internet as a substitute for traditional document depositories, which build on the experience in the Minnesota tobacco litigation;<sup>23</sup> (10) George Flynn and John Laravuso, on the duty to warn issue and the division of responsibility between judge and jury, suggesting that dis-

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16. Courtney Sylvester, *Economic Loss Doctrine*, 27 WM. MITCHELL L. REV. 417 (2000).

17. Kevin Reynolds, and Richard J. Kirschman, *The "Ten Myths" of Product Liability*, 27 WM. MITCHELL L. REV. 551 (2000).

18. Hildy Bowbeer, Wendy F. Lumish and Jeffrey A. Cohen, *Warning! Failure to Read this Article May Be Hazardous to Your Failure to Warn Defense*, 27 WM. MITCHELL L. REV. 439 (2000).

19. Sarah Brew, *Where the Rubber Hits the Road: Steering the Trial Court Through a Post-Kumho Tire Evaluation of Expert Testimony*, 27 WM. MITCHELL L. REV. 467 (2000).

20. Jennifer Dinham Henderson, *Protecting Rule 23 Class Members from Unfair Class Action Settlements: The Supreme Court's Amchem and Ortiz Decisions*, 27 WM. MITCHELL L. REV. 489 (2000).

21. Arvin Maskin, Konrad L. Cailteux and Joanne M. McLaren, *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521 (2000).

22. C. Paul Carver, *Subsequent Remedial Measures 2000 and Beyond*, 27 WM. MITCHELL L. REV. 583 (2000).

23. Paul Dieseth, *The Use of Document Depositories and the Internet in Large Scale and Multi-jurisdictional Products Liability Litigation*, 27 WM. MITCHELL L. REV. 615 (2000).

puted questions of the foreseeability of a risk should usually be a jury issue, where it is dispute;<sup>24</sup> (11) David Graham and Jacqueline Moen, on the discovery of regulatory information for use in products liability litigation, including access to European regulatory information;<sup>25</sup> (12) Laurie Kindel and Kai Richter, on the use of sanctions for spoliation of evidence;<sup>26</sup> and (13) Michael Landrum, on the use of alternative dispute resolution processes in products liability litigation.<sup>27</sup>

Finally, there are tributes to Solly Robins, one of Minnesota's great trial lawyers, written by John Eisberg<sup>28</sup> and Leo Feeney.<sup>29</sup> Solly Robins' contributions to products liability law were significant, including his role as plaintiff's lawyer in *McCormack v. Hanks Craft Co.*, the Minnesota Supreme Court adopting strict liability in tort for products liability cases. The tributes illustrate not only his successes in the courtroom, but the inspiration to excellence he instilled in generations of trial lawyers.

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24. George W. Flynn and John J. Laravuso, *The Existence of a Duty to Warn: A Question for the Court or the Jury?*, 27 WM. MITCHELL L. REV. 633 (2000).

25. David P. Graham and Jacqueline M. Moen, *discovery of Regulatory Information For Use in Products Products Liability Litigation: Getting Past the Road Blocks*, 27 WM. MITCHELL L. REV. 653 (2000).

26. Laurie Kindel and Kai Richter, *Spoliation of Evidence: Will the New Millennium See A Further Expansion of Sanctions for the Improper Destruction of Evidence?*, 27 WM. MITCHELL L. REV. 687 (2000).

27. Michael A. Landrum, *Through the Mists: ADR and Product Liability Claims in the Twenty-first Century*, 27 WM. MITCHELL L. REV. 713 (2000).

28. John F. Eisberg, *Solly Robins*, 27 WM. MITCHELL L. REV. 731 (2000).

29. Leo F. Feeney, *Solly Robins and the Development of Products Liability Law in Minnesota*, 27 WM. MITCHELL L. REV. 737 (2000).