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The Restatement (Third) of Torts Products Liability: The Tension Between Product Design and Product Warnings

by Spencer H. Silverglate

In May 1997, the American Law Institute (ALI)[1] completed the Restatement (Third) of Torts: Products Liability. The Third Restatement admittedly "goes beyond the law as the law otherwise would stand"[2] and is "an almost total overhaul"[3] of the Restatement (Second) of Torts, which was issued in 1965. The Second Restatement contained a single provision dealing with products strict liability: Section 402A. The vast majority of jurisdictions,[4] including Florida,[5] have adopted §402A. The major thrust of this section was to eliminate privity, so that any person injured by a defective product could directly sue the manufacturer and members of the chain of distribution.[6] The substantive focus of §402A was on manufacturing defects.[7] The Third Restatement greatly expands the coverage by addressing the many developments in products law occurring over the ensuing 35 years.[8]

One of the most significant and controversial features of the Third Restatement is its treatment of the relationship between product design and product warnings and instructions.[9] Most products can be designed more safely. If, however, a product may be used safely when its warnings are heeded, is the product defective if a safer design is not implemented? This article addresses the tension between the need for safe products on the one hand and for individual responsibility in following product warnings and instructions on the other. The issue is analyzed against the backdrop of the Second and Third restatements and Florida law.

The Second Restatement Position

Section 402A of the Restatement (Second) of Torts recognized products strict liability. It states that "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." This rule applies even though "(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." Courts have interpreted §402A to mean that a product may be unreasonably dangerous because of a defect in manufacturing, design, or warnings and instructions.[10]

Comment j to §402A addresses product directions and warnings. It states that "in order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warnings." Significantly, the comment goes on to state that "where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Comment j gave manufacturers a foothold to argue that products which could be used safely if their warnings and instructions were followed were neither defective nor unreasonably dangerous.[11]

The Third Restatement Position

The reporters of the Third Restatement referred to the Comment j emphasis on product warnings as

"unfortunate language" which has elicited "heavy criticism."[12] In response to this perceived criticism, the Third Restatement shifts the emphasis away from product warnings and toward safer product design. **The core provision of the Third Restatement, §2, states that "a product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design or is defective because of inadequate instructions or warnings." It goes on to define each category of strict liability separately:**

• 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."

• A product "contains a design defect 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 reasonable alternative design renders the product not reasonably safe."

• 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."

Reasonable Alternative Design

To prove design defect, the Third Restatement, unlike the Second Restatement, requires a plaintiff to demonstrate the existence of a reasonable alternative product design. This manufacturer-friendly provision was controversial and hotly contested.[13] Comment d to §2 of the Third Restatement defines reasonable alternative product design in terms of the "risk-utility balancing test." The test is "whether a reasonable alternative design would, at a reasonable cost, have reduced the foreseeable risk of harm posed by the product and, if so, whether the omission of the alternative design by the seller . . . rendered the product not reasonably safe."

Comment f addresses the factors relevant in determining whether the omission of a reasonable alternative design renders a product not reasonably safe. Such factors include the magnitude and probability of the foreseeable risks of harm; the instructions and warnings accompanying the product; consumer expectations regarding the product and the relative advantages of the alternative design, including its production costs, its effect on product longevity, maintenance, repair, and aesthetics; and the range of consumer choice among products.

Product Design and Product Warnings and Instructions

While the alternative reasonable design requirement of the Third Restatement favors manufacturers, the commentary regarding the relationship between product design and instructions and warnings does not. Comment l to §2 states:

> Reasonable design and instructions or warnings both play important roles in the production and distribution of reasonably safe products. In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not be adequately reached, may be likely to be inattentive or may be insufficiently motivated to follow the instructions or heed the warnings. However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product

> reasonably safe. Warnings are not, however, a substitute for the provision of a reasonably safe design.

As discussed below, Comment l has been interpreted to create a preference for safer product design over warnings and instructions.

A Case in Point: *Uniroyal Goodrich Tire Co. v. Martinez*

The contrast between the approach of the Second and Third restatements regarding product warnings is illustrated by the Texas Supreme Court in *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W. 2d 328 (Tex. 1998), *cert. denied,* 526 U.S. 1040 (1999). Mr. Martinez was a mechanic who was injured when a tire exploded while he was mounting a 16-inch tire on a 16.5-inch rim. "Attached to the tire was a prominent warning label containing yellow and red highlights and a pictograph of a worker being thrown into the air by an exploding tire."[14] The conspicuous label, which Mr. Martinez admitted that he had seen, warned him of the following:

> DANGER—NEVER MOUNT A 16" SIZE DIAMETER TIRE ON A 16.5" RIM. Mounting a 16" tire on a 16.5" rim can cause severe injury or death . . . . If an attempt is made to seat the bead by inflating the tire, the tire bead will break with explosive force.
>
> NEVER inflate a tire which is lying on the floor or other flat surface. Always use a tire mounting machine with the hold-down device or safety cage or bolt to vehicle axle.
>
> NEVER stand, lean or reach over the assembly during inflation.[15]

Mr. Martinez, having changed about a thousand tires in his life, admitted that he knew it was dangerous to lean over a tire while inflating it and that it was dangerous to try to mount a 16-inch tire on a 16.5-inch rim. He ignored these warnings and proceeded to mount a 16-inch tire on a 16.5-inch rim while leaning over the tire assembly during its inflation and without using a tire mounting machine or bolting the tire to the vehicle axle. The tire exploded and Mr. Martinez was injured.

Mr. Martinez sued Uniroyal, the manufacturer of the tire. In his lawsuit, he did not dispute that the tire carried an effective warning, that the warning was visible, that he had seen the warning, or that if he had heeded the warning, he would not have been injured. Instead, he argued that Uniroyal could have utilized an alternative design which would have reduced, but not eliminated, the risk of explosion.

On these facts, the jury awarded Mr. Martinez $17 million: $5.5 million in actual damages and $11.5 million in punitive damages. Amazingly, the jury found no comparative negligence against Mr. Martinez. Applying Comment j to §402A of the Second Restatement, the case likely would have been decided in Uniroyal's favor. The Texas Supreme Court, however, expressly declined to follow Comment j and instead relied on Comment l of the Third Restatement.[16] In so doing, the court affirmed the jury finding that the product was defectively designed.[17]

The result in *Uniroyal* defies logic and common sense. Most products can be designed safer, but at some point the design is safe enough. At that point, the manufacturer should be entitled to rely on its warnings and instructions and the user's common sense to avoid the residual risk of harm. The next section addresses how Florida courts strike this balance between product design and product warnings.

Florida Products Law

In 1976, the Florida Supreme Court officially adopted the Restatement (Second) of Torts §402A in *West v. Caterpillar Tractor Co,* 336 So. 2d 80 (Fla. 1976). Since then, Florida products liability law has proceeded in anything but a straight line. Even today, considerable confusion and disagreement exist in Florida as to the present state of products liability law.

Risk-Utility Test vs. Consumer Expectations Test

The confusion in Florida is articulated in the standard jury instruction on design defect in strict product liability cases: "A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits]."[18] The comments state that the jury instruction "defines 'unreasonably dangerous' both in terms of consumer expectations and in terms weighing the design risk against its utility."[19] It goes on to state that "absent more definitive authority in Florida, the committee recommends neither test to the exclusion of the other and expresses no opinion about whether the two charges should be given alternatively or together. PL 5 provides language suitable for either standard, or both, decided by the trial court to be appropriate."[20] In other words, the committee "punted" on the test to be applied in design defect cases.

In contrast, the Third Restatement adopts the risk-utility balancing test to determine design defect.[21] The Third Restatement acknowledges, however, that consumer expectations about product performance and the dangers attendant to product use may be considered as part of the risk-utility balancing test.[22]

Doctrinal Categories

One of the themes of the Third Restatement is to avoid doctrinal tort categories such as negligence, strict liability, and breach of warranty and instead define product defect functionally in terms of its design, manufacturing, and warning. Comment n takes the position that the definition of "defect" is the important issue and should remain the same regardless of the label, be it strict liability, negligence, or breach of warranty. The comment concludes that, to avoid confusion, only one tort theory should be submitted to the jury:

> Design and failure-to-warn claims may be combined in the same case because they rest on different factual allegations and distinct legal concepts. However, two or more factually identical defective-design claims or two or more factually identical failure-to-warn claims should not be submitted to the trier of fact in the same case under different doctrinal labels. Regardless of a doctrinal label attached to a particular claim, design and warning claims rest on a risk-utility assessment. To allow two or more factually identical risk-utility claims to go to the jury under different labels, whether "strict liability," "negligence," or "implied warranty of merchantability," would generate confusion and may well result in inconsistent verdicts.

The commentary about generating confusion rings true in Florida. Recent Florida decisions have rejected the notion that products liability law made strict liability and negligence concepts functionally equivalent.[23] To the contrary, Florida cases suggest that negligence and strict liability theories exist side-by-side in products cases.[24]

While Florida cases are clear that strict liability concepts did not supplant negligence in products liability cases, they are less clear in defining the standards to be applied with the different theories. In *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167 (Fla. 4th DCA 1998), the Fourth District Court of Appeal borrowed from the California Supreme Court in defining the duty to warn in a product strict liability claim:

> Failure to warn in strict liability differs markedly from failure to warn in the negligence context.

> Negligence law in a failure to warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons that fell below the acceptable standard of care, *i.e.*, what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with a standard of due care or the reasonableness of a manufacturer's conduct. *The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution.*[25]

Whether the *Ferayorni* definition of strict liability in failure-to-warn cases represents the State of Florida law is an open question. The commentary to the Florida Standard Jury Instructions states that "pending further developments of Florida law, the committee reserved the question of whether there can be strict liability for failure to warn and, if so, what duty is imposed on the manufacturer or seller."[26]

Product Design vs. Warnings and Instructions

While the Third Restatement contains many desirable features, its bias against product warnings is not one of them. If Comment l to §2 is applied slavishly, there will be aberrant results like the one in *Uniroyal*. Fortunately, Florida courts do not appear to be headed in that direction. Florida decisions generally strike a reasonable balance between the manufacturer's obligation to design safe products and its right to have its warnings and instructions heeded.

In *Kroon v. Beech Aircraft Corp*, 628 F.2d 891 (5th Cir. 1980), a pilot crashed an airplane on takeoff when he forgot to disengage a control locking system. The pilot was experienced and knew that the locking system had to be disengaged before takeoff. While he admitted that his own negligence contributed to the accident, he sued the airplane manufacturer for failing to design a locking system that rendered the plane entirely inoperable when engaged. The Fifth Circuit Court of Appeals, applying Florida law, affirmed summary judgment for the manufacturer. The court noted that while the locking system could have been designed differently so as to have prevented the accident, the design was not the proximate cause of the accident. The court approved the reasoning of the lower court, which analogized the situation to one in which a pilot takes off with only a gallon of fuel in his tank: "Such actions can and do happen; and no doubt an airplane could be designed to make such an accident impossible. It would, however, strain reason to suggest that the failure to make the aircraft foolproof in that detail proximately causes the resulting disaster if an experienced pilot familiar with a particular aircraft were to take off without checking to see if he had sufficient fuel."[27]

Similarly, in *Kohler v. Medline Inds., Inc.*, 453 So. 2d 908 (Fla. 4th DCA 1984), a trained nurse's aide neglected to close a urine bag. The contents spilled onto the floor, and another nurse slipped and fell in the resulting puddle. The nurse sued the bag manufacturer for warning and design defects. Citing *Kroon*, the Fourth District Court of Appeal likewise did not reach the design and warning issues but instead held that the nurse's aide's failure to close the urine bag was the sole proximate cause of the accident:

> This case is but a demonstration of human failing, and attempting to compensate therefor would be as futile as an attempt to reverse the seasons. McClellan's tardiness and Burnside's clumsiness at Antietam enabled Lee to hold. Redesign of the urine bag would have been no more relevant to the mental lapse of the nurse's aide here than improving those leaders' curriculum at West Point would have been to the outcome of that battle.[28]

In the same vein, the First District Court of Appeal in *Babine v. Gilley's Bronco Shop, Inc.*, 488 So. 2d 176 (Fla. 1st DCA 1986), found no design defect as a matter of law where the manufacturer of an "El Toro" mechanical bull did not include landing gear with its product. The manufacturer's warning of the need for

adequate landing gear was deemed sufficient to render the product not defective.[29]

Finally, in *Jennings v. BIC Corp.*, 181 F.3d 1250 (11th Cir. 1999), the 11th Circuit Court of Appeals held as a matter of law that a lighter was not defective for failing to contain childproof features. The warning "keep out of reach of children" was held sufficient to render the product not defective under Florida law. Interestingly, the court reached this conclusion under both strict liability and negligence theories. The court concluded that it "is not reasonable to require BIC to take all possible measures to ensure that its products could not be misused by anyone who might, even foreseeably, come into possession of them. Decisions of the Florida courts demonstrate that a maker or seller of a product need not go to extreme lengths to protect foreseeable users of its products."[30]

The *Jennings* decision drew a dissent from Judge Barkett. In her view, "Determining whether the manufacturer used reasonable care involves a balancing test wherein the likelihood and the gravity of the potential harm are weighed against the burden of the precaution necessary to avoid that harm. The majority's conclusion in this case—that, *as a matter of law*, a warning was sufficient and that anything more would represent an 'extreme' measure—has no basis in Florida law."[31] The dissent's language is strikingly similar to the Third Restatement approach and its preference for design safety over product warnings.[32]

Application of the Third Restatement in Florida

The Florida Supreme Court has not yet discussed the Third Restatement. At least one Florida appellate decision, however, has relied on it. In *Warren v. K-Mart Corp.*, 765 So. 2d 235 (Fla. 1st DCA 2000), a minor purchased CO_2 cartridges from K-Mart. He was blinded in his right eye when a companion fired from a pellet gun a pellet propelled by one of the cartridges. He sued K-Mart contending that the CO_2 cartridges should not have been sold to him. The case was dismissed with prejudice, and the minor appealed. In affirming the dismissal, the First District relied heavily on the Third Restatement in finding that the CO_2 cartridges were not defectively designed, nor was there a failure to warn of a hidden product defect. The court concluded, "The instant case is one, as suggested by the [Third] Restatement, where fairness requires the consumer to bear appropriate responsibility for proper product use in order to prevent careless users and consumers from being subsidized by more careful users."[33]

While the *Warren* decision may be an indication of things to come, the Third Restatement is not law in the state unless and until the Florida Supreme Court adopts it.[34] The Supreme Court undoubtedly will have occasion to consider the Third Restatement and may adopt some, all, or none of its provisions. How the court will act remains to be seen.

Conclusion

The Third Restatement emphasizes product design over product warnings and the obviousness of the danger. While Florida products liability law is less than clear in a number of respects (and could stand clarification), it does not suggest this preference. Florida courts traditionally have struck a reasonable balance between the competing needs for safe products on the one hand and individual responsibility on the other. Whatever the future holds for products liability law, Florida courts should maintain this common sense approach.

[1] The ALI is a private body that was organized in 1923. According to its charter, the ALI's purpose is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." *See* ALI website: www.ali.org. The ALI's bylaws authorize an elected membership of three thousand, consisting of "judges, lawyers, and law teachers from all areas of the United States as well as some foreign countries, selected on the basis of professional achievement and demonstrated interest in the improvement of the law." *Id.* About every 30 years, the ALI prepares a new Restatement of the Law of Torts (among other topic areas). Although the restatements do not have the force of law, they traditionally have been influential on the courts of the United States. The reporters of the Third Restatement were

Professor James Henderson, Jr., of Cornell Law School and Aaron Twerski of Brooklyn Law School, who were assisted in its preparation by a 20-person advisory committee composed of judges, law professors, and practicing members of the plaintiff and defense bars. *See* J. Denny Shupe & Todd R. Steggerda, *Toward a More Uniform and "Reasonable" Approach to Products Liability Litigation: Current Trends in the Adoption of the Restatement (Third) and its Potential Impact on Aviation Litigation*, 66 J. Air L. & Com. 129 n.2. (hereafter, "*Current Trends").*

[2] Restatement (Third) of Torts: Products Liability, Foreword (1997) (hereafter, "Restatement (Third)").

[3] *Id.* at Introduction.

[4] *See Current Trends, supra* note 1, at 131.

[5] *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

[6] Restatement (Third), Introduction.

[7] *Id.*

[8] For an overview of the Third Restatement, *see* Victor E. Schwartz, *The Restatement (Third) of Torts: Product Liability: a Guide to its Highlights*, 34 Tort & Ins. L.J. 85 (1998).

[9] *See* James A. Foster & Brian A. Schroeder, *Manufacturers Beware: The Attack on Product Warnings*, For The Defense, April 2001, at 27 (hereafter, "*Manufacturers Beware").*

[10] *See*, *e.g.*, *Ford Motor Co. v. Hill*, 404 So. 2d 1049 (Fla. 1981).

[11] *Manufacturers Beware, supra* note 9, at 27.

[12] Restatement (Third) at 101.

[13] *Id.* at Introduction.

[14] *Uniroyal,* 977 So. 2d at 332.

[15] *Id.* Mr. Martinez claimed that he thought he was mounting a 16-inch tire on a 16-inch rim.

[16] *Id.* at 335–38.

[17] *Id.*

[18] *Standard Jury Instructions - Civil Cases*, 778 So. 2d 264, 271 (Fla. 2000).

[19] *Id.* at 272.

[20] *Id.* The Florida Tort Reform Bill of 1999 provided additional defenses in product liability claims, namely, the government rules defense and the state-of-the-art defense. The former creates a rebuttable presumption that the product is not defective if it complies with governmental regulations and a rebuttable presumption that it is defective if it does not. Fla. Stat. §768.1256 (2000). The latter states that the finder of fact shall consider the state of the art that existed at the time the product was manufactured, not at the time of loss or injury. Fla. Stat. §768.1257 (2000).

[21] Restatement (Third) cmt. d.

[22] *Id.* cmt. g.

[23] *See High v. Westinghouse Elec. Corp.*, 610 So. 2d 1259 (Fla. 1992). However, strict liability in tort supplants breach of implied warranty of merchantability claims where there is no privity. *See Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37 (Fla. 1988).

[24] *See Thursby v. Reynolds Metals Co.*, 466 So. 2d 245 (Fla. 1st D.C.A. 1984), *rev. denied*, 476 So. 2d 676 (Fla. 1985).

[25] *Ferayorni,* 711 So. 2d at 1172 (citing *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal. 3d 1987, 281 Cal. Rptr. 528, 810 P. 2d 549, 558–59 (1991)).

[26] *See supra* note 18.

[27] *Kroon,* 628 F.2d at 893–94.

[28] *Kohler,* 453 So. 2d at 910.

[29] *Babine,* 488 So. 2d at 178.

[30] *Jennings,* 181 F.3d at 1257.

[31] *Id.* at 1262 (citations omitted).

[32] Of course, not all Florida cases resolve the issue of design defect as a matter of law or in the manufacturer's favor. *See, e.g.*, *Brown v. Glade and Grove Supply, Inc.*, 647 So. 2d 1033, 1035 (Fla. 4th D.C.A. 1994) ("By focusing on the issue of warnings, the trial court disregarded the disputed factual issue of defective design of the rear steering system raised by Plaintiff's engineering expert. Even if the warnings were adequate as a matter of law or unnecessary because of the obviousness of the danger, this would not remove from the jury the issue of defective design of the rear steering system.").

[33] *Id.*

[34] *See Current Trends* for a survey and discussion of the reactions of the highest state courts to the Third Restatement. States that have adopted sections of the Third Restatement include Iowa, New Jersey, and

Rhode Island. *Id.* States that have rejected sections of the Third Restatement include Connecticut, Kansas, Missouri, Montana, New Jersey, and Tennessee. *Id.*

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