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PRODUCT LIABILITY

In the early 1960s, the law of American products liability underwent significant change. Until that time, the ability of claimants to recover for personal injury resulting from defective and dangerous products was severely restricted by doctrines that either barred or limited the prosecution of successful tort actions. Since the early 1960s until the mid-1990s, the most dynamic and explosive area of tort law has been the field of products liability (1). However, even the most dynamic areas of the law tend, after a period of expansion, to settle down doctrinally. Thus, though products liability cases continue to be brought across a broad range of products, it has become increasingly clear since the early 1980s that the period of doctrinal expansion that eased recovery for claimants has slowed down considerably. Courts throughout the United States have entered a period of consolidation.

1. Historical Overview

Prior to 1960, an injured plaintiff seeking recovery in a products liability action could bring a case under either of two theories. The plaintiff could allege that the product seller was negligent, or that the seller breached a warranty that attended every product sale provided for under the Uniform Sales Act and, later, under Section 2-314 of the Uniform Commercial Code (UCC), which stipulated that for a product to be merchantable it must be "reasonably fit for the ordinary purposes for which such goods are used." Each of these theories came with a distinct disadvantage.

1.1. Negligence

Early in the development of the law of negligence-based liability for defective products, the courts almost universally held that the negligent supplier of a defective product could only be held liable to an injured person with whom the supplier had directly contracted. This rule, which limited a product supplier's tort liability, is generally referred to as the privity rule. Its origins have been traced to the opinion of Lord Abinger in Winterbottom vs Wright (2), in which the plaintiff sought to recover in negligence for injuries suffered when a horse-drawn mail coach collapsed while the plaintiff was driving it. The defendant had supplied the coach in question to the Postmaster General, pursuant to a contract that called for the defendant to keep the coach in good repair. The plaintiff alleged that the defendant negligently failed to fulfill his contractual promise to keep the coach in repair, thus causing the coach to collapse and injure the plaintiff.

In granting judgment for the defendant, the English court concluded that, given the absence of any contractual relationship between the defendant and the plaintiff, no recovery could be had in negligence. Refusing to permit the contract between the defendant and the Postmaster General to be turned into a tort, Lord Abinger observed:

> There is no privity of contract between [the plaintiff and the defendant]; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences. . .would ensure.

Although the privity rule in this case generally came to be recognized by the American courts by the end of the nineteenth century, a number of exceptions were developed judicially. In an early New York case, Thomas vs Winchester (4), a vendor of vegetable extracts falsely labeled a poison and sold it to a druggist, who in turn sold it to a customer. The customer, seriously injured as a result, recovered damages from the seller who affixed the erroneous label even though the injured plaintiff had no direct privity relationship with him. The defendant's negligence, the court said, "put human life in imminent danger." Once the breach of the privity barrier had been established for products that created "imminent danger," claimants barraged the courts with the contention that, indeed, their injuries were brought about by products that had high danger levels and which thus met the threshold test for bypassing the privity rule.

In MacPherson vs Buick Motor Company, Justice Cardozo put an end to the temporizing and effectively eliminated privity as an obstacle to recovery against negligent manufacturers (5):

> We hold. . .that the principle of *Thomas vs Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. . . .There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction.. . .We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law. . .

The MacPherson ruling abolishing privity in negligence actions was widely accepted, and in the 1990s is the law in all jurisdictions. Though privity was abolished and a plaintiff was free to sue a manufacturer directly for negligence, a substantial obstacle to recovery remained. A plaintiff was still required to prove that the defendant was negligent in bringing about the defective product. When a product contained a manufacturing defect, defendants would argue that they had instituted reasonable quality control procedures and hence the products were not negligently manufactured (see Quality control). In order to assist plaintiffs in establishing their cases, the court increasingly relied on the doctrine of *res ipsa loquitur.* The evidentiary doctrine of *res ipsa loquitur* (the thing speaks for itself) allows an inference of negligence to be drawn from the occurrence of an accident involving an instrumentality (in a products liability case, the product itself) within the defendant's control, under circumstances where such an accident would not ordinarily occur in the absence of negligence. Thus, from the fact that a defective product failed in use and caused an accident, courts allowed triers of fact to infer that the manufacturer of the product negligently caused the defect to occur.

It was clear, however, that this was a stopgap device and that courts were becoming less concerned with manufacturer fault and more concerned with whether the product marketed was, in fact, defective. In the famous case of Escola vs Coca-Cola Bottling Company (6), the plaintiff was injured when a bottle of Coca-Cola

beverage broke in her hand. She alleged negligence on the part of the bottler and relied on *res ipsa loquitur* to support her claim. The defendant presented compelling evidence to show that the bottler had exercised considerable precaution by carefully regulating and checking the pressure in the bottles and in making visual inspections for defects in the glass at several stages in the bottling process. The court nonetheless held that the jury was entitled to find the defendant negligent. In a landmark concurring opinion, Justice Traynor made the following observation:

> The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer, of a component part whose defects could not be revealed by inspection or unknown causes that even by the device of *res ipsa loquitur* cannot be classified as negligence of the manufacturer. The inference of negligence may be dispelled by an affirmative showing the proper care.. . .An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly. . .
> As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The customer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trademarks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark. Manufacturers have sought to justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds. The manufacturer's obligation to the consumer must keep pace with the changing relationship between them. . .

It would take two decades before Justice Traynor's prophetic opinion became a reality. In the interim, plaintiffs were formally saddled with the responsibility of proving that the defendant–seller of a product was negligent. The implications of retaining negligence as the operative theory were of considerable consequence. Plaintiffs seeking to sue retailers or wholesalers had difficulty doing so. These parties were rarely negligent, in that they could not ordinarily be expected to discover flaws and defects in the products sold. Thus, if a manufacturer were not subject to the jurisdiction of the courts of a given state, or if the manufacturer were unavailable for suit (eg, insolvency), the plaintiff would be left with no recourse.

In short, the abolition of privity opened manufacturers to liability for negligence. Plaintiffs, however, could not establish claims merely by proving that they were harmed by defective products from a manufacturer. The requirement that classic fault be established often stood as a formal barrier to a successful tort action.

1.2. Implied Warranty of Merchantability

An alternative method of recovery that required the plaintiff to establish only defect (no fault) was available. The plaintiff could bring an action for breach of the implied warranty of merchantability. Under the Uniform Sales Act and later under the UCC Section 2-314, a warranty accompanied every sale of goods (unless disclaimed) stating that the product is "reasonably fit for the ordinary purposes for which such goods are used." Defective

products fail to meet the statutory definition and provide a predicate for a cause of action. The implied warranty of merchantability can be characterized as strict liability in contract. Disadvantages of the Code warranty were quite substantial, however. First, because the cause of action was contractual, the requirement that the parties to the suit be in privity with each other was a necessary requisite for standing to sue. The MacPherson ruling dealt the death blow to privity in causes of action based on negligence; in contract, however, the privity doctrine remained very much alive. Thus, direct actions by injured consumers against product manufacturers were barred. Plaintiffs could sue immediate sellers for breach of implied warranty; however, this right was often misleading. Retail sellers were often judgement-proof. In some cases they disclaimed liability as allowed by the UCC Section 2-316. Furthermore, the UCC statute of limitations, Section 2-715, provides for a maximum of four years from tender of delivery (sale). A tort statute of limitations generally runs from the time of injury, thus in many cases providing a longer time to bring suit.

1.3. Combining Tort and Contract Advantages

Two methods were available to allow plaintiffs an easier road to recovery. Courts either stripped the tort action of the necessity for establishing fault, or interpreted the UCC in such a way that privity was not necessary and the other Code defenses were not applicable to cases involving personal injury or property damage. Either way a manufacturer would be open to direct suit without the need to prove fault. The decision that overturned the privity requirement was an action for breach of the implied warranty of merchantability. In Henningsen vs Bloomfield Motors, Inc. (7), a plaintiff brought suit for injuries sustained when a newly purchased car went out of control. The plaintiff was driving when she heard a loud noise from the bottom by the hood. The steering wheel then spun in her hands; the car veered sharply and crashed into a wall. The trial judge dismissed negligence counts against the manufacturer of the car. The judge submitted the issue of breach of implied warranty of merchantability to the jury, which found against both the retailer and the manufacturer. The auto manufacturer subsequently appealed the verdict against it on the grounds that the company was not in privity with the injured plaintiff. In striking down the privity defense the court said:

> Under modern condition the ordinary layman. . .has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has control of its construction, and to some degree on the dealer who, to the limited extent called for by the manufacturer's instructions, inspects and services it before delivery. In such a marketing milieu his remedies and those of persons who properly claim through him should not depend "upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon 'the demands of social justice.'". . .
> Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial (85).

The Henningsen decision sought to impose strict liability against manufacturers within the framework of the Uniform Commercial Code. Only a short time elapsed before the courts recognized that the language used by the UCC to address liability provided a clumsy tool for prosecuting personal injury cases, and that strict liability was a purely tort doctrine.

In Greenman vs Yuba Power Products Company (9), a plaintiff brought an action for damages he suffered on account of a power tool. The plaintiff was working on the power lathe when a piece of wood suddenly flew out of the machine and struck him in the forehead. About 10 months later, the plaintiff gave the retailer and the manufacturer written notice of claimed breaches of warranties. Under a provision of the Uniform Commercial

Code applicable in California (Section 2-607), a buyer, in order to maintain an action under the Code, was required to give the seller notice of the breach of warranty within a "reasonable time after the buyer knows or ought to know" of the breach. The defendant claimed that the buyer had not done so in this case and was thus barred from proceeding under the Code cause of action. Justice Traynor rejected the defence, holding that a valid claim lies in strict liability in tort without the necessity of implicating the UCC:

> Although in these cases strict liability has usually been based on the theory of an express of implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law. . .and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products. . .make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.

The Greenman decision was a watershed, and privity-free strict liability in tort swept the country as a tidal wave. In 1965, the American Law Institute embraced the concept in Section 402A, and thousands of decisions cited to the Restatement. Within a decade the decision became the majority rule in the United States; in the 1990s all but a tiny minority of states ascribe to it.

2. The Second Restatement

All discussion of the post-1965 era must begin with the Restatement (Second) of Torts, Section 402A. The person responsible for this section was Dean William Prosser, who became the reporter for American Law Institute's Restatement (Second) of Torts at a time when change was on the horizon in the field of products liability. His initiative in drafting Section 402A provided the courts with a ready-made formulation for the adoption of strict tort liability. Entitled "Special Liability of Seller of Product for Physical Harm to the User or Consumer," Section 402A reads as follows:

> (*1*) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (*2*) The rule stated [above] applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Two comments sought to give content to the terms "defective condition" and "unreasonably dangerous" that appear in this rule:

> (g) Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a sale condition, and subsequent mishandling or other causes make it harmful by the time it is consumed.

> The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.
> Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.
> (i) Unreasonably dangerous. The rule stated in this Section applied only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from overconsumption.. . .The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous.. . .

2.1. Prima Facie Case and Affirmative Defenses

The imposition of strict tort liability did not mean that a plaintiff was entitled to automatic recovery when injured by a product. The following decisions set forth the basic elements that a plaintiff must establish in order to make out a prima facie case of products liability and the affirmative defenses that either reduce or bar plaintiff's recovery.

2.1.1. Defect

A plaintiff must establish that the product which injured him was defective. A product can be defective in three ways: it may be defectively manufactured, defectively designed, or sold with inadequate warnings.

Manufacturing defects are those that arise during the production process of the product. Quality control should eliminate most manufacturing defects from reaching the market. However, no quality control system is foolproof and occasionally flawed products do reach the consumer.

Unlike manufacturing defects that are idiosyncratic and random, design defects arise on the drawing board and are generic. If the product is defectively designed, every unit that is in the marketplace suffers from the same defect. A classic example of a design defect is McCormack vs Hankscraft Company (10). In that case, the plaintiff, a three-year old child, suffered serious burns when she tripped over the cord of a hot water vaporizer. The top of the vaporizer dislodged and scalding hot water poured out on her. The contention of the plaintiff was that the design of the vaporizer was defective. Plaintiff's experts testified that the vaporizer could have been designed so that the cap of the vaporizer was secured to the jar, which would have prevented the water from spilling when the vaporizer tipped over.

A product may also be defective because it was sold with inadequate warnings. Burch vs Amsterdam Corporation (11) is an early example of a failure-to-warn case. A plaintiff was badly burned in an explosion and flash fire that occurred while he was applying a floor tile adhesive sold by the defendant. The label on the can of mastic adhesive warned that the product was extremely flammable and should not be used near a fire or flame. Although the plaintiff checked his surrounding to be sure there were no flames he failed to notice the gas stove pilot light in the kitchen where he was working. After plaintiff applied a coat of adhesive, the vapors from the adhesive reached the pilot light and exploded. The court held that whether the warning given was adequate should be decided by a jury. It noted that an ordinary user might not have realized that "near fire or flame" included nearby pilot lights or that fumes and vapors, as well as the adhesive itself, were extremely flammable.

2.1.2. Cause-In-Fact

It is not sufficient that a product is found to be defective. In order to be successful in a products liability action, a plaintiff must establish that the product defect was causally related to the harm the plaintiff suffered. If the selfsame harm would have occurred even if the product had not been defective, then plaintiff's harm cannot be linked to the product defect and recovery is barred. In a 1994 case, O'Bryan vs Volkswagenwerk, AG (12), the plaintiff was injured following a serious collision when he was thrown from the car and was rendered a quadriplegic. The plaintiff alleged that the door lock of the car should have been designed to withstand greater pressure in the event of a collision. The court entered verdict for the defendant holding that the plaintiff had not established that even a better-designed door lock would have withstood the violent impact of the collision which caused the plaintiff's harm. Thus, even if the design of the door lock were hypothetically defective, there was no causal nexus between the alleged defect and the harm.

2.1.3. Proximate Cause

Even when there is a causal connection between the defect and the harm, it is still necessary for a plaintiff to establish that the nature of the plaintiff's harm, together with the circumstances of its occurrence, were reasonably foreseeable. The law, in general, does not protect against remote unforeseeable risks. For example, in Buckley vs Bell (13), the plaintiff ordered gasoline from the defendant and the defendant delivered diesel fuel by mistake, thus making the product "defective." The plaintiff filled his hay baler with the diesel fuel and, when it would not start, discovered the error in delivery. He emptied the fuel tank onto the ground, refilled it with gasoline, and attempted to start the baler. A backfire-induced fire ensued, involving the spilled diesel fuel, and the hay baler was destroyed. The plaintiff sought to recover for the value of the machine. The trial court sitting as trier of fact decided that there was no causal connection between the delivery of the defective fuel and the plaintiff's loss, because the consequence could not be foreseen. The Wyoming Supreme Court affirmed, concluding that the but-for connection is not, by itself, enough to support liability.

Another example of the proximate cause requirement is presented by Ritter vs Narragansett Electric Company (14). A suit was brought against both the retailer and the manufacturer of a stove for injuries sustained by a minor while playing in the kitchen of her home. The minor attempted to look into a pot atop the stove in which water was boiling. She opened the oven door, which was a drop-type door, and placed her foot on the edge of the door with the intention of standing on it to look into the pot. As she put her weight on the door, the range toppled over, and the pot of boiling water scalded her.

The evidence against the manufacturer of the stove revealed that when weight of approximately thirty pounds or more were placed on the door, the range would tip forward. The court decided that a jury could conclude that as a result of the design of the range, the danger in the use of the oven door as a shelf was foreseeable. The defendant would thus be negligent in either failing to warn about the danger, or in not designing the stove with a better center of gravity.

Having decided the defect question, the court still had to face the question of abnormal use or misuse. To be sure, if a 30-lb turkey had been placed on the oven door and the stove had tipped, there would be little question that injury was within the scope of the risk created by the defect. But the injury did not occur in that manner. Instead, a minor decided to use the oven door as a step-stool for peering over the top of the range. Was the manner of the occurrence so unforeseeable that it is not fair to assign this harm to the product defect? Was this injury less a result of product defect and more a result of children not being properly supervised? No formula has been devised to resolve this kind of proximate cause question. In this instance the court sent the issue of abnormal use back to the trial court for a jury determination as to whether the injury had been the product of an abnormal or improper use of the range.

2.1.4. The Role of Plaintiff's Conduct

Until the early 1970s, the majority rule in the United States was that if a plaintiff's fault was a contributing cause to the injury, recovery was barred. Since that time a revolution of sorts has taken place. Almost all states follow a rule that reduces a plantiff's recovery by the percentage of fault attributed to the plaintiff. Thus juries are asked to compare the conduct of the plaintiff and the defendant and then to assign a percentage of fault to each. Plaintiff's recovery is then reduced by a given percentage. Many jurisdictions take the position that if the fault assigned to the plaintiff is over 50% then recovery is barred.

In cases where the plaintiff has suffered harm as a result of a defective product, the claim is often made that the plaintiff contributed to the harm by negligent conduct. For instance, the steering mechanism of an automobile may be defective, but the accident may have occurred because plaintiff was driving over the speed limit. The injury may thus have been caused by the joint fault of a bad product and faulty plaintiff behavior. A small minority of courts has taken the position that, in products liability cases, a plaintiff's fault should not serve to reduce recovery. The argument is that the product should function well even when a plaintiff is acting negligently. To allow the defendant to reduce liability compromises the role of product sellers in guaranteeing the integrity of the products being placed on the market. However, the overwhelming majority of courts applies principles of comparative responsibility and allows for the reduction of the plaintiff's recovery based on the percentage of fault assigned by a jury to the conduct of the plaintiff.

3. The Third Restatement

3.1. New Definitions of Defect

The concept espoused by Section 402A of the Restatement (Second) of Torts, namely, that a manufacturer was strictly liable for selling a defective product and that proof of fault was unnecessary, worked well with regard to products that contained manufacturing defects.

If the plaintiff can demonstrate that a particular product unit came off the assembly line with a manufacturing defect which made the product significantly more dangerous than other similar units, then the conclusion can be drawn that the defect rendered the product legally unacceptable. In effect, the manufacturer is the author of the standard (the intended design) against which the allegedly defective unit is measured. In a design defect case, the individual unit is exactly what the manufacturer wanted it to be. If the product is defective it is because the design standard set by the manufacturer is found wanting. In most cases, this means that the manufacturer has failed to include design features that would have provided greater safety. In essence, the plaintiff's argument is that the design fails to measure up to some hitherto adoptable, but as yet unadopted, standard. In practical terms, the plaintiff must hypothesize a reasonable, safer alternative design and the court must find the hypothetical alternative a preferred substitute for the offending product.

In examining whether a design was defective, most courts found it necessary to revert back to a test analogous to negligence. The question that had to be confronted was whether the manufacturer had acted reasonably in designing the product. Some courts have sought to bypass this inquiry by adopting the consumer expectation test, which allows for the imposition of liability when the plaintiff establishes that the product failed to perform as a reasonable consumer would have expected. Although this rule has some currency, it is on the wane in the 1990s. This is because for most product designs of any complexity it is difficult to determine consumer expectations with regard to product performance. Consumers generally expect well-designed products, but such an expectation merely brings back the question of whether the product was reasonably designed.

In June 1992, the American Law Institute undertook the task of drafting the Restatement (Third) of Torts: "Products Liability." Tentative Draft No. 2 takes the position that different liability rules must apply for manufacturing defects and defects based on inadequate design or failure to warn:

(a) a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
(b) a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
(c) a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

A large number of U.S. states are in agreement with this new formulation. In cases where the claim is based on design defect the need for plaintiff to establish the availability of a reasonable alternative design gives content to the liability rule. In cases based on inadequate warning, the rule requiring the plaintiff to establish that the harm could have been avoided by the provision of a reasonable instruction or warning is not an easy one to administer. Claimants can easily allege that the product should have provided a warning of the very risk that caused the injury. Such a position pushed to its extreme would lead to a plethora of warnings of remote risks. Overwarning can lead to the debasement of warnings and to their becoming trivialized by the consumers. Careful balance is necessary to make certain that claims of inadequate warnings are reality-based and will actually render products safer.

3.2. The Role of Foreseeability

In cases based on design defect and failure to warn, defect is established by showing the presence of foreseeable risks of harm which warranted either a better design or a warning. The requirement that foreseeability be established is at odds with the concept of strict liability. However, a overwhelming majority of courts has refused to impose liability for risks that were unforeseeable at the time of product sale. In most cases dealing with mechanical defects, it is rare that the risk of harm from foreseeable product use is not known. However, in cases dealing with chemicals, drugs, or other toxic agents, it is not uncommon for risks of harm to be discovered only after a long period of product use. The foreseeability requirement thus provides significant protection for manufacturers when they can legitimately claim that the risk of harm was neither known nor knowable by the application of reasonable scientific inquiry available at the time of sale.

3.3. Defendant Identification

It is normally incumbent on a plaintiff to establish which defendant's product caused harm. In a small class of toxic tort cases, courts have relaxed this requirement. A problem developed in the 1980s in connection with which plaintiffs had great difficulties identifying the defendant that caused the relevant harm. The problem centered on the distribution and sale of the drug diethylstilbesterol [56-53-1] (DES) from 1941 to 1971. DES was prescribed to help prevent miscarriage. Daughters of mothers who consumed DES during pregnancy claimed that as a result they suffered various forms of cancerous and precancerous conditions and required surgery to prevent the spread of the disease. They alleged that the drug companies that marketed the drug were negligent in failing to discover that DES was a carcinogen and failing to test for the efficacy and safety of the drug, and hence breached a duty to warn about such dangers. The diseases complained of did not manifest themselves until at least 10 to 12 years after birth. There was a substantial latency period between the time of ingestion and the time the disease became known to its victims.

DES was a generic drug without any clearly identifiable shape, color, or markings, and was produced with a single chemical formula. Over three hundred companies at one time or another produced or marketed DES. Because of the long latency period between exposure and injury, it was often impossible to locate records with which to identity which manufacturers' drugs were dispensed to the mothers of particular plaintiffs. Several leading courts recognized the exceptions to the normal rule requiring the plaintiff to bear the burden of establishing the defendant's identity. Instead, they imposed liability in proportion to the defendant's share of the relevant DES market.

Other courts addressing this problem have refused to adopt a rule of proportional recovery. Some have asserted that such a fundamental change of a basic tort principle is more appropriately a legislative function. Others have expressed concern that the long latency period renders any reconstruction of market shares highly speculative. The Restatement notes the opposing views but takes no position on this controversial issue.

After a period of turbulence, the field of products liability has begun to settle down in the 1990s. The most explosive aspects of the field, ie, litigation based on design defect and failure to warn, are recognized to be closely analogous to traditional rules of negligence. Liability will attach only if there was a reasonable alternative design or warning that would have prevented the plaintiff's harm. Over the years numerous bills have been introduced in Congress to federalize aspects of products liability law. It appears that the basic structure of the law will not be affected by the legislation pending in U.S. Congress in 1996. The law of products liability is part of the great common law tradition administered by state courts throughout the United States. It is likely to remain so for the foreseeable future.

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