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PRODUCTS LIABILITY:
THE NEXT ACT

*Marshall S. Shapo*

I. A NEWBORN UNDER FIRE

Now and then, history yields coincidences worthy of remark. In May 1997, a remarkable pairing of events occurred in the history of products liability law. On May 20th, The American Law Institute approved a final draft of a Restatement of products liability—the Restatement (Third) of Torts: Products Liability (“Products Restatement”).

The new baby had a quick baptism by fire. Precisely one week later, the decision of the Supreme Court of Connecticut in *Potter v. Chicago Pneumatic Tool Co.* rather directly repudiated a principal pillar of the black letter of that Restatement. It also severely took issue with a test that provided a bedrock foundation for the Restatement, as elucidated in its comments.

The *Potter* decision, substantially bulwarked with scholarship, puts in focus the question of what Restatements are and what they aspire to be. I have identified three principal models: the Restatement as abacus, Restatements as an effort to embody “wisdom and excellence in [the] choice of legal rules,” and Restatements as adopting a “frank legislative approach,” which seeks politically viable solutions to problems initially identified as legal. The Connecticut decision presents interesting implications with respect to each of these models. In this Article, I critically explore a few controversial features of the new Restatement, and I also outline some areas of explosive legal growth to which the general Re-

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2. 694 A.2d 1319 (Conn. 1997).
statement model is likely to find itself not entirely suited to respond.

Whatever their differences on major and minor issues in the law, students of products liability are likely to agree that if there is a single, vital doctrinal center in the subject, it lies in the definition of defect. Evidence of the centrality of that concept appeared in section 402A of the Restatement (Second) of Torts, which required plaintiffs suing under strict liability to show that the product at issue was “in a defective condition unreasonably dangerous to the user.”4 Besides being at the heart of the strict liability theory, the idea of defect is also a core concept in implied warranty, and it resides implicitly at the heart of negligence claims for product injuries.5 The concept of defect is no narrow technical idea; it is, in fact, a proxy for judicial responses to consumer disappointment with products in a culture in which people significantly define themselves by their possessions.6

The Products Restatement also puts defect in the spotlight. Section 1 requires plaintiffs to show that a product was “defective.”7 The black letter and the comments of the highly controversial section 2, labeled “Categories of Product Defect,” feature at least two elements that generate disagreement, including the points upon which the Connecticut court disputed the draft.8

Both of these points, one concerning the requirement of a “reasonable alternative design,” and the other concerning the comments’ single-minded focus on risk-utility analysis, relate to the definition of a “design defect.” The black letter of section 2(b) requires the plaintiff to show that “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design” and that “the omission of the alternative design renders the product not reasonably safe.”9 A comment to this section admits

8. See infra notes 15-18, 30-34 and accompanying text.
9. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b).
that some disagreement on the issue exists, noting that "[s]everal courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design." Although the comment plays with this idea for a paragraph, the black letter requirement stands in majestic isolation, admitting of no exceptions.

The Potter case dealt with allegations that tools made by the defendants caused serious physical problems, summed up under the medical label of "hand arm vibration syndrome," to workers who used the tools in their work as grinders. Appealing from jury verdicts for the plaintiffs, the defendants argued that the workers should have been required to prove that a "feasible alternative design" existed when the tools were manufactured. Among other sources upon which they relied, the defendants cited the Products Restatement's requirement of a reasonable alternative design ("RAD"). Noting the "substantial controversy among commentators" about this requirement, the Connecticut court crisply announced its disagreement with the draft: "Contrary to the rule promulgated in the Draft Restatement (Third), our independent review of the prevailing common law reveals that the majority of jurisdictions do not impose upon plaintiffs an absolute requirement to prove a feasible alternative design."

The court in Potter thus viewed the Products Restatement as deficient in its performance of the role of abacus. Beyond that, it found the RAD requirement substantively unwise, saying that it "imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration." It suggested that the requirement would undercut the state rule permitting juries to infer defects without expert testimony. Moreover, it pointed out that the requirement would prevent courts from holding—as sometimes it would be desirable to hold—that "a product may be in a defective condition unreasonably dangerous to the user even though no feasible alternative design is available."

10. Id. § 2 cmt. c.
11. See id.
13. See id. at 1327.
14. See id. at 1331.
15. Id. & n.11 (summarizing analyses of more than 30 design defect cases involving the role of feasible alternative designs).
16. Id. at 1332.
17. See id.
18. Id.
The Connecticut court’s rejection of the RAD requirement cut very deep, for that requirement appears with an almost mantra-like repetition in other Restatement comments. But the court went further in its disagreement with the philosophy of section 2. Specifically, it effectively criticized the amount of weight that the drafters of the Products Restatement placed on a risk-utility test as the principal standard for guiding courts in design defect cases.\(^{20}\)

The drafters did not place the risk-utility test in the black letter, but their initial reference to it in the comments is unqualified.\(^{21}\) In comment d, they say flatly that section 2(b) “adopts a reasonableness (‘risk-utility balancing’) test as the standard for judging the defectiveness of product designs,”\(^{22}\) The drafters counterpose their selection of this standard to the competing test that is generally labeled “consumer expectations,” asserting that “consumer expectations do not constitute an independent standard for judging the defectiveness of product designs.”\(^{23}\)

The drafters do soften this judgment in their descriptive statement that “[c]ourts frequently rely, in part, on consumer expectations when discussing liability based on other theories of liability.”\(^{24}\) They also concede that “the nature and strength of consumer expectations” is one factor to be “considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe.”\(^{25}\) And, elsewhere, they place consumer expectations at center stage in the case of defective food products\(^{26}\) and used products\(^{27}\)—two choices puzzling only by their contrast with the relegation of consumer expectations to secondary status in the general definition of design defect.

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19. See, e.g., \textit{Restatement (Third) of Torts: Products Liability} \S 2 cmt. f (1998) (listing consumer expectations as one factor in determining reasonableness of alternative design); \textit{id.} \S 2 cmt. g (interpreting cases as equating consumer expectations with RAD).

20. See infra text accompanying notes 30-34.

21. Although as a matter of literary convenience I refer at some points to “the drafters,” I mean with that phrase to signify the draft as adopted by The American Law Institute. Although having had the honor to serve as an Adviser to this Restatement project, I have disagreed on many points with the language used in the final version.

22. \textit{Restatement (Third) of Torts: Products Liability} \S 2 cmt. d.

23. \textit{id.} \S 2 cmt. g.

24. \textit{id.}

25. \textit{id.} \S 2 cmt. f.

26. See \textit{id.} \S 7 (“[A] harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.”).

27. See \textit{id.} \S 8(b) (stating that a commercial seller or distributor of defective used products is liable if the defect “is a manufacturing defect . . . and the seller’s marketing of the product would cause a reasonable person . . . to expect the used product to present no greater risk of defect than if the product were new”).
However, the comments on design defects confirm the drafters’ staunch attachment to the hegemony of the risk-utility standard. They interpret the use of “‘reasonable consumer expectations’” by “[s]ome courts” as being “an equivalent of ‘proof of a reasonable, safer design alternative,’” and they argue that “consumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm, both of which are relevant under Subsection [2](b).”

Relevant to this exercise in labeling is a piece of Lincoln apocrypha, as a Washington judge quoted it in a products case. As a lawyer, the future president was cross-examining a witness: “‘[I]f you call the tail a leg, how many legs does a horse have?’ ‘Five,’ answered the witness. ‘Nope,’ said Abe, ‘callin’ a tail a leg don’t make it a leg.’”

The Connecticut court suffered no confusion about labels in Potter. Although it “recognize[d] that there may be instances involving complex product designs in which an ordinary consumer may not be able to form expectations of safety,” it “adhere[d] to [Connecticut’s] long-standing rule that a product’s defectiveness is to be determined by the expectations of an ordinary consumer.” The result was a “modified consumer expectation test,” which “provides the jury with the product’s risks and utility and then inquires whether a reasonable consumer would consider the product unreasonably dangerous.” Punctuating this standard was the court’s declaration that its “adoption of a risk-utility balancing component to our consumer expectation test does not signal a retreat from strict tort liability” and its emphasis that it would “not require a plaintiff to present evidence relating to the product’s risks and utility in every case.” Operationally, this meant that it would be “the function of the trial court to determine whether an instruction based on the ordinary consumer expectation test or the modified consumer expectation test, or both, is appropriate in light of the evidence presented.” Applying these premises, the court concluded that the trial court had appropriately instructed the jury that it could consider the “reasonable expectations of an ordinary user of the defendants’ tools” in deciding whether the tools were unreasonably dangerous.

28. Id. § 2 cmt. g.
31. Id. This formulation is essentially presented twice in the same paragraph.
32. Id. at 1334.
33. Id.
34. Id. at 1334-35.
The coincidence in time of this decision with the adoption of the Products Restatement is striking, in light of the court's quarrel with the draft. With reference to the models of Restatement strategy I have identified, Potter teaches modesty to those seeking to restate the law in areas charged with political controversy. First, it indicates that the processes of the ALI may have no comparative advantage with political institutions in making choices among political arguments. Second, it suggests that it is arguable whether this Restatement's policy choices were wise. Third, Potter makes clear that there is considerable room for argument on how to count the precedents.

Paralleling these lessons are several other generalizations about the life of modern law and legal scholarship. One comment would seem banal except that it is currently fashionable in the legal academy to intimate that law is relatively an easy study, intellectually subordinated to other disciplines upon which it depends. This point is, simply, that law can be a challenging study. When squads of veteran observers cannot agree on the meaning of decisions about mundane events that superficially appear to be written in plain English, we evidently are dealing with an interpretative problem of some difficulty.

Another pair of observations concerns lessons about the benefits and the limits of dialogue. One speculative example, based on personal participation in the Restatement process, concerns the benefits of dialogue. My persistent reference to the impact of modern methods of

35. See supra p. 761 and note 3.
36. Other recent authority has called the Restatement formulation into question. The Montana Supreme Court specifically rejected the "state-of-the-art" defense, which had been argued to be a component of the concept advanced in the draft:

Despite the adoption of the state-of-the-art defense in other jurisdictions [and] recognition of the defense in the Restatement (Third) of the Law of Torts: Products Liability..., we choose to continue to adhere to the clear precedent we have heretofore established which focuses on the core principles and remedial purposes underlying strict products liability.


While the draft of the new Restatement was in progress, the California Supreme Court restated its approval of the consumer expectation test "for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design." Soule v. General Motors Corp., 882 P.2d 298, 308 (Cal. 1994). Even in a crashworthiness case—in which the court expressed dubiety about applying the consumer expectation test—the court refused to hold an instruction on that test to be reversible error, since it thought it "highly unlikely" that the jury applied that test "without regard to a weighing of risks and benefits." Id. at 311. Besides indicating the continued viability of its Barker test's mixture of consumer expectation and risk-utility components, the court also emphasized its rejection of the manufacturer's "insinuation that ordinary consumers lack any legitimate expectations about the minimum safety of the products they use." Id. at 310.
product portrayal may have helped to convince the Reporters that they should include a specific mention of that point in the text of the comments. A parallel example of the limits of dialogue can be adduced. Despite a flock of critical commentaries of the RAD requirement, the Reporters essentially never modified a black letter position that had been concretized in print five years before the final vote on the Restatement.

II. LOOKING TO THE FUTURE: BEYOND RESTATEMENT

The law of products liability moves on, as it always has, in the decisions of courts. In the design defect area, Potter may be a prologue. It may be useful to describe a number of other issues that will present ongoing controversies to judges. Some of these are issues that Restatements—not just this Restatement—are by their nature and format not well-equipped to resolve.

A. The Role of Representations

Products liability law has relied on a number of theories to deal with direct representations about the attributes of a product: fraud, negligent misrepresentation, express warranty, and innocent misrepresentation in tort. The new Products Restatement briefly summarizes tort theories of misrepresentation.

More subtly, products law has recognized the impact of product promotion under a variety of other labels. The implied warranty of fitness for a particular purpose serves as a bridge between express war-
ranty and the merchantability warranty. The implied warranty of merchantability itself provides a subtle recognition of the influence of product portrayals.

Most dramatically, the doctrine of strict liability in tort has captured the impact of product promotion on consumer decisions to purchase, use, or encounter products when that promotion does not quite become actionable misrepresentation. Many decisions have reflected a recognition of that impact since strict liability became part of our jurisprudence, with judges recognizing as jurists what everyone knows as members of a society bombarded by advertising messages.

B. Warnings Issues

Some of the most vigorous bumping in the products area takes place in litigation about alleged failures to provide sufficient information about product hazards. Arguments about failure to warn are an exponential growth stock in the law. At one level, the arguments focus on the economics of information, with plaintiffs constantly pointing to the relatively minimal cost of providing the extra datum on risk and defendants noting the dilution of significant information about hazards by trivia. At another level, the argument concerns intuitions about moral responsibility. For example, the use of the "obviousness" doctrine in warnings cases captures such intuitions, often substituting for a holding of contributory negligence in cases involving severely injured plaintiffs.

C. Proof

_Daubert v. Merrell Dow Pharmaceuticals, Inc._, devised to fashion a solution to a difficult set of evidentiary problems on scientific proof,

45. See generally 1 SHAPO, supra note 6, ¶ 6.03.
46. See 1 id. ¶ 6.02.
47. See, e.g., Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962) (in bank) (stating, in applying strict liability in a case involving a power tool, that it "should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do").
48. See, e.g., Shapo, supra note 37, at 1155-1264 (summarizing recognition of the impact of product portrayal under both representational and nonrepresentational doctrines).
49. See generally 1 SHAPO, supra note 6, ¶¶ 19.01-.14 (145 pages) & Supp. 1997 (70 pages).
50. See generally 1 id. ¶ 19.08[1].
51. See 1 id. ¶¶ 19.11[1][b], at 19-103 & 19.11[1] passim.
has given rise to a new set of controversies. Symbolic of current live issues are decisions in the wake of Daubert that refuse admissibility of the testimony of plaintiffs' experts on the exact issue that Daubert treated: the alleged causation of birth defects of the anti-nausea drug Bendectin. It is difficult to envision the Restatement of Evidence that will provide a spare solution to these problems. Thus, courts confronted with issues of scientific causation must grapple with them in painful progression. General Electric Co. v. Joiner is probably the first of several essays in this catalog.

D. Preemption

Large problems of intergovernmental relations—between federal and state governments, between legislatures and courts—are evident in questions about whether federal statutes preempt state products liability claims. Cipollone v. Liggett Group, Inc., Freehliner Corp. v. Myrick, and Medtronic, Inc. v. Lohr all exhibit the product- and statute-specific nature of these problems. Medtronic is especially symbolic. It arose from a dispute about the interpretation of technical statutory language and involves the distinction between two types of regulatory processes within the same legislative framework. Yet, Justice Stevens's plurality opinion turns on the generality of tort principles: "The legal duty that is the predicate for the [plaintiffs'] negligent manufacturing claim is the general duty of every manufacturer to use due care to avoid foreseeable dangers in its products." Courts will have to continue to relate the generality of the common law to an alphabet of statute and agency law, ranging from flammable fabrics to prescription drugs to pleasure boats. A recent decision under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") exhibits the level of specificity of language that is frequently at issue, employing the statutory term "environment," further defined to include "plants," to preempt a claim

53. See, e.g., Raynor v. Merrell Pharm., Inc., 104 F.3d 1371, 1374-75 (D.C. Cir. 1997); Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1315 (9th Cir. 1995).
54. 118 S. Ct. 512, 517 (1997) (holding that an appellate court must apply an "abuse of discretion" standard when reviewing a lower court's decision to admit or exclude expert testimony).
58. Id. at 501.
based on crop damage by a herbicide.  

E. Economic Loss

The economic loss issue, long a staple of torts controversy, has occupied courts in products cases since the great confrontation between California and New Jersey in Seely v. White Motor Co.\(^6\) and Santor v. A&M Karagheusian, Inc.\(^6\) Although Santor has attracted few adherents, the general controversy has continued, reaching to the Supreme Court. The Court first applied the economic loss rule in East River Steamship Corp. v. Transamerica Delaval Inc.,\(^6\) spawning a raft of supporting decisions in the states, but also some controversy. Then, last term, Saratoga Fishing Co. v. J.M. Martinac & Co.\(^6\) opened up some room for maneuver for plaintiffs, holding that there could be tort recovery for equipment added to a boat after its initial purchase.\(^6\) The most fascinating problem, and one that will continue to rear its head, is the case where a product poses a safety hazard serious enough that it causes the loss of life and limb as well as injuring the product itself. The courts have divided on this issue.\(^6\) Saratoga Fishing strongly suggests that the fact that a person is injured will not propel the claim for the lost product itself into the tort liability category; the Court firmly indicates that although the defect at issue contributed to a fire, there would be no tort recovery for the loss of the vessel.\(^6\) Yet one wonders what the Court would do with a suit by the aircraft owner whose plane is ruined in a crash that kills passengers, or even with a crash that miraculously spares those on board. It is true that many courts have insisted that what is "commercial" is entirely the province of the Uniform Commercial Code,\(^6\) but some courts have been unable to stomach the idea that products presenting physical risk get a pass in tort.\(^6\)

\(^{61}\) See Kuiper v. American Cyanamid Co., 131 F.3d 656, 664 (7th Cir. 1997).
\(^{63}\) 207 A.2d 305 (N.J. 1965).
\(^{64}\) 476 U.S. 858 (1986).
\(^{65}\) 117 S. Ct. 1783 (1997).
\(^{66}\) See id. at 1785.
\(^{67}\) See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 reporters' note, cmt. d (1998) (covering, expansively, the case law discussing harm to the product itself).
\(^{68}\) See Saratoga Fishing, 117 S. Ct. at 1785.
\(^{70}\) See, e.g., Alaskan Oil, Inc. v. Central Flying Serv., Inc., 975 F.2d 553, 555 (8th Cir. 1992) (emphasizing that a plane with safety defects that had not crashed was nonetheless "in a defective condition and unreasonably dangerous" and declaring that "Arkansas law permits recovery under strict liability even when the only damages sustained are to the defective product itself").
III. CONCLUSION

Products liability law will continue to reflect the tensions in our views of the goods we buy: a true cultural mirror. From its use of liability theories to its definition of defect to its chameleon-like use of notions of obviousness, it identifies almost novelistically our views about the value of goods and our attitudes toward risk.

The new Products Restatement ably summarizes what scholars know about a variety of subjects, ranging from manufacturing defects to successor liability. Because of the constraints of the Restatement form, it necessarily does not address, or addresses only partially, several matters of increasing significance in products law as well as the perennial, pervasive problem of the effects of product promotion.

The Products Restatement’s attempt to devise a new, functional framework of liability theory is ingenious, but one may question whether it is wise, given the judicial investment in the concept and the terminology of strict liability. The Products Restatement moves into deep waters with its definition of design defect. Its presentation of its case on that issue is again able, but as Potter so dramatically demonstrated, that brief is a highly disputed one.

Beyond particular issues of what products liability law is or ought to be, the problem of what I have termed the “frank legislative approach” bedevils the effort to “restate” an area of the law in which courts are heavily involved on a daily basis, and which features such fierce policy disputes. What can a private organization contribute to courts on such issues, beyond simply presenting a point of view as would a law review article that takes a strong position on any controversial question of law? The style of Restatements is not judicial, for the judicial process formally presents room for disagreement in the form of published dissents.

In the end, the process requires persuasion through the marshaling of precedent, and ultimately through closely reasoned argument. Drawing back from battles on specific issues to put the debate on products liability in perspective, we may take heed of the wisdom of Professor Twerski, expressed twenty years ago: “The common law of products liability is coming along nicely. It should be let alone to complete its mosaic.”

71. For an earlier call for functional analysis, see Shapo, supra note 37, at 1369, advocating the development of a more general conception of a “consumer tort.”
