The Restatements of Products Liability: Which One Should Oregon Follow?

OADC Magazine, Spring 2003
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In 1964, the American Law Institute (ALI) adopted section 402A of the Restatement (Second) of Torts. For over thirty years it has formed the backbone of strict product liability law across the nation. It has proven instrumental in Oregon’s product liability law since 1967. Under Oregon’s current statutory product liability scheme, strict liability standards must be construed in a manner consistent with the Restatement (Second) of Torts, § 402A, comments a-m.

Although it was originally intended to apply only to products with latent manufacturing defects, § 402A has also formed the basis for finding manufacturers liable for design defects and for failure to warn. It established a standard under which a manufacturer was to be held strictly liable if its product was sold in a “defective condition unreasonably dangerous to the user.”

Unfortunately, § 402A has proved lacking in detail and left practitioners with an abundance of ambiguities. Although most states claim, at least in part, to follow the Restatement (Second), its application differs greatly throughout the courts.

In 1997, ALI scrapped its previous work in favor of the Restatement of the Law Third of Torts: Products Liability (“Restatement (Third)”). In the Restatement (Third), the authors sought to exhaustively cover the contours of strict liability doctrine. What follows are some of the highlights.

Highlights of the Restatement (Third)

1. Proof of Defect

The Restatement (Third) limits the “strict liability” contemplated under §402A to claims of manufacturing defect and articulates a different standard, more akin to negligence, for design defects. It also rejects the “unreasonably dangerous” terminology of §402A. Under § 2(b), a product is defectively designed “when the foreseeable risks of harm*** could have been reduced or avoided by the adoption of a reasonable alternative design ***, and the omission of the alternative design renders the product not reasonably safe.” This imposes a “risk-utility” test, while incorporating negligence concepts. Indeed, comment n states that “[r]egardless of the doctrinal label attached to a particular claim, design and warning claims rest on a risk-utility assessment.” Consumer expectations are recognized merely as a risk factor under this standard. According to comment g:

[C]onsumer expectations do not play a determinative role in determining defectiveness****Nevertheless, consumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm, ****It follows that, while disappointment of consumer expectations may not serve as an independent basis for allowing recovery****, neither may conformance with consumer expectations serve as an independent basis for denying recovery."

This is significant because while a risk-utility test is utilized in many jurisdictions, courts often either (1) recognize an alternative consumer expectation test or (2) exclusively rely on a consumer expectations test. In addition, jurisdictions utilizing a risk-utility test do not necessarily require the plaintiff to bear the burden of demonstrating a reasonable alternative design.

2. Indeterminate Defect Claims
Section 3 of the Restatement (Third) explicitly recognizes res ipsa-type claims of product defect, akin to Oregon’s “indeterminate defect liability.”

3. Failure to Warn

Failure to warn claims are also subjected to a “reasonableness” standard, which is equally applicable to both negligence and strict liability claims. A product is defective “when the foreseeable risks of harm could have been reduced or avoided by the provision of reasonable instructions or warnings, and the omission of the instructions or warnings renders the product not reasonably safe.” This is similar to §402A, comment j, which provides that a seller must provide a warning “if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of the presence of the danger.” However, the Restatement (Third) rejects the rebuttal “heeding presumption” of comment j that, had an adequate warning been given, it would have been heeded and the danger avoided.

4. Post-Sale Activities Liability

Section 10 of the Restatement (Third) imposes limited post-sale obligations, even when a product was not defective at the time of sale. A supplier must use due care to provide post-sale warnings warn identifiable users and consumers of known or knowable risks that are sufficiently great to justify the burden of such warnings. This rule represents an expansion of potential liability in many states. In addition, there is liability for the failure to recall a product when required by government action or if a manufacturer undertakes a recall but negligently fails to carry it out in a reasonable manner.

5. Enhanced Injuries Caused by Product Defect

Comment a to §16 provides that “a manufacturer has a duty to design and manufacture its product so as reasonably to reduce the foreseeable harm that may occur in an accident brought about by causes other than a product defect.” A defendant may be liable for all injuries if the portion of injuries attributable to other causes cannot be determined.

6. Specific Liability Standards & Defenses for Prescription Drugs and Medical Devices

Section 6 of the Restatement (Third) carves out specific rules for imposing liability for prescription drug and medical device manufacturers. Although comment k to the Restatement (Second) provided an “unavoidably unsafe” defense to defective design claims, and such defense was viewed as particularly appropriate for drugs, some courts treated all types of products alike. Others have held that prescription products should be entirely immune from strict liability.

The Restatement (Third) limits design liability in the drug and medical device arena to cases in which “the foreseeable risks of harm are sufficiently great in relation to [the] foreseeable therapeutic benefits that reasonable health care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.” Essentially, the plaintiff must prove that the drug or device should not have been on the market. Section 6 also specifically adopts the learned intermediary rule, while recognizing an exception where the manufacturer knows or should have known that warning only the health care provider was insufficient.

7. Comparative Fault Adopted

Section 17 apportions responsibility among the plaintiff and defendants based on their respective percentages of fault. Plaintiff’s negligence proportionately reduces the recovery.

8. Product Misuse and Alteration; State of the Art; “Per Se” Defectiveness
Product misuse and alteration that is not reasonably foreseeable may potentially reduce or eliminate liability. The Restatement (Third) also specifically permits the admission of “state of the art” evidence, but only to determine whether an alternative design is reasonable. In addition, § 4 also recognizes a “per se” defect where the product fails to comply with “product safety statute[s] or administrative regulation[s].”

9. Successor Liability; Component Manufacturers

The Restatement (Third) rejects the “product line” theory of successor liability which holds purchasers of manufacturing assets liable for the products made by the seller prior to the asset purchase. It also provides that, while component part manufacturers are liable if the plaintiff establishes that the component is defective in and of itself and if such defect caused the injury or damage, liability generally may not be based upon defective incorporation of the component part into the subject product.

The Restatement (Third)’s Impact: Other States

Although a few states have expressly adopted portions of the Restatement (Third) (New Jersey; Iowa (post-sale duty to warn); Rhode Island (component part liability), courts appear reluctant to abandon conflicting precedent set over the past few decades. Some states, including Oregon, have codified the doctrines of the predecessor Restatement (Second). Other states, including Connecticut, Kansas, Missouri, Montana, Montana, New Jersey, Tennessee and Wisconsin, have already rejected portions of the Restatement (Third).

Impact in Oregon?

In Oregon, the courts by and large have ignored the Restatement (Third), and continue to look to ORS 30.920 and, by reference, the Restatement (Second).

In Griffith v. Blatt (2002), despite the existence of the learned intermediary defense in the Restatement (Third), the Oregon Supreme Court recently rejected the learned intermediary doctrine, at least in part, based on the absence of its explicit mention in the Restatement (Second):

The Court of Appeals' analysis of the learned intermediary doctrine failed to acknowledge that Oregon statutes, not the common law, govern plaintiff's strict liability claim****

Neither the text nor the context of those statutes indicates that the legislature intended to relieve a seller from potential strict product liability on the basis of the adequacy of a manufacturer's product warnings to another intermediary (here, the physician). By contrast, Section 402A of the Restatement (Second) of Torts, referred to in ORS 30.920(3), indicates that the legislature intended to create no such protection from strict liability.

More recently, in Mlodinoff v. Sony Online Entertainment, Inc., Judge Jelderks considered the Restatement (Third)’s definition of “product,” where plaintiff contends an on-line video game caused him to suffer seizures. Ultimately, the Court did not find the definition helpful, and noted that the “***Oregon courts have not decided whether the Restatement (Third) of Torts should be adopted.”

While the Restatement (Third) is instructive on many issues in product liability cases, absent legislative action, Oregon courts are likely to continue to apply ORS 30.920 and the body of case law which has grown up around it and the Restatement (Second). Given that the Restatement (Third) addresses so many issues beyond the contemplation of the drafters of §402A nearly four decades ago, perhaps the time has come for Oregon to consider a change.