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DISPELLING THE PRODUCTS LIABILITY SYNDROME:
TENTATIVE DRAFT NO. 2 OF THE RESTATEMENT
(THIRD)

John E. Simonett†

In the beginning, products liability law asked the question: “How might the fault in an inanimate object become the fault of the maker of the object?” Making sense of this question was not easy because the question uses “fault” in two different senses.

Tentative Draft No. 2 of the Restatement (Third) of Torts¹ (“Tentative Draft”) tells the story of how the bar and the courts have struggled with products liability law over the past thirty years. Much has happened. Section 402A of the Restatement (Second) of Torts² was adopted in 1965 and consists of one section with seventeen comments. The latest draft has four topics, thirteen sections with seventy-nine comments, plus detailed reporters’ notes. While much has happened, one is left with the impression that the law has come full circle. Except for the manufacturing defect, products liability law now appears to be pretty much negligence tort law but with its own idiosyncratic features.

In this issue of the William Mitchell Law Review, experienced practitioners present thoughtful essays on critical provisions of the Tentative Draft. This introduction provides an overview of the draft, pointing out some areas where old problems of strict liability have been laid to rest, where some problems remain, and where new questions are surfacing. In an introduction, one has the luxury of skimming the surface, alighting briefly here and there, and leaving the heavy spade-work to others.

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I. Introduction

In the sixties and early seventies, the courts worried about privity between the seller and others. Most remnants of warranty law have now been shrugged off. Privity is no longer a problem, nor are notice requirements and disclaimers. In the early years, too, courts worried about whether the affirmative defenses of assumption of risk and contributory and comparative fault applied to strict liability. Here, again, that problem is resolved; affirmative defenses are available in Minnesota and most states. The Tentative Draft is in accord.

Of more immediate interest, however, is recognition in the Tentative Draft that there are three distinct kinds of product defect, each with its own standard of liability: "A product is defective if, 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." This section accurately reflects current case law. Interestingly enough, the old Section 402A never really said what constituted a defect; instead, the section described a "defect" in terms of its ensuing consequences, i.e., a defect was whatever made the product unreasonably dangerous. This is reminiscent of medical practice, where, if a patient's low back hurts for some unknown reason, the patient is said to have a "lumbar disc syndrome." Section 402A, in effect, defined a "defect" as a "products liability syndrome." Tentative Draft No. 2 effectively dispels this syndrome by identifying the defect itself.

The classic case for strict liability, at least in the beginning, was, of course, the manufacturing defect, which presented a condition much like res ipsa loquitur in negligence law. With strict liability, the defect was a flaw physically present in the product. But where products liability law has really flourished

3. Tentative Draft No. 2, supra note 1, § 13 (invalidating disclaimers on new products that attempt to bar or limit claims by plaintiffs for personal injury). However, disclaimers can be effective for sales of used products. See id. § 9(c)(1).
4. See MINN. STAT. § 604.01, subd. 1(a) (1994).
5. Tentative Draft No. 2, supra note 1, § 12 cmt. b and Reporters' Note.
6. Id. § 1(b).
7. See RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) ("One who sells any product in a defective condition unreasonably dangerous to the user... or to his property is subject to liability for physical harm thereby caused... ").
8. Tentative Draft No. 2, supra note 1, § 9 cmt. a.
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in the past three decades is in cases of design defect and failure to warn. In these cases, the product is structurally and functionally sound, yet harm has occurred; the defect, if there is one, must then be sought elsewhere, outside the product itself. The choices include the product's design or its operating instructions or warnings. In other words, the focus shifts from the product itself to the maker of the product. This focus is on the conduct of human actors, which traditionally has been the domain of negligence law. And so we come full circle.

It should come as no surprise then that the major debate in products liability law has been over the test for a design defect, whether it should be a "conscious design choice" test or a "consumer expectation" standard. Except for food cases where consumer expectations govern, the Tentative Draft opts for a conscious design test which requires, as a predicate for a design defect, proof of a reasonable alternative design. After a review of Minnesota cases, the Reporters' Note states, "A fair reading of Minnesota law is that for the majority of design defect cases proof of a reasonable alternative is necessary." Other articles in this issue of the law review discuss in depth the implications of an alternative design test with its risk-utility balancing approach.

There is irony in the emergence of the design defect in products liability law. One of the early rationales for strict liability was to reduce transactional costs by relieving the plaintiff from the burden of proving fault on the manufacturer. But, if anything, proof of a design defect today requires employment of a host of experts, no different practically than for a negligence suit.

9. Id. § 2 cmt. g.
10. Id. § 2(b) and cmt. e; see also id. Reporters' Note to cmt. c. Interestingly, in determining what may be a reasonable alternative design, the court may consider as one of the relevant factors "the nature and strength of consumer expectations." Id. § 2 cmt. e.
11. Id. § 2 Reporters' Note to cmt. c (citing Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 212-13 (Minn. 1982); Bilotta v. Kelley Co., 346 N.W.2d 616, 622 (Minn. 1984); Kallio v. Ford Motor Co., 407 N.W.2d 92, 96 (Minn. 1987)). Section 398 of the Restatement (Second) covers negligence claims for "Chattels Made Under Dangerous Plan or Design," and says, simply, that a manufacturer will be liable for "failure to exercise reasonable care in the adoption of a safe plan or design." RESTATEMENT (SECOND) OF TORTS § 398 (1965). Will proof of negligence, as for strict liability, henceforth require a showing of a reasonable alternative design?
12. Tentative Draft No. 2, supra note 1, § 2 Reporters' Note to cmt. a.
The Tentative Draft takes notice of practical problems which had arisen over the manner of submitting a products liability case to the jury. Because of the overlap in negligence, strict liability and warranty claims, it was found that submitting duplicate theories of recovery to a jury caused confusion and created a risk of perverse verdicts. Minnesota resolved this problem by not allowing submission of duplicate claims.\textsuperscript{13} The Tentative Draft takes a similar position.\textsuperscript{14}

Any practitioner with a failure to warn case will profit from the analysis given this subject in the Tentative Draft.\textsuperscript{15} Because failure to warn claims are relatively easy to assert, especially with the advantage of post-accident hindsight, and because failure-to-warn will lie where the product is not defective in design or manufacture, it is important that the courts carefully oversee the legitimacy of these types of claims. Apparently it was with these concerns in mind that the court in \textit{Germann v. F.L. Smithe Machine Co.},\textsuperscript{16} stated that "whether a legal duty to warn exists is a question of law for the court";\textsuperscript{17} and if the danger should have been reasonably foreseeable, "the courts then hold as a matter of law a duty exists."\textsuperscript{18} The jury, noted the court, is then left with the issues of adequacy of the warning, breach of duty, and causation. The \textit{Germann} court went on to hold, in the case before it, that the defendant manufacturer could have foreseen that the owner of the hydraulic press would remove the safety bar, and therefore the manufacturer (not just the owner-user of the press) had a "legal duty" to warn operators of the

\textsuperscript{13} Hauenstein v. Loctite Corp., 347 N.W.2d 272, 275 (Minn. 1984) (holding that the plaintiff can plead and prove both negligence and failure to warn but, after the parties rest, the plaintiff must choose one of the two theories to go to the jury); see also Kallio v. Ford Motor Co., 407 N.W.2d 92, 100 (Minn. 1987) (stating a preference for separate interrogatories on verdict form when plaintiff alleges alternate bases for recovery).

\textsuperscript{14} Tentative Draft No. 2, supra note 1, § 2 cmt. m. This section, entitled \textit{Relationship of definitions of defect to traditional doctrinal categories}, states as follows: "[T]wo or more factually identical defective design claims under § 2(b), or two or more factually identical failure-to-warn claims under § 2(c), may not be submitted to the trier of fact in the same case under different doctrinal labels. Thus, for example, if a design claim is characterized as 'strict liability,' a 'negligence' design claim on the same facts should not be allowed." \textit{Id.}

\textsuperscript{15} \textit{Id.} § 2 cmts. h-n.

\textsuperscript{16} 395 N.W.2d 922 (Minn. 1986).

\textsuperscript{17} Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986).

\textsuperscript{18} \textit{Id.}
peril of operating the press without the safety bar attached. 19

Some of the language in *Germann* has been interpreted to mean that a jury never decides whether a duty to warn exists.

The trial court must decide, of course, based on the evidence, whether to submit the issue of failure to warn to the jury. This is a question of law for the court. Put another way, it is a question of law for the judge whether there is a question of fact for the jury. In submitting a failure to warn claim to the jury, the trial court ordinarily is instructing the jury to determine from all the evidence if, in fact, the risk to be warned against was reasonably foreseeable, so that a duty to warn was necessary; and if so, whether any warnings were adequate or could have been effective (which relates to the scope of the duty); and, finally, whether the duty was breached and causation was present. In a particular case, one or more of these questions may be decided by the trial court as a matter of law and the jury so told. But otherwise, generally, the jury decides if a duty to warn exists and if it was breached. 20

Section 402A left open the question whether strict liability applies to the seller of a component part for a product to be assembled. The Tentative Draft now resolves this question, stating that strict liability does apply. 21

Except for damage to the defective product itself, Section 6 of the Tentative Draft excludes from a strict liability recovery "economic loss" other than that resulting from harm to the

19. *Id.* at 925.
20. See MINNESOTA DIST. JUDGES ASS’N COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 119, in 4 MINNESOTA PRACTICE 1, at 90 (3d ed. 1986).

As Section 2(c) of the Tentative Draft explains, a manufacturer or seller has a duty to provide reasonable instructions or warnings where the foreseeable risks of harm posed by the product could have been reduced or avoided and where the absence of such instructions or warnings renders the product not reasonably safe.

In *Germann* there was conflicting lay and expert testimony on whether the defendant manufacturer should have to warn about using the press without the designed safety feature attached. *Germann*, 395 N.W.2d at 926. By submitting the issue to the jury, the trial court was telling the jury that it could find the manufacturer, not just the owner-user of the press, had a duty to warn. Because it was undisputed that the manufacturer had given no warning about using the press without the safety guard, there was no issue for the jury on whether, if a duty existed, there had been an adequate warning. No warning, as a matter of law, would be inadequate.

21. Tentative Draft No. 2, *supra* note 1, § 4 Reporters’ Note to cmt. b. If the component part loses its identity as a separate product, strict liability no longer applies to it.
plaintiff's person or harm to the plaintiff's property.\textsuperscript{22} Minnesota has also dealt legislatively with the problem of strict liability for non-manufacturer sellers.\textsuperscript{23}

II. Second

Brief mention should be made of some aspects of strict liability left open in the Tentative Draft and some of the areas where the law is still developing. The \textit{Restatement}, it should be remembered, is not the law in Minnesota until the Minnesota Courts say it is. The \textit{Restatement} does not purport to make law but to distill the current state of judicial opinions and scholarly comment. Because it does its work well, the \textit{Restatement}'s pronouncements are deservedly influential. And because the law is constantly developing, Tentative Draft No. 2 is not necessarily final any more than Section 402A was the final word.

Justice Holmes once remarked that if a case is an easy one, the judge decides as a question of law; if it is a hard one, it is a question of fact for the jury.\textsuperscript{24} One of the hardest questions in strict liability is what constitutes a design defect and a reasonable alternative design.\textsuperscript{25} Here a judgment must be made involving aesthetics, engineering, behavioral sciences, economics, cost accounting, and marketing. These considerations can present the trial judge with difficult rulings on the admissibility of evidence and the use of experts. If unsafe design is submitted to the jury, the trial judge must decide what guidance to give the jury. Should there be a general instruction about "reasonableness," or should the jury be told of the same risk-utility

\textsuperscript{22} Compare Tentative Draft No. 2, \textit{supra} note 1, § 6, \textit{with} MINN. STAT. § 604.10 (1994) (providing that economic loss arising from sales between "merchants in goods of the kind [is] not recoverable in tort") \textit{and} Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11 (Minn. 1992) (same).

\textsuperscript{23} See MINN. STAT. § 544.41 (1994) (requiring the dismissal of a non-manufacturer under certain specified circumstances); \textit{cf.} Tentative Draft No. 2, \textit{supra} note 1, § 1 cmt. e.


\textsuperscript{25} In some cases, it may be difficult to distinguish between defective design and a manufacturing defect or a failure to warn. "Instructions and warnings accompanying the product are relevant to the question of defective design and in some cases adequate instructions and warnings will suffice to render the product nondefective." Tentative Draft No. 2, \textit{supra} note 1, § 2 cmt. k.
factors that the trial judge took into consideration in allowing the issue to go to the jury? This is not an easy question.26

The Tentative Draft says it "takes no position regarding the specifics of how a jury should be instructed" for a design defect.27 The difficulty is that the jury is being asked to undertake an unaccustomed role, or so it seems. Rather than applying an objective standard of care, the jury is asked to sit like a court in equity, balancing risk versus utility, weighing various engineering, cost and marketing trade-offs, so that a finding of the presence or absence of a design defect appears more as an equitable remedy than a tort verdict of fault. To avoid undue diffusion of the standard of care it will be important that jury instructions and special verdict questions be devised in particular cases to provide an adequate analytic structure for the jury's deliberation.

Other questions are left open too. The validity of disclaimers between parties is left by the Institute "to developing case law."28 A few states have adopted "proportional liability" in drug cases where the plaintiff cannot identify the particular defendant who caused the harm. Here, the Institute "leaves to developing law" whether such a rule should be adopted.29

Over the years it has come to be recognized that drug products are unique cases for strict liability, and much discussion has centered about Comment k of Section 402A dealing with "unavoidably unsafe products." The Tentative Draft brings up to date the law which has extensively developed in this area.30

Section 11 of the Tentative Draft deals with increased harm due to a product defect, a problem that arises particularly in automobile crashworthiness cases.

Section 4 defines "product" generally as tangible personal property, but then cites somewhat exotic examples worthy of a law school examination. There is some authority, says the Tentative Draft, for considering sales of land developers and mass-builders as "products." And might computer software be

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27. Tentative Draft No. 2, supra note 1, § 2 cmt. e.
28. Id. § 6 cmt. f.
29. Id. § 10 cmt. c.
30. Id. § 8.
subject to strict liability, at least when mass-marketed, or will warranty claims under the Uniform Commercial Code provide an adequate remedy?31

III. Third

We live in a post-industrial society characterized by rapidly advancing technology where goods are being produced on a massive scale as never before, with demand for these goods fed by increasingly adept marketing techniques. In this environment it would seem reasonable that tort law should take measures to assure that those who make and sell goods and products have a responsibility to make them reasonably safe. It is in this context that “strict liability” developed.

Tentative Draft No. 2 comes at a time when there is a clamor for “tort reform” in strict liability, presumably based on a perceived imbalance in what is fair to require of the producer-seller of products as compared to what is fair for the user-consumer to expect. In the nature of things, these two interests will always be in a state of tension and aberrations will occur. But generally speaking, over the past thirty years, products liability law has kept in mind its purpose to provide, fairly, products that are reasonably safe.

Products liability law has, however, suffered from guilt by association, i.e., with the associated problems of punitive damages and the high transactional costs of products litigation.32 These problems are outside the scope of the Tentative Draft but will continue to affect products liability.

As indicated at the beginning of this introduction, it appears strict liability is becoming more like negligence law with its traditional standard of reasonable care adapted to the special circumstances of products liability. Tentative Draft No. 2 is an invaluable contribution to the ongoing development of products liability law.

31. *Id.* § 4 cmt. d. Here the Reporters state that while there are no cases on point finding computer software a “product,” numerous commentators have discussed that possibility. Fortunately—at least for the Bar—the Tentative Draft states that a lawyer’s work product is not a product.

32. A recent survey of members of the Minnesota Bar reported that respondents felt excessive discovery was most common in commercial and products liability cases where the financial stakes are high. REPORT OF THE DISCOVERY TASK FORCE, MINNESOTA STATE BAR ASSOCIATION (1993).