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Twenty-Five Years of Strict Product Liability Law: The Transformation and Present Meaning of Section 402A

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TWENTY-FIVE YEARS OF STRICT PRODUCT LIABILITY LAW: THE TRANSFORMATION AND PRESENT MEANING OF SECTION 402A

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Many of the ideas contained in this essay have been expressed earlier, in more detail, in a trilogy written by the author: *The Determinative Test for the Hybrid Sales/Service Transaction Under Section 402A of the Restatement (Second) of Torts*, 45 ARK. L. REV. 913 (1992); *The Illusive Meaning of the Term "Product" Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635 (1991); and *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205 (1989-90).

Although this edition focuses on contributions of the St. Mary's faculty, it is fair to honor former and current students as well. Once again, the author would like to express his gratitude to those research assistants who devoted much time and energy to the above articles. That group includes Ed R. Frnka, Shanan T. Bailey, Jeffrey R. Davis, and Diana L. Roberts, all of whom currently are respected and productive members of the bar. In addition, Leslie A. Coleman, a third-year student and current Note & Comment Editor on the *St. Mary's Law Journal*, helped with the publication of both the *Arkansas Law Review* article and this essay. Scott A. Carlson, a second-year student, offered many constructive ideas with this work. Finally, the author wishes to thank his colleague, Vincent R. Johnson, for his help and advice.

I. INTRODUCTION

Twenty-five years ago the American Law Institute had just published Section 402A of the *Restatement (Second) of Torts*.[1] As a consequence of this new and innovative rule, the theory of recovery in the area of defective products was expanded from a system based upon principles of negligence and warranty to one that also included the doctrine of strict product liability. The promulgation of Section 402A marked the beginning of a growing revolution in the field of plaintiff-oriented litigation. Under this new section, parties and courts are no longer required to focus upon the conduct of the defendant or principles set forth by the law of warranty. Instead, parties and courts frequently center their inquiry upon the defectiveness of the product and issues related thereto. Unfortu-

1. Section 402A states:

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 in Subsection (1) 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.

Restatement (Second) of Torts § 402A (1965).

nately, since the advent of Section 402A, the American legal system has not perfected one uniform doctrine governing recovery. In some instances, states have set forth rules particular to their own jurisdictions.[2] Some symmetry has evolved, however, and it is the purpose of this essay to discuss the development of these principles during the last two and one-half decades.

II. BACKGROUND

The first fact that should be emphasized is that Section 402A of the *Restatement (Second) of Torts* did not appear unexpectedly. As far back as the 1940s, concurring decisions calling for the implementation of strict liability when injury was caused by a defective product began to appear. Various legal scholars also supported this position. However, it was not until 1962, when Justice Roger Traynor of the Supreme Court of California wrote his decision in *Greenman v. Yuba,*[3] that the principle acquired a semblance of authority. *Greenman* was the first case to impose strict product liability upon a manufacturer. Two years later, using this decision as a foundation, the American Law Institute (ALI) approved the final draft of Section 402A of the *Restatement (Second) of Torts*. Section 402A was officially adopted the following year in 1965. Interestingly, this adoption was the first time in the history of the *Restatement* that a section was promulgated without the support of a majority or minority position. This fact, and the criticism that the ALI had usurped a legislative function by creating a new cause of action, did not prevent an almost universal acceptance of the rule. The resulting development, however, appears to have extended the concept of strict product liability much further than was originally planned.

III. "ONE WHO SELLS . . ."

From the beginning, Section 402A was intended to apply only to persons who were involved in the sale of goods. In contrast, individuals rendering services would continue to be held to the standard of the reasonably prudent person on the theory that no more

2. *See* Newmark v. Gimbel's, Inc., 258 A.2d 697, 701 (N.J. 1969) (allowing strict product liability action in situations in which defendant has provided service).

3. 377 P.2d 897 (Cal. 1962).

accountability could be expected of them. The decision to hold sellers strictly liable for sales of defective products can be justified on a number of grounds. First, a seller engaged in the business of selling goods for profit should bear the burden of defectiveness as a cost of doing business. Second, the liability of a merchant can be passed on to the consumer as part of the selling price, or, in an appropriate situation, restitution may be obtained from the original supplier. Sellers are also in a position to correct and control noncompliance and nonconformity when goods are in their possession. Finally, strict product liability is a loss for which insurance may be obtained. All of these reasons have been asserted at one time or another as the basis for imposing strict product liability upon a seller of defective goods.

It did not take long for the argument to be made that, in today's economy, anything sold may also be leased. New Jersey was one of the first jurisdictions to take note of this phenomenon. In *Cintrone v. Hertz Truck Leasing & Rental Services*,[4] the Supreme Court of New Jersey reasoned that strict product liability should and would be imposed upon the lessor of defective goods. The logic for this position was that such a supplier placed merchandise into the marketplace in much the same way as any seller, and, therefore, all of the reasons for imposing strict product liability applied. The rule was extended to bailment transactions and soon thereafter was applied to other nonsale situations such as demonstrations and free samples.[5] Today, as a result of these early decisions and those decisions that followed, the view that the application of strict product liability is no longer limited to "one who sells," but instead is applied to "one who places into the stream of commerce," is well established.

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4. 212 A.2d 769 (N.J. 1965).

5. *See* First Nat'l Bank v. Cessna Aircraft Co., 365 So. 2d 966, 968 (Ala. 1978) (extending liability to products merely placed into stream of commerce). The court discussed the "market cycle," and stated:

> When a product is placed in the "stream of commerce," the marketing cycle as it were, whether by demonstration, lease, free sample or sale, the doctrine should attach. In each of these situations the profit motive of the manufacturer is apparent whether or not a "sale" in the strict sense takes place. Moreover, the manufacturer who enters the market is in a better position to know and correct defects in his product and as between him and his prospective consumers should bear the risk of injury to those prospective consumers when any such defects enter the market uncorrected.

Id.

IV. "[A]NY PRODUCT . . ."

As stated previously, individuals rendering services are held to the standard of actionable negligence. As a rule, these people are held to practice inexact sciences and, therefore, should only be required to exercise the judgment of a reasonably prudent person. Unlike those individuals who place goods into the stream of commerce, individuals rendering services should not be held to the exacting standard of strict product liability. However, various problems are inherent in such a simple rule.

One of the first problems encountered is the hybrid sales/service transaction, in which the issue is whether the bargain—admittedly mixed—is for the sale of goods or for the rendering of a service. This issue is a problem that previously had been faced under the Uniform Commercial Code and its predecessor, the Uniform Sales Act. These codes were applied in the realm of contract, but the issue is the same under Section 402A, which applies in the area of tort. All three provisions apply only to the sale of goods. In other words, services are excluded. When determining whether strict product liability was applicable, the courts, borrowing from the precedent that had been established in earlier cases, relied upon various standards. The standard that achieved the most prominence was the "predominant factor" test. In essence, the question when applying this test becomes one of whether the controlling motivation for entering the transaction is the procurement of a service or the purchase of goods. As a general rule, if the seller's expertise, knowledge, or experience in any way influences the purchaser, the transaction is held to be one for services. This issue, more often than not, is answered by the jury.

One notable exception to this type of hybrid transaction concerns the purchase of blood. At first, the various jurisdictions were evenly divided on whether one who purchased a transfusion had paid for a product or a service. It is easy to see both sides of the issue, largely because blood is unique. Not only does blood save lives, but it is also a commodity which will be destroyed if tested for every conceivable illness it can transmit. This fact, and the advent of diseases such as AIDS, caused virtually every jurisdiction to adopt legislative protection for blood banks in the form of blood shield statutes. As a rule, these laws provide that in transactions involving blood, actionable negligence is the only basis for recovery. This provision is an efficient, although arguably inequitable,

way to solve the problem of whether the bargain is for a service or the sale of a product.

A second area of concern involves *used* products. The *Restatement* is silent on this point, and, as a result, the states once again have gone in two different directions. Some states follow the concept that strict product liability should not be applied to this type of transaction because a used product is no longer within the original production and marketing scheme. As a result, two of the main reasons for imposing Section 402A are absent: the ability of the seller to seek restitution from the original manufacturer, and the manufacturer's ability to treat such liability as a cost of doing business. In effect, the seller of a used product, if held strictly liable, would become an insurer. The *Restatement* was never intended to impose absolute liability upon a seller of defective goods.

Other states impose strict product liability in this type of transaction and argue that the *Restatement* makes no distinction between products that are new and those that are used. The *Restatement* speaks merely in terms of "[o]ne who sells any product," and, as a result, no exception should be made for this type of commodity. In addition, the argument is made that sellers of used products are motivated by profit, and the cost of defectiveness, therefore, should be imposed upon them rather than the innocent injured consumers. The dichotomy of views on used products is interesting, especially because both sides are supported by logic as well as precedent.

The third area in which this part of Section 402A has had an impact involves real estate transactions. Laypersons as well as law students think of real estate as the antithesis of goods, and yet some courts have had little difficulty in extending the concept of strict product liability to houses[6] as well as to land.[7] Houses are often mass-produced in the sense that they may be erected one block at a time: the first block is nothing but foundations; the second, foundations plus sides; the third, foundations, sides, and roofs; the fourth, foundations, sides, roofs, and interiors; and so on. The

6. *See* Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 325 (N.J. 1965) (holding that no meaningful difference exists between mass production of homes and mass production of automobiles).

7. *See* Avner v. Longridge Estates, 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633, 639 (1969) (applying strict product liability to house lots that subsided because of defective subsurface conditions).

houses are no different from automobiles constructed in an assembly plant. Courts taking note of this similarity reason that strict product liability should be applied. The same reasoning holds true when large tracts of land are mass-developed—situations in which land is cleared, utilities are installed, and streets are paved. If organized in a methodical procedure, the development resembles an assembly line. The result of these decisions is to end with a distorted position in relationship to the meaning of "product."

In years to come, the real question may be how far the courts will go in extending the definition of "product." In addition to land and houses, diverse commodities such as electricity,[8] water,[9] component parts,[10] and defective ideas[11] have all been held to constitute products. In all of these cases the courts have avoided the dictionary's approach to defining the subject matter, and have instead decided each case upon the basis of whether strict product liability *should* be applied. Once that decision is made by applying the policy reasons for the rule, the subject of the litigation is categorized as a product. As illustrated, this process has produced some unusual decisions, and there is no way to determine the extent to which future plaintiffs will seek to extend the term "any product."

V. "[I]N A DEFECTIVE CONDITION . . ."

Originally, the phrase "in a defective condition" was one of the most difficult parts of Section 402A for the courts to apply. This predicament was caused in large part by the occasional near-impossibility of drawing the line between the proverbial "lemon" and a product that is "in a defective condition." This problem was exacerbated by the idea that all products are capable of inflicting in-

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8. *See* Pierce v. Pacific Gas & Elec. Co., 166 Cal. App. 3d 68, 84, 212 Cal. Rptr. 283, 292 (1985) (holding that electricity is "force like the wind" and is therefore classified as product).

9. *See* Moody v. City of Galveston, 524 S.W.2d 583, 588 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (concluding that § 402A is applicable to sale of water).

10. *See* Scott G. Night, Comment, *Products Liability: Component Part Manufacturer's Liability for Design and Warning Defects*, 54 J. AIR L. & COM. 215, 226 (1988) (finding that majority of jurisdictions hold manufacturers of component parts liable under § 402A).

11. *See* Andrew T. Bayman, Note, *Strict Liability for Defective Ideas in Publications*, 42 VAND. L. REV. 557, 564 (1989) (discussing evolution of strict liability for defective ideas).

jury,[12] and no product is technologically perfect.[13] Also adding to the confusion was the courts' initial uncertainty on the notion that a product may be defective because it has been misdesigned, mismanufactured, or mismarketed. This ambiguity was amplified because the idea had not yet been established that a test for determining one aspect of defectiveness might not be the best test for determining others. A "defective condition" was clearly required, though, for liability to attach. From the beginning, the liability imposed by Section 402A was not absolute but, instead, strict. The difference is that strict liability is imposed not because the plaintiff has been injured, but because the injury sustained was caused by a defective product placed into the stream of commerce by the defendant. The decisions rendered during the early years were somewhat confusing. Once the concept of defectiveness became clear, however, well-established standards evolved. Perhaps the best way to illustrate the subsequent development in this area is to discuss each facet of the problem separately.

A. *Mismanufactured Products*

A product that has been mismanufactured may be defective for one of two reasons. First, the raw materials used in its construction may be substandard,[14] or, in the alternative, the product may have been misassembled.[15] In either instance, the product stands alone because it differs from the rest of the manufacturer's production. The "reasonable expectations test" soon emerged as the best test for determining defectiveness in this type of situation. Under this test, the determining factor is whether the product, as introduced into the stream of commerce, meets the reasonable expectations of the ordinary user-consumer.

The most common methods for determining reasonable expectations are by reference to product usage (i.e., the purpose for which

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12. Some of the more inane examples may be a ball-point pen, a necktie, or the plastic covering that accompanies dry cleaning.

13. One need only to consider the automobile sitting in the driveway, or perhaps the myriad products encountered in our daily existence, to agree with this statement.

14. *See* Pouncey v. Ford Motor Co., 464 F.2d 957, 961 (5th Cir. 1972) (evaluating evidence that defendant's supplier used "dirty" steel to manufacture defective fan blades).

15. The classic example in this situation would be the product with the loose bolt or missing screw. Something is missing or different from the rest of the defendant's production.

the product is ordinarily employed), product characteristics (i.e., the most common features or traits of the commodity), and the manufacturer's advertisements (i.e., representations or allegations made by the manufacturer concerning the product). These methods work hand-in-hand in determining what the reasonable consumer expects when using the product. If this expectation is breached, the jury in any subsequent litigation may determine that the product was in a defective condition.

This reasonable-expectations test has not been applied universally. In instances in which products such as food are involved, the courts may utilize other standards. Here, the "foreign-natural doctrine" is also used to determine if a product is defective. Under the foreign-natural test, the jury determines whether the allegedly adulterated food contains a "natural" substance, such as a kernel of corn in corn flakes, or a "foreign" substance, such as a burr in a can of peas.[16] In the last twenty-five years, the reasonable expectations test, even in cases involving food, has emerged as the most generally used test when determining whether a product is mismanufactured.

B. *Misdesigned Products*

While a decision of mismanufacture isolates one product, a finding of misdesign condemns the manufacturer's entire line of production. For this reason, the courts have exercised more caution in this latter area. As a result, at one time or another, different standards for the determination of defectiveness have been advanced. At various times, the tests have been: whether the product fulfilled reasonable consumer expectations (the same test that emerged as the prevailing approach in mismanufacturing cases); whether a reasonably prudent manufacturer would have introduced the product into the stream of commerce if the allegedly defective condition had been known; whether the commodity was unreasonably dangerousness; and whether the risk created by the product out-

16. *See* Mix v. Ingersoll Candy Co., 59 P.2d 144, 148 (Cal. 1936) (recognizing question for jury as to whether food is fit for human consumption). In *Mix*, the Supreme Court of California was the first court to hold that a chicken bone in a chicken pie could not be called a foreign substance, and, therefore, its presence should have been anticipated. *Id.* Thus, the dish was not unfit for human consumption. *Id.*

weighed its utility.[17] At one time or another, all of the tests, with various combinations of these factors, have been employed.

The last test, designated as the risk-benefit analysis, has emerged as the standard most frequently used in the area of misdesign. This analysis assumes that the seller intended to place the product into the marketplace in its present condition. In any subsequent litigation calling into issue the question of defectiveness, the court engages in a balancing of the risk involved in the use of the product against the burden of, at least, reducing or, at best, eliminating, that risk. The court then measures this outcome against the benefit to society that would ensue from a safer product. Only if the court determines that the resulting benefit outweighs the burden is the product judged to be defective.

The issue of defectiveness is typically one for the jury, which often analyzes the question of burden on the basis of an alternative design. Comparing the existing product with a substitute takes into consideration such factors as increased cost, marketability, state-of-the-art or technological feasibility, and, of course, resulting safety. On the other hand, the question of benefit concerns itself only with the issue of reduced risk. The general acceptance of this test in the area of misdesign is easy to understand. In essence, it is a standard in which the burden of redesigning the product is measured against the resulting benefits. The test is easy to apply in cases in which an alteration, addition, modification, or deletion in the existing commodity will result in increased safety.

The issues of misuse and obvious dangers are related to product defectiveness. Each may be defensive in nature. As a general rule, whether the misuse of a product constitutes a defense to an allegation of defectiveness depends upon the foreseeability of such maltreatment. If, for example, a manufacturer places a product into the stream of commerce and misuse could or should be foreseen,[18] the manufacturer will remain liable for resulting injuries. If, however, such misuse is not foreseeable, the defendant will be exoner-

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17. *See* John W. Wade, *Strict Tort Liability for Products: Past, Present and Future*, 13 CAP. U. L. REV. 335, 345 (1984) (discussing standards used in determining whether product is misdesigned).

18. The classic example of misuse of a product is standing on a chair. Everyone knows that chairs are designed, manufactured, and marketed for the purpose of being used as a device for sitting. However, everyone at one time or another has stood on a chair. This type of use is a most foreseeable misuse of a product.

ated of liability. This rule is both logical and fair. An individual should not be held accountable when a product is used in a manner which was not only unintended, but never anticipated. On the other hand, if the misuse was expected, the manufacturer should have made allowances for this deviation and, having failed to do so, should be held accountable for resulting injuries.

The issue of an obvious danger is more complex than product misuse. This issue arises when a product has a patently obvious risk inherent in its use—for example, a glass-crushing machine without a guard. The peril comes as a surprise to no one. And as a result, the plaintiff's contributory negligence in self-exposure to the danger must be factored into the damaging event. The reason for doing so is that public policy dictates that the law not reward manufacturers for placing a product with an obvious flaw in its design into the stream of commerce. They must be encouraged to perfect their goods. In any subsequent litigation, the question becomes one of whether reasonably prudent persons would have exposed themselves to the risk. There may be some situations in which the plaintiff had no choice, and as a result acted prudently in using the product.[19] In other cases, reasonable alternatives may have been available. If reasonable alternatives were available, there is little doubt of the presence of contributory negligence, which should diminish the amount of defendant's liability.

As in the area of mismanufacture, no universally accepted test in the area of misdesign exists. The risk-benefit analysis, however, has acquired the largest following and appears to be the best analysis for the particular issue of misdesign.

C. *Mismarketed Products*

The third type of defectiveness concerns mismarketing, which involves the adequacy of the instructions and warnings accompanying the product, and which deals with a product's effective and safe use. As in the case of misdesign, a mismarketed product is one the

19. *See* Micallef v. Miehle Co., 348 N.E.2d 571 (1976). The plaintiff was injured while operating a high-speed printing press. He was able to introduce evidence that it was the custom to remove imperfections from the material being printed while the press was in motion. This procedure was referred to as "chasing hickies on the run." The justification was that "[o]nce the machine was stopped, it required at least three hours to resume printing and, in such event, the financial advantage of the high-speed machine would be lessened." *Id.*

defendant intended to introduce into the stream of commerce in its present condition. Once again, the most widely used test that has emerged for determining the question of defectiveness is the risk-benefit analysis. In this instance, however, the test is not concerned with an alternative design. Instead, the question is whether existing instructions or warnings are sufficient. The risk inherent in the use of the product in its present condition is measured against the burden of any additional warnings or instructions. In view of this burden, the question is whether the resulting benefit to society, i.e., a safer product, requires the inclusion of additional information. If the jury subsequently determines that such data should have been included, the product is one which has been mismarketed. Because it is impossible to warn or instruct of all possible risks inherent in the use of a particular item, the real questions in these cases are: What quantum of data is sufficient? What must be included in order to justify a finding of adequacy?

It is easy to fall prey to the conclusion that *any* resulting benefit justifies the burden of an additional warning or instruction. How burdensome could this additional information be? Because of this reasoning, the rule of diminishing returns must be considered. If instructions or warnings are voluminous, and the manufacturer includes too much information, the user-consumer may disregard all such statements. The solution, although circuitous, is to include the information that would satisfy the reasonably prudent person. This determination will usually be a question of fact for the jury.

To whom should the information be given? The information should be given to all foreseeable plaintiffs. However, reasonable minds may differ in defining this group. Moreover, different duties may be owed to different members of this class, for a product is capable of inflicting injury as it passes through the various stages of its marketing scheme. A product may endanger prospective plaintiffs while being displayed,[20] demonstrated, or used. Warnings must be adequate to guard against harm in each of those circumstances and perhaps more. The problem can be very complex at times and often seems clearer in retrospect. Nevertheless, the rule

20. *See* Davis v. Gibson Prod. Co., 505 S.W.2d 682, 686 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (raising issue of inadequate warnings when potential buyer suffered injury while inspecting machete on display in store).

mandating adequate warnings to all foreseeable plaintiffs is well established and enjoys a majority following.

A unique problem arises in the marketing of drugs and other products that can cause an allergic reaction in the user-consumer. As a general rule, drugs are one of two types: those drugs generic in nature that are sold over the counter, and those that may be dispensed only by prescription. If the drug is sold over the counter, all warnings and instructions should be directed, as a rule, to the potential user in order to satisfy the manufacturer's obligation. If, however, the drug in question is a prescription drug, the law requires that all warnings and instructions be given to the prescribing physician, who is viewed as a "learned intermediary." The reason for this rule is that the doctor deals with patients one-on-one and is in a better position to discuss potential problems, which are known to an individual with experience and expertise, but which the ordinary layman may not anticipate. As with many general rules, there are exceptions, the most notable of which involves the use of prescription drugs that presumably will be dispensed by individuals other than the family doctor—for example, drugs for mass inoculations. In this situation, even though dealing with a prescription drug, the courts have stated that the warnings, if any, should be given directly to the consumer. The reason for this exception is that the "learned intermediary" may not be present, and the patient should be warned of any adverse reactions of which the layperson may not know or suspect.

When dealing with goods that cause allergic reactions, various states have endorsed three positions. The first position, which is the majority rule, is that there is no duty to warn of any idiosyncratic reaction unless an "appreciable number" of individuals who would be affected by the product in question exist. The second position, which has a respectable following, is that it is a question of fact for the jury to determine whether there is a need to issue an adequate warning where "some," because of their own peculiar chemistry, will sustain harm from using the product. Finally, the third and strictest position of all, which represents a minority position, requires a warning in any situation where "a" person will suffer adverse consequences.

Obvious dangers and misuse should be mentioned also in regard to marketing. Each was previously discussed in conjunction with design defects. In marketing goods, unlike with misdesigned prod-

ucts, there is no duty to warn of obvious risks or perils. One court best explained the nonexistence of such duty: "We hardly believe it is anymore necessary to tell an experienced factory worker that he should not put his hand into a machine that is at that moment breaking glass than it would be necessary to tell a zookeeper to keep his head out of a hippopotamus' mouth."[21] The rule concerning the absence of a duty to warn of an obvious danger when marketing a product is simple, but, like many simple truths, may be difficult to apply. The real question often is whether the danger is obvious. In many instances the potential existence of danger presents a question of fact for the jury. If the jury determines that the plaintiff was confronted with an obvious risk, the manufacturer is exonerated of liability based on failure to warn.

Misuse is treated in the same manner in mismarketing cases as it is in misdesign. Here again the focus is on foreseeability. If the misuse was reasonably anticipated, and any product clearly is susceptible of being used in a manner other than that which was intended by the manufacturer, there is a duty on the part of the manufacturer to warn of any risk or harm that might result. If, however, the misuse was not foreseeable, the manufacturer, as in the case of obvious risks, is not liable.

The law undoubtedly has progressed during the last twenty-five years. The requirement of defectiveness appears to mean much more than originally may have been intended. Not only may a product be defective on any of three different grounds, but divergent positions have emerged in individual states on how these rules should be applied in determining "in a defective condition."[22]

VI. "[U]NREASONABLY DANGEROUS . . ."

The drafters of Section 402A included the term "unreasonably dangerous" in order to distinguish among: products that are capa-

21. Bartkewich v. Billinger, 247 A.2d 603, 606 (Pa. 1968).

22. Some readers may feel that the author has omitted a great deal on the development and subsequent emergence of the various tests for determining defectiveness. Space limitations have necessitated a short-hand rendition of this particular facet. For example, there is no mention of products possessing "useful dangers," such as sharp knives, fast cars, and potent poisons, whose characteristics making them dangerous are the same characteristics for which they are purchased. Likewise not included are the unavoidably unsafe products, such as certain medicines. Therefore, only the history of product liability law with respect to the term "in a defective condition" is highlighted.

ble of causing injury even though nothing is wrong with them; products which, even though flawed, cause no harm; and products which are unreasonably dangerous because of their defective condition. Because any product is capable of inflicting injury, the drafters intended to impose strict product liability only in the latter situation. There was, however, a consensus that commodities such as butter, eggs, whiskey, cigarettes, and automobiles, and many other types of goods that can cause harm regardless of their condition be excluded from the ramifications of strict product liability. In addition, other products may be flawed, not functioning as expected, and yet causing no injury—for example, a camera flash that fails to provide illumination. These kinds of goods must be distinguished from commodities that are unreasonably dangerous because of their defective condition. In other words, an injured plaintiff must prove that the product was defective and, as a result of such defect, was in a condition that was unreasonably dangerous. The plaintiff meets this requirement by showing that because of the defect (in any or all three of the phases mentioned above), the product fails to meet the reasonable expectations of the user-consumer, regardless of the standard employed to determine defectiveness.

Some states have refused to enforce this two-tiered standard, reasoning that it places too much of a burden upon the plaintiff.[23] The majority position in the country, however, requires that an injured plaintiff prove both the defect and the resulting unreasonably dangerous condition.

VII. "[T]O THE USER OR CONSUMER OR TO HIS PROPERTY . . ."

One of the arguments advanced for the adoption of Section 402A was the inability of the law of warranty to deal in an adequate manner with those individuals who were not in privity with the person who had placed the product into the stream of commerce. From its inception, product liability law, which in essence consisted of breach of warranty and actionable negligence, had re-

23. *See* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1163 (Cal. 1972) (concluding that to require proof of both product defect and unreasonably dangerous condition places greater burden on injured plaintiff than is required in *Greenman*).

quired a contractual relationship between plaintiff and defendant.[24] This relationship was viewed as necessary in order to curtail a flood of litigation that might have endangered the Industrial Revolution. The requirement of privity was to protect fledgling industries and established manufacturers from law suits filed by remote plaintiffs. But as times changed the law changed. Consumers no longer deal face-to-face with the butcher, baker, and candlestick maker. Today's marketplace is one in which all manufacturers are remote, and, in some cases, unknown. As a result, the requirement of privity began to wane. By providing that relief was available if the user, the consumer, or the property of either sustained injury, Section 402A extinguished the privity requirement. Today, privity is generally not an issue, whether a plaintiff's action is in warranty, actionable negligence, or strict product liability.

The courts, by allowing innocent bystanders to recover, have once again extended the parameters of the Section beyond the original text. Section 402A speaks in terms of injury to "the user or consumer or to his property," and yet the courts have had little difficulty in extending this provision to include the innocent bystander. Two reasons exist for this extension of liability. First, to do so imposes no additional burden upon the manufacturers, who are already required to protect users and consumers. To include third parties imposes no additional precautions. Second, principles of fair play and equity compel protection of these individuals, who have no say in the selection of the product and do not participate in its inspection. Furthermore, innocent bystanders have no influence on the manner in which the product is used. As a consequence, they, more than anyone else, should be protected by the law. Hence, even though the *Restatement* does not mention recovery by innocent third-party bystanders, they are allowed to utilize Section 402A.

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24. *See* Winterbottom v. Wright, 152 Eng. Rep. 402, 404-05 (1842) (holding that without privity of contract, law would provide means of letting in "infinity of actions" leading to "absurd and outrageous consequences").

VIII. "[I]S SUBJECT TO LIABILITY FOR PHYSICAL HARM THEREBY CAUSED TO THE ULTIMATE USER OR CONSUMER, OR TO HIS PROPERTY . . ."

From a casual reading, the intent of Section 402A to compensate users and consumers for physical harm, as well as for injury to their property, may appear obvious. Yet the courts, once again, have extended the provisions of Section 402A to include compensation for economic loss. The first court to apply the rule in this manner was the Supreme Court of New Jersey in *Santor v. A. & M. Karagheusian, Inc.*[25]

The plaintiff's only loss in this case was the cost of the carpet purchased. After the carpet had been installed, the plaintiff discovered that the dyeing process was defective. A dark line appeared in the middle of the rug, and, as the pile wore down, the line became more apparent. In the subsequent suit, a unanimous court reasoned that the plaintiff could maintain a cause of action against the manufacturer on either of two causes of action: breach of an implied warranty of fitness, or strict product liability. The court found that Section 402A would apply in this case because manufacturers should bear any and all losses caused by a defective product that they placed into the stream of commerce.

Then, four months after *Santor*, the Supreme Court of California rejected the idea of applying strict product liability to economic losses. In *Seely v. White Motor Co.*,[26] the plaintiff brought suit to recover for, among other injuries, loss of business when the truck he had purchased overturned as a result of defective brakes. Justice Traynor, writing for the majority, made it clear that the provisions of the *Restatement* apply only when the injuries in question relate to the safety of the product, not to a contractual frustration. He reasoned that economic loss sounded in contract, not in tort. As a result, the California court held that Section 402A should not be extended to compensate an injured plaintiff for this kind of loss.

After an initial tug-of-war between these two opposing positions, *Seely* now seems to represent the majority opinion in the country. The majority rule is that for economic loss, strict product liability, which is a recovery in tort, does not apply. Some jurisdictions con-

25. 207 A.2d 305 (N.J. 1965).
26. 403 P.2d 145 (Cal. 1965).

tinue to allow recovery of an economic loss under Section 402A if other injuries have been sustained.[27] They reason that, in a suit of this sort, the economic frustration is part of the damaging event, and the resulting judgment should therefore compensate the plaintiff for this harm.

Punitive damages also represent an example of the extension of Section 402A beyond its original text. Nowhere does Section 402A mention exemplary damages. Such damages can hardly be implied from the phrase "is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property." And yet, the courts have had little difficulty in awarding punitive damages.

IX. "[I]F (A) THE SELLER IS ENGAGED IN THE BUSINESS OF SELLING SUCH A PRODUCT . . ."

The requirement that the defendant be engaged in the business of selling the product that caused injury has been extended slightly. As mentioned above, the law no longer limits liability to one who sells, but instead holds liable any person in the business of placing into the stream of commerce a product that, because of its defect, causes injury. Liability attaches whether such placement be by lease, bailment, gift, or other means. One interpretation of Section 402A that has remained constant, however, is that it was never intended to and does not apply to one who engages in an occasional sale.[28] In other words, the isolated transaction will not impose strict product liability, and an injured plaintiff will have to seek a remedy under some other cause of action. The reasons for this rule are varied. Some commentators feel that nonmerchants are not in

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27. *See* Page Keeton, *Torts*, 32 Sw. L.J. 1, 6-7 (1978) (discussing case law concerning strict liability for pure economic loss).

> A distinction should be made between the type of "dangerous condition" that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms only the product should be treated as irrelevant to policy considerations directing liability placement in tort.

Id. at 5.

28. An individual's garage sale and a savings and loan association's sale of a repossessed boat are illustrative of the types of transactions to which § 402A was never intended to apply.

a position to warrant the imposition of such liability. Nonmerchants cannot exercise any control over the original manufacturer, nor are they able to correct any deficiencies in the product. Furthermore, their not being business entities prevents nonmerchants from allocating such cost as an item of overhead and passing it on to the consumer, as well as inhibits their ability to obtain appropriate liability insurance. In short, none of the reasons for imposing strict product liability is present.

X. "[A]ND (B) IT IS EXPECTED TO AND DOES REACH THE USER OR CONSUMER WITHOUT SUBSTANTIAL CHANGE IN THE CONDITION IN WHICH IT IS SOLD."

In addition to establishing (1) that the product is in a defective condition and as a result is unreasonably dangerous, and (2) that defendant is in the business of placing goods of this sort into the stream of commerce, an injured plaintiff must also be able to allege and prove (3) that the injury-causing commodity was in its defective condition at the time it was placed into the marketplace. This requirement is both logical and fair. Any other position would impose absolute rather than strict liability. As previously discussed, the defendant is held liable not because the plaintiff has been harmed. Instead, liability is predicated upon the fact that the defendant introduced a product into the stream of commerce which, because of its defect, caused injury. It was never the intent of the *Restatement* drafters to make the seller an insurer. Therefore, a showing that the product was tampered with, or in any way altered, after it left the seller's possession will operate as a defense and exoneration from liability. In this instance, the courts have closely followed the intent of Section 402A of the *Restatement.*

XI. "THE RULE STATED IN SECTION (1) APPLIES ALTHOUGH (A) THE SELLER HAS EXERCISED ALL POSSIBLE CARE IN THE PREPARATION AND SALE OF HIS PRODUCT . . ."

Negligence was never intended to be an issue in any suit brought under Section 402A. Any argument that the defendant acted as a reasonably prudent person is totally irrelevant. The sole basis of Section 402A liability is strict product liability in respect to the design, manufacture, and marketing of the product. Many commentators, however, have criticized the courts for employing "negligence talk" when discussing the standards for determining

defect. Some lawyers will admit that the terminology used for determining negligence on the part of the defendant and defect in the product can be the same. If there is uncertainty about what cause of action a plaintiff is utilizing, it may be difficult to discern the theory of recovery because many of the terms are identical. For example, in the area of mismanufacture, courts speak in terms of reasonable expectations. And in the area of misdesign and mismarketing, courts speak of the foreseeability of misuse as well as a plaintiff's contributory negligence when confronted with an obvious danger. And finally, the courts speak of the foreseeable plaintiff when determining to whom warnings and instruction must be given.

There are, however, two very important distinctions between the two causes of action. First, under the *Restatement*, the focus is on the condition of the product rather than on the behavior of the defendants. Second, when discussing the element of foreseeability under Section 402A, courts hold defendants not to the standard of a reasonable person, but to the standard of an expert. As experts, the defendants are charged with a higher degree of care and knowledge. There are some facts which they are required to know. There is no question of whether defendants could have or should have foreseen—they *knew*. Aside from this occasional overlapping of terms, there is no inquiry as to whether defendants acted as reasonably prudent persons in that they "exercised all possible care in the preparation and sale of [their] product." Under Section 402A, whether the defendants' conduct constitutes negligence is irrelevant.

XII. "[A]ND (B) THE USER OR CONSUMER HAS NOT BOUGHT THE PRODUCT FROM OR ENTERED INTO ANY CONTRACTUAL RELATION WITH THE SELLER."

The last part of Section 402A stresses the immateriality of the absence of any contractual relationship between the parties. Privity, which was so essential in the early days of product liability law, is no longer required under Section 402A. To paraphrase Dean Prosser: The assault upon the citadel is complete.[29]

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29. *See* William L. Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1099, 1099 (1960) (discussing changes in strict liability law).

XIII. DEFENSES

Defensive issues include obvious dangers, misuse, and the fact that the product may have undergone some change after it left the defendant's control. Of the other important developments in defenses evolving during the last twenty-five years, perhaps the most important concerns contributory negligence. Traditionally, the plaintiff's negligence was not an issue in strict product liability litigation; the issue arose only when recovery was attempted under actionable negligence, and then, no matter how slight, it operated as a total bar to recovery.

During the 1970s, mounting criticism of the harsh effect of the rule of contributory negligence caused some courts, as well as the legislatures of various states, to abandon this position and replace contributory negligence with the concept of comparative negligence. Under this revised system, the fault pertaining to the damaging event is allocated between the parties, and the plaintiff's recovery, instead of being barred, is simply diminished proportionately. This allocation is a much more equitable way to distribute the cost of harm; each party pays for that portion of the injury for which he or she is responsible. This change in the law, while much fairer from a plaintiff's perspective, managed to produce unusual results in lawsuits brought on the alternate theories of actionable negligence and strict product liability.

At first there was a problem in those cases in which plaintiffs attempted to recover under the theory of actionable negligence. The plaintiffs' contributory fault, now called comparative negligence, reduced the amounts to which they were entitled. However, their assumption of risk—knowing and appreciating the danger and voluntarily exposing themselves to it—continued to operate as a complete and total bar to recovery. This dichotomy was illogical, and the courts were forced to move quickly. The solution, however, was easy: the defendant's defense of assumed risk was simply incorporated into the theory of contributory negligence. When the evidence warranted, the jury was asked to determine whether the plaintiff was reasonable in confronting the peril in question.[30] In this way, the elements of assumed risk were forced to conform to

30. *See* Rosas v. Buddies Food Store, 518 S.W.2d 534, 538 (Tex. 1975) (declaring that reasonableness of actor's conduct in confronting risk is to be determined under theory of contributory negligence).

the notion of comparative negligence, and the conflict which had been so disturbing ceased to exist.

In lawsuits involving strict product liability, the plaintiffs' negligence had never been an issue, and their assumption of the risk, which had always been a defense, continued to operate as a total bar. Adding to the disorder, the courts began to take note of plaintiffs' misuse of products and employed such conduct as a justification for diminishing the final amount of the award.[31] As a result, courts were once again faced with an unusual inconsistency. If a plaintiff brought suit seeking to recover on the alternate theories of actionable negligence and strict product liability, the defendant was entitled to special issues on the plaintiff's negligence, assumed risk, and misuse of the product. This entitlement meant that in the negligence action, assumed risk was subsumed into comparative fault, which reduced the amount of recovery. In the strict product liability action, however, assumed risk was a separate affirmative defense which barred the plaintiff's recovery completely, whereas the unforeseeable misuse of the product merely diminished the plaintiff's amount of damages. An additional problem arose because the evidence used to establish the defense of unforeseeable misuse in strict product liability could be used also to establish contributory fault in suits based upon actionable negligence. Furthermore, the courts had to face the fact that contributory negligence (now known as comparative negligence) and misuse were one and the same, posing a perplexing dilemma. In retrospect, however, the solution in this instance was equally as simple as the one involving assumed risk and contributory negligence: the courts just eliminated the distinction. Both defenses—contributory negligence and unforeseeable misuse of the product—were simply designated as

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> [H]enceforth in the trial of all actions based on negligence, *volenti non fit injuria*—he who consents cannot receive an injury—or, as generally known, voluntary assumption of risk will no longer be treated as an issue in actions based on negligence; but . . . the reasonableness of an actor's conduct in confronting a risk will be determined under principles of contributory negligence. . . . Furthermore, since Texas has embraced comparative negligence by legislative enactment, the intent to apportion negligence rather than completely bar recovery is persuasive to an abandonment of the *volenti* defenses. This has followed in the wake of comparative negligence in many jurisdictions.

Id. at 538-39.

31. *See* General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977) (allowing reduction in recovery for plaintiff's own foreseeable misuse of product).

contributory negligence, a move easy to justify since both concerned the plaintiff's conduct. This similarity, however, left the problem of applying contributory negligence in a strict product liability suit and the inconsistent positions concerning assumed risk. These problems too, however, were solved in an honest and straightforward manner.

The argument for comparative negligence had always been that it was motivated by "logic, justice, and fundamental fairness."[32] From the beginning, the basis for adopting this idea was to promote the notion of an equitable allocation of loss among the people involved. The goal was to make all parties responsible in direct proportion to their degree of fault. The answer was apparent. Comparative fault should be applied in the area of strict product liability litigation in the same manner as in negligence actions. This application meant that assumed risk, unforeseeable misuse, and contributory negligence should all be considered under the umbrella of comparative fault. The resulting idea—that in strict product liability actions, the plaintiff's contributory negligence was now a defense—was accepted quickly. Today, whether by court decision, legislative action, or tort reform, this viewpoint represents the majority position in the country. Contributory negligence, which had never been applied outside of actions based upon negligence, is now a defensive issue in strict product liability suits.

XIV. PREDICTIONS

No essay reflecting upon the changes that have taken place during the last twenty-five years should conclude without a look into the future. If the author were asked at the end of the next two and one-half decades to repeat this exercise, an analysis of the following predictions would be a good place to start. Where did the author think the developments would lead? And, what has actually transpired? The American Law Institute has already begun a revision of Section 402A, and if the next generation of lawyers is as productive and innovative as the last, there are bound to be some astounding changes.

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32. *See* Daly v. General Motors Corp., 575 P.2d 1162, 1172 (Cal. 1978) (extending comparative fault to strict product liability actions).

One of these changes is sure to involve tobacco litigation. Ironically, from the beginning, cigarette companies have been able to avoid liability owing to the unique characteristics of their product. The companies argue that, at first, no one knew that smoking was dangerous. After issuance of the Surgeon General's Report in 1964, everyone knew that smoking was hazardous to his health. As a result, the product went from one for which liability was avoided on the basis of unknown dangers to one for which recovery was barred because the injured plaintiff was fully aware of the perils involved. Underlying the defense of known risk is the fact that federal law now mandates that each cigarette package warn the user-consumer of the dangers of smoking. The fact remains, however, as one trial court recently stated, that when used for the purpose for which they are intended, "[C]igarettes are the most lethal product which may be legally sold in this country. Cigarettes are defective because . . . they cause cancer, emphysema, heart disease and other illnesses."[33] Use of this product causes serious harm. Notwithstanding these facts, many states have made recovery impossible in a suit of this kind by enacting legislation that isolates tobacco companies from strict product liability. Someone, however, will eventually come forth with a theory of recovery that will allow an injured plaintiff to prevail, and to prevail within the confines of product liability law. Whether defectiveness is alleged in the design, manufacture, or marketing of tobacco products, it must be recognized that these products inflict serious injury. They are addictive, cause property damage, pollute the air, and in many cases are lethal. No one can argue that tobacco use provides any resulting benefit to society.

Another development that is much more defensive in nature will be the widespread acceptance of statutes of repose. Statutes of limitation prevent the filing of a law suit *x* number of years after an injury has been inflicted, or in the case of discovery statutes, *x* number of years after the injury was discovered or should have been discovered. Statutes of repose, on the other hand, bar a cause

33. *See Legal Beat*, WALL ST. J., May 13, 1993, at B5 (quoting decision by Washington County Circuit Court Judge Eugene Bogen, in Greenville, Mississippi, holding that cigarettes are defective and unreasonably dangerous). This decision has been called "so far out of the mainstream that it has no precedential value." *Id.* However, antitobacco lawyers are describing the case as "significant." *Id.*

of action a stated number of years after the product has been introduced into the stream of commerce, regardless of whether injury has occurred. In effect, such statutes may bar litigation even before injury. This type of protection, however, must be encouraged because it efficiently recognizes that all products, regardless of the technology involved, have a useful life. In other words, after a certain period of time, every product eventually grows old and dies. There has never been a "duty on a manufacturer to furnish . . . [goods] that will not wear out,"[34] and a statute of repose, or a "useful life defense," would recognize this phenomenon. From a manufacturer's perspective this defense is logical and reasonable. No one should be expected to anticipate indefinitely liability for a product.

Finally, as the twenty-first century approaches, society is becoming increasingly aware of the limited availability of the earth's natural resources. The days of the "disposable society" are at an end. As a result, many products, by necessity, will undergo a recycling process. The dismantling, processing, reusing, and storing of products, as well as the salvaging of parts, must become a foreseeable use. The law must face the fact that undesirable consequences such as poisoning, soil contamination, depletion of stratospheric ozone, and other hazardous results may occur, and must be in a position to anticipate and control such dangers. Some courts have taken the unrealistic and antiquated stance that the processing and disposal of worn-out products is an unforeseeable use,[35] a position that precludes placing an injured plaintiff in this type of case into the category of a user-consumer and, as a consequence, prevents the utilization of Section 402A. This position, however, is not logical. Going back to the original reasons for imposing strict product liability, and acknowledging that there are risks inherent in the disposal and salvaging of some goods, there is no choice but to place liability where it belongs. Manufacturers must be held accountable for loss or harm caused in the foreseeable processing of a product once it has fulfilled the reason for which it was placed into the

34. Mickle v. Blackmon, 166 S.E.2d 173, 189 (S.C. 1969) (noting that seller is not responsible when, after long period of time, product wears out).

35. *See* Kalik v. Allis-Chalmers Corp., 658 F. Supp. 631, 635 (W.D. Pa. 1987) (finding dismantling and processing of components not to be reasonably foreseeable use of product).

stream of commerce. This accountability could be accomplished in much the same way that automobile manufacturers are required to design vehicles that are "crashworthy."

Some people may recall that this accountability was one of the major debates in product liability law in the late 1960s and early 1970s. The controversy originated with *Evans v. General Motors Corp.*,[36] in which the court observed that General Motors had breached no duty in failing to design a safer vehicle because an automobile was not designed, manufactured, and placed into the stream of commerce for the intended purpose of participating in collisions. A contrary position was taken a short time thereafter in *Larsen v. General Motors Corp.*,[37] in which the plaintiff had been killed in a head-on collision. The Eighth Circuit Court of Appeals held that the defendant-manufacturer was under a duty to provide a safer means of transportation. The court cited and relied upon statistics to establish the clear foreseeability of automotive accidents. The court found that most vehicles are involved in at least one damaging event during their useful lives, and that some of these accidents cause death to the passengers. The court indicated that a manufacturer must, therefore, produce a more crashworthy product, and noted: "The sole function of an automobile is not just to provide a means of transportation, it is to provide a means of safe transportation or as safe as is reasonably possible . . . ."[38] This same analogy can and should be employed in the area of recycling products. The fact that salvaging procedures will take place is definitely foreseeable. The manufacturer, therefore, should be held accountable for any resulting harm inflicted during the recycling process.

It is not inconsistent to recognize that a product has a useful life and thereby limit the manufacturer's liability once that period has ended, and at the same time to continue to hold the manufacturer liable for harm caused during the disposal or salvaging of the same product. One position deals with a product's effective life-span, and the other deals with the elimination of the product once its useful life is over. If in the latter situation there is danger or risk of harm, the manufacturer must attempt to place a safer alternative

36. 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).
37. 391 F.2d 495 (8th Cir. 1968).
38. *Larson*, 391 F.2d at 502.

into the marketplace. The manufacturer can accomplish this safety precaution by using alternate raw materials, developing a safer design or, at the very least, providing an adequate warning. Finding liability for harm caused in the disposal or salvage of the product could be based on the reasonable-expectations analysis or on the risk-benefit analysis utilized in the area of determining defectiveness.

XV. CONCLUSION

Much has transpired in the law of strict product liability during the last twenty-five years. As a result, Section 402A of the *Restatement (Second) of Torts*, adopted by the ALI in 1965, does not, as written, represent the true state of the law today. Many of the early uncertainties have been eradicated, and the apparent intent of the drafters has been altered radically by the courts and legislatures. Section 402A has been interpreted and extended far beyond its original intent. Today, as a result of ingenious lawyers and sympathetic judges, events and individuals not mentioned in the original section can find recourse under the law. As a result, we can restate Section 402A of the *Restatement (Second) of Torts* to read as follows:

> (1) One who places into the stream of commerce any product which is defective in its manufacture, design, or marketing scheme and as such is in an unreasonably dangerous condition to the user, consumer, or innocent bystander, or to such person's property, is subject to strict liability for physical harm and perhaps economic loss, and may be subject to liability for punitive damages thereby caused to the ultimate user, consumer, or innocent bystander, or to such person's property, if (a) the seller is engaged in the business of placing such product into the stream of commerce, and (b) it is expected to and does reach the user, consumer, or innocent bystander without substantial change.
>
> (2) The rule stated in Subsection (1) applies (a) although the defendant has exercised all possible care in the manufacture, design, or marketing scheme of the product, and (b) although there is a total lack of privity between such parties.

One can barely imagine what additional changes will occur in the realm of product liability law as a new generation advances into the twenty-first century.