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# A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability

Michael K. Steenson

*Mitchell Hamline School of Law*, [mike.steenson@mitchellhamline.edu](mailto:mike.steenson@mitchellhamline.edu)

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# A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability

## **Abstract**

This Article compares the Restatement (Third) of Torts: Products Liability with Minnesota products liability law. The Restatement (Third) of Torts: Products Liability provides a yardstick for measuring products liability law in each individual state. Minnesota's law is largely similar to the rules set out in the Restatement. While Minnesota has not yet adopted all of the positions in all of the rules, the Minnesota Supreme Court has taken positions on the rules governing liability, which are substantially the same. It no longer seems possible to argue that negligence principles do not control in cases involving design defect and failure to warn. The strict liability vernacular may still be used in design defect cases, but the important question is whether the supreme court's statement in *Kallio v. Ford Motor Co.*, that proof of a feasible alternative is not part of the plaintiff's prima facie case in a design case, establishes a meaningful wall between the theories. This article proceeds on a section-by-section basis, explaining each section of the Restatement (Third) and comparing it to Minnesota law.

## **Keywords**

Minnesota law, economic loss, product defect, manufacturing defect, Commercial Seller, distributor, manufacturer, integration, recall

## **Disciplines**

Torts

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PRODUCTS LIABILITY LAW AND THE RESTATEMENT  
(THIRD) OF TORTS: PRODUCTS LIABILITY**

Mike Steenson†

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† Margaret H. and James E. Kelley Professor of Tort Law, William Mitchell College of Law. The author wishes to thank Brian McMahon, student at William Mitchell College of Law, for research assistance on this article.

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## INTRODUCTION

Minnesota adopted strict products liability law in 1967 in *McCormack v. Hanksraft Co.*<sup>1</sup> *McCormack* sanctioned section 402A of the *Restatement (Second) of Torts* as the law in Minnesota.<sup>2</sup> Since then, the Minnesota courts have developed a comprehensive, yet incomplete, products liability scheme. In so doing, the courts have addressed issues such as the basic liability rules applicable in products liability cases, the relationship between negligence and strict liability theories, the interaction between the Uniform Commercial Code and products liability law, and the principles of loss allocation.<sup>3</sup>

1. 278 Minn. 322, 154 N.W.2d 488 (1967).

2. See *id.* at 338, 154 N.W.2d at 500.

3. See, e.g., *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984) (addressing the basic liability rules applicable in products liability cases and the relationship between negligence and strict liability theories); *S.J. Grove & Sons v. Aeropatiale Helicopter*, 374 N.W.2d 431 (Minn. 1995) (addressing the interaction between the U.C.C. and products liability law); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977) (addressing principles of loss allocation).

The *Restatement (Second) of Torts* was the Reporters' vision of the law, as it existed in 1965. Section 402A and its seventeen comments stated the law of strict liability.<sup>4</sup> It was a rudimentary effort to solidify basic products liability principles. *The Restatement (Third) of Torts: Products Liability*, building on thirty years of case law, overshadows the *Restatement (Second)* in its comprehensiveness. It attempts to reach consensus on the status of products liability law in a politically charged environment populated by interest groups with distinct and conflicting interests.<sup>5</sup> The *Restatement (Third) of Torts* includes twenty-one sections that discuss liability standards for sales of products by commercial sellers, post-sale obligations of sellers, and loss allocation principles.<sup>6</sup> It offers detailed guidance on the kinds of transactions and products to which products liability law will apply.<sup>7</sup>

Generally speaking, current Minnesota law and the *Restatement (Third) of Torts* seem to be a good fit. Both deal with the perpetual tension between negligence and strict liability principles. The *Restatement (Third)* emphasizes that negligence concepts are at the base of design defect and failure to warn claims in its rules.<sup>8</sup> Minnesota law helps to reinforce that conclusion.

There are gaps, however, between Minnesota law and the *Restatement (Third)*. For example, Minnesota law regarding post-sale obligations of product sellers is not fully formed, despite its similarities to the *Restatement (Third)*.<sup>9</sup> As well, there are some differences in the way claims for economic loss and property damage are treated.<sup>10</sup>

This Article will compare the *Restatement (Third) of Torts* with

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4. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

5. See *Products Liability Symposium*, 30 MICH. J.L. REF. 197 (1997).

6. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-21 (Proposed Final Draft, April 1, 1997) [hereinafter Proposed Final Draft].

7. See Proposed Final Draft, *supra* note 6, § 19 (defining a product); §§ 3, 6, 8, 11-14 (addressing various transactions).

8. See Proposed Final Draft, *supra* note 6, § 2.

9. The *Restatement (Third)* imposes a post-sale duty to warn only when a reasonable person in the product seller's position would provide the warning. See Proposed Final Draft, *supra* note 6, § 10. Similarly, the Minnesota Supreme Court held that a continuing duty to warn post-sale arises only in special cases where the circumstance create the duty. See *Hodder v. Goodyear Rubber & Tire Co.*, 426 N.W.2d 826, 833 (Minn. 1988) (holding that Goodyear's continued sale of tires fitting a discontinued tire rim created the duty to warn), *cert. denied*, 492 U.S. 926 (1989).

10. See *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 565 N.W.2d 16 (Minn. 1997) (explaining that purchasers of goods may sue for economic damage but other parties must show physical injury).

Minnesota products liability law. The comparison proceeds on a section-by-section basis, explaining each section and comparing it to Minnesota law.

### § 1. LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR FOR HARM CAUSED BY DEFECTIVE PRODUCTS

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the product defect.<sup>11</sup>

#### Commentary

Section 1 “states a general rule of tort liability applicable to commercial sellers and other distributors of products.”<sup>12</sup> It is based on both warranty and tort law.<sup>13</sup> Likewise, Minnesota products liability law has both tort and warranty origins.<sup>14</sup>

Section 1 does not use the term “strict liability,” unlike section 402A of the *Restatement (Second) of Torts*.<sup>15</sup> This reflects the ALI’s judgment that true “strict liability” principles are not readily applicable to cases involving defective design and failure to warn cases:

“[S]trict products liability” is a term of art that reflects the judgment that products liability is a discrete area of tort law which borrows from both negligence and warranty. It is not fully congruent with classical tort or contract law. Rather than perpetuating confusion spawned by existing doctrinal categories, §§ 1 and 2 define the liability for each form of defect in terms directly addressing the various kinds of defects. As long as these functional criteria are met, courts may utilize the terminology of negligence, strict liability or the implied warranty of merchantability, or simply define liability in the terms set forth in the black letter.<sup>16</sup>

Justice Simonett posited essentially the same argument in his

11. Proposed Final Draft, *supra* note 6, § 1.

12. *Id.* cmt. a.

13. *See id.*

14. *See, e.g.,* McCormack v. Hanksraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970); Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959).

15. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

16. Proposed Final Draft, *supra* note 6, § 1 cmt. a.

concurring opinion in *Bilotta v. Kelley Co.*,<sup>17</sup> which was later incorporated in the Minnesota Civil Jury Instructions.<sup>18</sup> With that in mind, one need not determine whether the theory of recovery is negligence or strict liability, so long as the plaintiff receives the benefit of the strongest and broadest theory of recovery, at least in design and failure to warn cases.<sup>19</sup>

Ultimately, Section 1 reflects the general treatment of product defects by the Minnesota Supreme Court, dividing products liability cases into manufacturing flaw, design defect, and failure to warn categories.<sup>20</sup>

Minnesota limits the application of strict liability to product sellers, including product manufacturers and other parties in the chain of distribution.<sup>21</sup> In certain situations, however, Minnesota statutorily exempts sellers in the chain of manufacture and distribution from liability. Section 544.41 of the Minnesota Statutes reads as follows:

Subdivision. 1. In any product liability action based in whole or in part on strict liability in tort commenced or maintained against a defendant other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based in whole or part on strict liability in tort against a certifying defendant shall toll the applicable statute of limitation relative to the defendant for purposes of asserting a strict liability in tort cause of action.

Subd. 2. Once the plaintiff has filed a complaint against a manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant, provided the certifying defendant is not within the categories set forth in subdivision 3. Due diligence shall be exercised by the certifying

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17. 346 N.W.2d 616, 626 (Minn. 1984).

18. See MINNESOTA DIST. JUDGES ASS'N COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 117-119 (Michael K. Steenson, rep.) in 4 MINN. PRACTICE 1, at 81-90 (3d ed. 1986) [hereinafter JURY INSTRUCTION GUIDES].

19. See JURY INSTRUCTION GUIDES, *supra* note 18, JIG 117, Authorities at 83.

20. See Proposed Final Draft, *supra* note 6, § 6 cmt. a.

21. See *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 156 (Minn. 1982); *O'Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826, 830-32 (Minn. 1977); *Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 361, 216 N.W.2d 859, 864 (1974).

defendant in providing the plaintiff with the correct identity of the manufacturer and due diligence shall be exercised by the plaintiff in filing a law suit and obtaining jurisdiction over the manufacturer.

The plaintiff may at any time subsequent to dismissal move to vacate the order of dismissal and reinstate the certifying defendant, provided plaintiff can show one of the following:

(a) That the applicable statute of limitation bars the assertion of a strict liability in tort cause of action against the manufacturer of the product allegedly causing the injury, death or damage;

(b) That the identity of the manufacturer given to the plaintiff by the certifying defendant was incorrect. Once the correct identity of the manufacturer has been given by the certifying defendant the court shall again dismiss the certifying defendant;

(c) That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this state, or, despite due diligence, the manufacturer is not amenable to service of process;

(d) That the manufacturer is unable to satisfy any judgment as determined by the court; or

(e) That the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff.

Subd. 3. A court shall not enter a dismissal order relative to any certifying defendant even though full compliance with subdivision 1 has been made where the plaintiff can show one of the following:

(a) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which has caused the injury, death or damage;

(b) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(c) That the defendant created the defect in the product which caused the injury, death or damage.

Subd. 4. Nothing contained in subdivisions 1 to 3



shall be construed to create a cause of action in strict liability in tort or based on other legal theory, or to affect the right of any person to seek and obtain indemnity or contribution.<sup>22</sup>

Minnesota requires proof of three basic elements in a products liability case: (1) that the defendant's product was in a defective condition unreasonably dangerous for its intended use, (2) that the defect existed when the product left the defendant's control, and (3) that the defect was the proximate cause of the injury sustained.<sup>23</sup> The elements in Section 1 are similar to Minnesota law, but a subtle difference exists. Section 1 eliminates use of the term "unreasonably dangerous" and now requires proof that the product was in a "defective condition."<sup>24</sup> The Minnesota Supreme Court traditionally adheres to the "unreasonably dangerous" requirement,<sup>25</sup> but has not used it as a dispositive element in all products liability cases.<sup>26</sup> Even so, whether the term "unreasonably dangerous" is used seems irrelevant. The critical factor is how the term is defined, rather than the term itself.<sup>27</sup> Consequently, eliminating the "unreasonably dangerous" language from jury instructions would not change the substance of the standards used to determine liability issues.

## § 2. CATEGORIES OF PRODUCT DEFECT

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. A product:

- (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
- (b) is defective in design when the foreseeable risks of

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22. MINN. STAT. § 544.41 (1996).

23. See *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 623 n.3 (Minn. 1984); *Aby v. St. Paul Union Stockyards*, 373 N.W.2d 810, 812 (Minn. Ct. App. 1985); *Smits v. E-Z Por Corp.*, 365 N.W.2d 352, 354 (Minn. Ct. App. 1985); see also *Worden v. Gangelhoff*, 308 Minn. 252, 254-55, 241 N.W.2d 650, 651 (1976) (stating that these basic elements are common to strict liability, negligence, and implied warranty theories of recovery).

24. See Proposed Final Draft, *supra* note 6, § 1 cmt. a.

25. See *Bilotta*, 346 N.W.2d at 623 n.3.

26. See, e.g., *Hudson*, 326 N.W.2d at 155; *Kerr v. Corning Glass Works*, 284 Minn. 115, 117, 169 N.W.2d 587, 588 (1969).

27. See *Bilotta*, 346 N.W.2d at 626 (Simonett, J., concurring specially).

harm posed by the product could have been reduced by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) 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.<sup>28</sup>

### Commentary

The *Restatement (Third)* utilizes different standards for each type of product defect. With respect to manufacturing defects, the *Restatement (Third)* imposes liability even if the manufacturer exercises reasonable care in its quality control efforts.<sup>29</sup> Strict liability in this context fosters several objectives such as promoting safety, discussing consumption of defective products, and reducing litigation costs. Specifically, the *Restatement (Third)* notes:

On the premise that tort law serves the instrumental function of creating safety initiatives, imposing strict liability on manufacturers for harm caused by manufacturing defects encourages greater investment in product safety than does a regime of fault-based liability under which, as a practical matter, sellers may escape their appropriate share of responsibility. Some courts and commentators also have said that strict liability discourages the consumption of defective products by causing the purchase prices of products to reflect, more than would a rule of negligence, the costs of defects. And by eliminating the issue of manufacturer fault from plaintiff's case, strict liability reduces the transaction costs involved in litigating that issue.<sup>30</sup>

In addition, there are important fairness concerns that support the imposition of liability on a manufacturer. Liability results

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28. Proposed Final Draft, *supra* note 6, § 2.

29. *See id.* cmt. a.

30. *Id.*

even when the plaintiff cannot prove that the manufacturer's quality control standards are unreasonable. The *Restatement (Third)* provides:

In many cases manufacturing defects are in fact caused by manufacturer negligence but plaintiffs have difficulty in proving it. Strict liability therefore performs a function similar to the concept of *res ipsa loquitur*, allowing deserving plaintiffs to succeed notwithstanding what would otherwise be difficult or insuperable problems of proof. Products that malfunction due to manufacturing defects disappoint reasonable expectations of product performance. Because manufacturers invest in quality control at consciously chosen levels, their knowledge that a predictable number of flawed products will enter the marketplace entails an element of deliberation about the amount of injury that will result from their activity. Finally, many believe that consumers who benefit from products without suffering harm should share, through increases in the prices charged for those products, the burden of unavoidable injury costs that result from manufacturing defects.<sup>31</sup>

While not clearly articulated in Minnesota cases, some of the above reasons have motivated the supreme court's application of strict liability in products liability cases involving manufacturing defects.<sup>32</sup>

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31. *Id.*

32. *See, e.g., Lee v. Crookston Coca-Cola Bottling Co.*, 290 Minn. 321, 327-28, 188 N.W.2d 426, 431 (1971); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967). In *McCormack*, the supreme court adopted the theory of strict liability and noted:

This rule of strict tort liability, as it is appropriately called, qualifies as a tested legal theory along with the traditional theories of negligence and breach of warranty where the latter meet the purpose for which liability should be imposed upon a supplier of a product. However, in our view, enlarging a manufacturer's liability to those injured by its products more adequately meets public-policy demands to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions. In a case such as this, subjecting a manufacturer to liability without proof of negligence or privity of contract, as the rule intends, imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of upon the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences.

*McCormack*, 278 Minn. at 338, 154 N.W.2d at 500.

In *Lee*, the court summarized the policy concerns noted in *McCormack* and

The *Restatement (Third)* posits that liability cases involving design defects and defects based on inadequate instructions or warnings are predicated on concepts different from manufacturing defect cases.<sup>33</sup> Whether there is a design defect cannot be decided using the manufacturer's own design standards, as in manufacturing defect cases, because the plaintiff attacks the standard itself as unreasonable.<sup>34</sup> Therefore, some form of risk-utility balancing is necessary to determine whether the design standard is unreasonable.<sup>35</sup> Furthermore, a product is not defective just because it presents an element of danger.<sup>36</sup> A manufacturer must balance a variety of factors when selecting a particular design, and any standard of liability should focus on those tradeoffs to determine if the design is flawed or the warnings or instructions are inadequate.

The *Restatement's* definition of "defective condition" coincides with the Minnesota definition adopted in *Bilotta*.<sup>37</sup> The policy considerations are the same. Both permit a jury to evaluate the utility as well as the risk created by a particular product in order to de-

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elsewhere, as follows:

- (1) The public interest in safety will be promoted by discouraging the marketing of defective products which constitute a menace to consumers not equipped to protect themselves from products they are induced to purchase through modern advertising methods by persuasive representations that the product is suitable and safe for its intended use; (2) the burden of loss caused by placing a defective product on the market should be borne by the manufacturer, who is best able to distribute it by insuring against inevitable hazards as a part of the cost of the product; (3) maximum legal protection should be afforded the consumer to promote product safety and to encourage the growing practice of reputable manufacturers and sellers of settling valid claims without litigation; and (4) one injured by a defective product should be entitled to bring action directly against the party responsible for putting the product on the market without becoming involved in the delay and expense of joining other sellers in the chain of distribution, as frequently occurs when liability is sought to be determined under warranty provisions of the Uniform Commercial Code.

*Lee*, 290 Minn. at 327-28, 188 N.W.2d at 431-32.

The *Lee* court noted that the greatest impediment to establishing strict liability under the *Restatement (Second)* rule is proving that the product was defective and that the defect existed when it left the manufacturer's hands. *See id.* at 329, 188 N.W.2d at 432. The court held that the core of the *res ipsa loquitur* doctrine is sufficient to take a case involving an exploding bottle to a jury on a theory of strict liability, as well a negligence theory. *See id.* at 329-30, 188 N.W.2d at 432-33. The court intended to ease the plaintiff's burden of proof in such cases.

33. *See* Proposed Final Draft, *supra* note 6, § 2 cmt. a.

34. *See id.* § 2 cmt. d.

35. *See id.*

36. *See id.*

37. *See id.* § 2; *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984).

termine which costs should be fairly borne by the manufacturer.<sup>38</sup> The *Restatement (Third)* rejects the consumer expectation standard as a means of determining whether a product is defective.<sup>39</sup> The Minnesota Supreme Court did the same in *Bilotta*.<sup>40</sup>

Prior to *Bilotta*, the standard approach to products liability cases was reflected in the second edition of the *Civil Jury Instruction Guides*:

A product is in a defective condition if, at the time it leaves the seller's hands, it is in a condition which is unreasonably dangerous to the ordinary user.

A condition is unreasonable dangerous if it is dangerous when used by an ordinary user who uses it with the knowledge common to the community as to the product's characteristics and common usage.

The defect may be in the design of the product itself or in the instructions necessary for its safe use.<sup>41</sup>

The instruction, although rudimentary, appeared all-encompassing. Use of the instruction, when coupled with other standards, occasionally resulted in inconsistent jury verdicts.<sup>42</sup> Prior to *Bilotta*, the Minnesota Supreme Court edged toward a comprehensive theory in defective design cases. In 1982, the supreme court rejected obviousness of a product danger as a bar to recovery in *Holm v. Sponco Mfg., Inc.*<sup>43</sup> The *Holm* decision overruled *Halvorson v. American Hoist & Derrick Co.*,<sup>44</sup> which held only six years earlier that obviousness could bar recovery.<sup>45</sup> The current Minnesota approach is reflected in the *Restatement*.<sup>46</sup> Obviousness of the danger is only one factor among many in determining whether a product is defective.<sup>47</sup>

38. See Proposed Final Draft, *supra* note 6, § 2 cmt. a; *Bilotta*, 346 N.W.2d at 622.

39. See Proposed Final Draft, *supra* note 6, § 2 cmt. a.

40. See *Bilotta*, 346 N.W.2d at 622.

41. MINNESOTA DIST. JUDGES ASS'N COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG II 118 (Hetland & Adamson, reps.) in 4 MINN. PRACTICE 1, at 98 (2d ed. 1974).

42. See, e.g., *Halvorson v. American Hoist & Derrick Co.*, 307 Minn. 48, 240 N.W.2d 303 (1976) (reversing jury verdict that danger of electrocution was obvious), *overruled on other grounds by Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207 (Minn. 1982).

43. 324 N.W.2d 207 (Minn. 1982).

44. 307 Minn. 48, 240 N.W.2d 303 (1976).

45. See *id.* at 57, 240 N.W.2d at 308.

46. See Proposed Final Draft, *supra* note 6, § 2 cmt. d.

47. See *Holm*, 324 N.W.2d at 212.

*Bilotta* was a design defect case involving an allegedly defective dockboard.<sup>48</sup> The manufacturer made conscious design choices when it adopted the design in question.<sup>49</sup> The trial court instructed the jury using the *Restatement (Second) of Torts*' consumer expectation standard. The result was in a plaintiff's verdict.<sup>50</sup> On appeal, the supreme court reversed, holding that the standard was unduly narrow in design cases:

JIG II 118 was formulated for the qualitatively different product defect of inadvertent manufacturing flaws. In such a case an objective standard exists—the flawless product—by which a jury can measure the alleged defect. Thus, in manufacturing-flaw cases, the defect is proved by focusing on the condition of the product. The JIG II 118 consumer expectation instructions, which focus only on the condition of the product, are appropriate for this type of case, since the manufacturer's conduct is irrelevant.

In a design defect case, however, there is no doubt that the product is in the condition intended by the manufacturer. In such a case, the "defect" lies in a consciously chosen design. The manufacturer has deliberately added or omitted the challenged component and has presumably made that decision after balancing a variety of factors. A jury must, appellant contends, be told to weigh these same factors and decide whether the risk-utility balance struck by the manufacturer was or was not reasonable. In *Holm v. Sponco*, we adopted as an objective standard the reasonable care balancing test, which focuses on the conduct of the manufacturer in evaluating whether its choice of design struck an acceptable balance among several competing factors.<sup>51</sup>

The position taken in the *Civil Jury Instruction Guides* attempts to outline the court's decision. The instruction reads as follows:

A manufacturer has a duty to use reasonable care when designing a product, so as to avoid any unreasonable risk of harm to (anyone who) (property that) is likely to be exposed to harm when the product is put to its intended use or to any use that is unintended but is reasonably foreseeable.

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48. See *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 619 (Minn. 1984).

49. See *id.*

50. See *id.* at 621.

51. *Id.* at 621-22.

What constitutes reasonable care will vary with the surrounding circumstances. Reasonable care is the care that a reasonably prudent person would exercise under the same or similar circumstances.

The reasonable care to be exercised by a manufacturer when designing a product will depend on all the facts and circumstances, including, among others, the likelihood and seriousness of harm against the feasibility and burden of any precautions which would be effective to avoid the harm. You are instructed that the manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field.

If the manufacturer did not use reasonable care when designing the product in question, then the product is in a defective condition unreasonably dangerous to the (user or consumer) (user's or consumer's property).<sup>52</sup>

With this approach, the plaintiff receives the same instruction whether the theory alleged is strict liability or negligence.<sup>53</sup> The instruction informs the jury that the product is defective if the manufacturer failed to use reasonable care in designing the product.<sup>54</sup> Unless other distinctions between strict liability and negligence surface, these theories are simply different labels without any substantive distinctions between them.<sup>55</sup> In *Bilotta*, the court stated that, "the distinction between strict liability and negligence in design-defect and failure-to-warn cases is that in strict liability, knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer, whereas in negligence these elements must be proven."<sup>56</sup> The implication is that knowledge of product dangers is imputed to product manufacturers irrespective of whether they reasonably know or should have known of the dangers. The issue is whether the court really meant what it said.

The *Restatement (Third)* notes that foreseeability of the risk is rarely an issue in design defect cases that involve mechanical product:

Once the plaintiff establishes that the product was put

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52. JURY INSTRUCTION GUIDES, *supra* note 18, JIG 117, at 82.

53. *See id.* Authorities at 83.

54. *See id.* Authorities at 82-83.

55. *See id.*

56. *Bilotta*, 346 N.W.2d at 622; *see also* JURY INSTRUCTION GUIDES, *supra* note 18, JIG 117, Authorities at 83.

to a reasonably foreseeable use, physical risks of injury are generally known or reasonably knowable by experts in the field. It is not unfair to charge a manufacturer with knowledge of such generally known or knowable risks.

The issue of foreseeability of risk of harm is more complex in the case of products such as prescription drugs, medical devices, and toxic chemicals. Risks attendant to use and consumption of these products may, indeed, be unforeseeable at the time of sale. Unforeseeable risks arising from foreseeable product use or consumption by definition cannot specifically be warned against. Thus, in connection with a claim of inadequate design, instruction, or warning, plaintiff should bear the burden of establishing that the risk in question was known or should have been known to the relevant community.<sup>57</sup>

The *Civil Jury Instruction Guides* take the following position on the issue:

In a case where the design defect was the result of an error, or where the decision was not made with clear knowledge of its ramifications, it may be appropriate to add to the jury instruction language incorporating the imputed knowledge concept. The following addition to the jury instruction would incorporate that concept:

You are to assume that the manufacturer knew of the condition of the product and the risks involved in the product's condition in determining whether reasonable care was exercised in the design of the product.<sup>58</sup>

The concern expressed in the accompanying comments is similar to the *Restatement's*:

If the imputed knowledge language is applied literally in either design defect or failure to warn cases, then the manufacturer's conduct in either design defect or failure to warn cases would be judged according to knowledge of product dangers that the manufacturer did not discover and could not have discovered. However, the Committee is of the opinion that the supreme court did not intend to impute to a product manufacturer knowledge of a danger that was not and could not have been discovered at the time the product was manufactured. To avoid applying the imputed knowledge language in such cases, the sug-

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57. Proposed Final Draft, *supra* note 6, § 2 cmt. m.

58. JURY INSTRUCTION GUIDES, *supra* note 18, JIG 117, Authorities at 84.



gested instruction incorporating the imputed knowledge language should be utilized only where there is evidence that the manufacturer either knew or should have known of the dangers created by the product in question.<sup>59</sup>

Under the *Restatement* standard, the plaintiff must show that foreseeable risks of harm could be reduced by the adoption of “a reasonable, safer design.”<sup>60</sup> The *Restatement* notes that “state of the art”:

has been variously defined to mean that the product design conforms to industry custom, that it reflects the safest and most advanced technology developed and in commercial use, or that it reflects technology at the cutting edge of scientific knowledge. This Section states that a design is defective if the product could have been made safer by the adoption of a reasonable alternative design. If such a design could have been practically adopted at time of sale and if failure to adopt such a design rendered the product not reasonably safe, the plaintiff establishes defect under Subsection (b). When a defendant demonstrates that its product design was the safest in use at the time of sale, it may be difficult for plaintiff to prove that an alternative design could have been practically adopted. Defendant is thus allowed to introduce evidence with regard to industry practice that bears on whether an alternative design was practicable. Industry practice may also be relevant to whether the omission of an alternative design rendered the product not reasonably safe. While such evidence of industry practice is admissible, it is not necessarily dispositive. If plaintiff introduces expert testimony to establish that a reasonable alternative design could practically have been adopted, a trier of fact may conclude that the product was defective notwithstanding that such a design was not adopted by any manufacturer, or even considered for commercial use, at the time of sale.<sup>61</sup>

In apparent contrast, the Minnesota Supreme Court in *Kallio v. Ford Motor Co.*<sup>62</sup> took the position that “existence of a safer, practical alternative design is not an element of an alleged defective

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59. *Id.*

60. Proposed Final Draft, *supra* note 6, § 2 cmt. d.

61. *Id.*

62. 407 N.W.2d 92 (Minn. 1987).

product design prima facie case.”<sup>63</sup> In *Kallio*, the trial court used JIG 117 of the third edition as the base instruction and instructed the jury that it could consider other factors, including “state of the art” and the “practices of the automotive industry” at the time the truck was sold.<sup>64</sup> The court approved the instructions, noting that the “tenor, if not the literal wording, of the instructions permitted the jury to consider availability of, and failure to use, an alternative, safer design as a factor.”<sup>65</sup>

Ford Motor Co.’s requested instruction was lengthier, and it was framed in mandatory terms:

For you to conclude that the design of the park system in the subject Ford vehicle was defective and unreasonably dangerous at the time of sale by Ford Motor Company, the plaintiff must establish by a preponderance of the evidence that, at the time the vehicle was designed, there was available to the defendant a feasible practicable alternative design and that that design, if it had been chosen by Ford, would have avoided or materially reduced the plaintiff’s injury. If the plaintiffs fail to prove the existence of such a feasible, practicable alternative design, they will be unable to prove that Ford’s choice of design was unreasonable. The plaintiff cannot carry his burden in this regard merely by showing that an alternative design was possible. To succeed in this case the plaintiffs must establish that such a design would have been feasible and practicable, and that it would have avoided or materially reduced the plaintiff’s injury.<sup>66</sup>

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63. *Id.* at 97.

64. *See id.* at 96.

65. *Id.* at 97.

66. *Id.* at 94 n.4. The *Civil Jury Instruction Guides* contain a suggested jury instruction on the feasible alternative issue, should a court choose to instruct on the issue:

In deciding if the suggested alternative design was feasible at the time the product in question was manufactured, there are several factors you must consider. First, was the suggested alternative design technologically feasible? This means that, given the technology available at the time the product was manufactured, the suggested alternative was technically available.

Second, you must consider the safety of the suggested alternative. Does it provide overall safety as good as or better than that of the product in question, and does it provide better protection against the particular hazard or risk of injury created by the product in question.

Third, you must consider the cost of the suggested alternative. Will the suggested alternative significantly increase the cost of the product in question.

The supreme court found the requested instruction overly broad for two reasons. First, it elevated the feasible alternative requirement to part of the plaintiff's prima facie case. Second, it tended to overemphasize the reasonable alternative factor.<sup>67</sup>

The supreme court sanctioned the trial court's instruction, because it included "state of the art" as a factor in design defect cases. Despite this sanction, the court clearly noted the importance of state of the art evidence in design litigation.<sup>68</sup> First, the court noted that "as a practical matter, successful plaintiffs, almost without fail, introduce evidence of an alternative safer design."<sup>69</sup> Second, the court noted that a plaintiff normally presents such evidence, and it is appropriate for the jury to consider state of the art evidence. The court explained:

As in other tort cases, plaintiffs asserting a strict liability tort claim based upon alleged defective design of a product ultimately have the burden to prove the elements of the asserted claim. Generally in a case based upon alleged improper design, one of those elements requires production of evidence that the design employed was unreasonably dangerous. To establish a prima facie case that it was unreasonably dangerous normally requires production of evidence of the existence of a feasible, alternative design.<sup>70</sup>

The court concluded that while the evidence is relevant and may be pivotal in deciding design cases, "it is not necessarily required in all cases."<sup>71</sup> If there is any potential difference between the *Restatement* and Minnesota positions on design defect, it is in

Fourth, you must consider whether the suggested alternative will affect the performance of the product.

Before you find the suggested alternative to be feasible, you must find that any increases in the cost of the product or changes in the performance and function of the product are outweighed by the added safety of the alternative design.

JURY INSTRUCTION GUIDES, *supra* note 18, JIG 117, Authorities at 85. The instruction is based on *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978). *See id.*

67. *See Kallio*, 407 N.W.2d at 97. The Minnesota pattern jury instructions include an instruction on custom, stating that the evidence is not conclusive on the due care issue, but is to be considered by the jury, "along with all the other evidence in the case in deciding whether the (plaintiff) or (defendant) exercised reasonable care." JURY INSTRUCTION GUIDES, *supra* note 18, JIG 101.1, at 51.

68. *See Kallio*, 407 N.W.2d at 96-97.

69. *Id.* at 96 n.6.

70. *Id.* at 96.

71. *Id.* at 96-97.

this language in *Kallio*. The court footnoted the statement<sup>72</sup> and referred to two cases: *Wilson v. Piper Aircraft Corp.*,<sup>73</sup> a 1978 Oregon Supreme Court case, and *O'Brien v. Muskin Corp.*,<sup>74</sup> a 1983 New Jersey Supreme Court case. The court prefaced the citation to those cases by stating that, "[c]onceivably, rare cases may exist where the product may be judged unreasonably dangerous because it should be removed from the market rather than be redesigned."<sup>75</sup>

*Wilson* reflects the Minnesota Supreme Court's concern, but without being specific. The court stated:

If, for example, the danger was relatively severe and the product had only limited utility, the court might properly conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce. We hold here only that, given the nature of the product and of the defects alleged, it was improper to submit the issue of a defect in the engine design to the jury in the absence of appropriate evidence that the safer alternative design was practicable.<sup>76</sup>

*O'Brien*, however, is more specific.<sup>77</sup> Central to the case was the feasible alternative requirement.<sup>78</sup> The court rejected the necessity of proving a feasible alternative in all cases. It stated:

The evaluation of the utility of a product also involves the relative need for that product; some products are essentials, while others are luxuries. A product that fills a critical need and can be designed in only one way should be viewed differently from a luxury item. Still other products, including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others. That cost might dissuade a manufacturer from placing the product on the market, even if the product has been made as safely as possible. Indeed, plaintiff contends that above-ground pools with vinyl liners are such products and that manufacturers who market those pools should bear the cost of injuries they cause to foreseeable users.

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72. *See id.* at 97 n.8.

73. 577 P.2d 1322 (Or. 1978).

74. 463 A.2d 298 (N.J. 1983).

75. *Kallio*, 407 N.W.2d at 97 n.8.

76. *Wilson*, 577 P.2d at 1328 n.5.

77. *See O'Brien*, 463 A.2d at 298 (involving an above-ground swimming pool that utilized a vinyl liner).

78. *See id.* at 306.

A critical issue at trial was whether the design of the pool, calling for a vinyl bottom in a pool four feet deep, was defective. The trial court should have permitted the jury to consider whether, because of the dimensions of the pool and slipperiness of the bottom, the risks of injury so outweighed the utility of the product as to constitute a defect. In removing that issue from consideration by the jury, the trial court erred. To establish sufficient proof to compel submission of the issue to the jury for appropriate fact-finding under risk-utility analysis, it was not necessary for plaintiff to prove the existence of alternative, safer designs. Viewing the evidence in the light most favorable to plaintiff, even if there are no alternative methods of making bottoms for above-ground pools, the jury might have found that the risk posed by the pool outweighed its utility.

In a design-defect case, the plaintiff bears the burden of both going forward with the evidence and of persuasion that the product contained a defect. To establish a prima facie case, the plaintiff should adduce sufficient evidence on the risk-utility factors to establish a defect. With respect to above-ground swimming pools, for example, the plaintiff might seek to establish that pools are marketed primarily for recreational, not therapeutic purposes; that because of their design, including their configuration, inadequate warnings, and the use of vinyl liners, injury is likely; that, without impairing the usefulness of the pool or pricing it out of the market, warnings against diving could be made more prominent and a liner less dangerous. It may not be necessary for the plaintiff to introduce evidence on all those alternatives. Conversely, the plaintiff may wish to offer proof on other matters relevant to the risk-utility analysis. It is not a foregone conclusion that plaintiff ultimately will prevail on a risk-utility analysis, but he should have an opportunity to prove his case.<sup>79</sup>

The *Restatement* disagrees. The fourth illustration, in comment d to section 2, reads as follows:

XYZ Co. Manufactures above-ground swimming pools that are four feet deep. Warnings are embossed on the outside of the pools in large letters stating "DANGER-DO NOT DIVE." In disregard of the warnings, Mary, age 21,

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79. *Id.*

dove head first into an XYZ pool and suffered serious injury. Expert testimony establishes that when Mary's outstretched hands hit the pool's slippery vinyl bottom her hands slid apart, causing her to strike her head against the bottom of the pool. For the purposes of this Illustration it is assumed that the warnings were adequate and that the only issue is whether the above-ground pool was defectively designed because the bottom was too slippery. All the expert witnesses agree that the vinyl pool liner that XYZ utilized was the best and safest liner available and that no alternative, less slippery liner was feasible. Mary has failed to establish defective design under Subsection (b).<sup>80</sup>

The next comment and illustration of the *Restatement (Third)* outline its position on the issue. The comment explains that a product might be defective even though there is no feasible alternative that would not impair the product's utility:

Several courts have suggested that the design of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design. In large part the problem is one of how the range of relevant alternative designs is described. For example, a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children could be found to be defectively designed within the rule of Subsection (b). Toy guns unlikely to cause injury would constitute reasonable alternatives to the dangerous toy. Thus, toy guns that project ping pong balls, soft gelatin pellets, or water might be found to be reasonable alternative designs to a toy gun that shoots hard pellets. However, if the realism of the hard-pellet gun, and thus its capacity to cause injury, is sufficiently important to those who purchase and use such products to justify the court's limiting consideration to toy guns that achieve realism by shooting hard pellets, then no reasonable alternative will, by hypothesis, be available. In that instance, the design feature that defines which alternatives are relevant - the realism of the hard-pellet gun and thus its capacity to injure - is precisely the feature on which the user places value and of which the plaintiff complains. If a court were to adopt this characterization of the product, and deem the capacity to cause

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80. Proposed Final Draft, *supra* note 6, § 2 illus. 4.

injury an egregiously unacceptable quality in a toy for use by children, it could conclude that liability should attach without proof of a reasonable alternative design. The court would declare the product design to be defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product.<sup>81</sup>

The fifth illustration, following comment e, reads as follows:

ABC Co. manufactures novelty items. One item, an exploding cigar, is made to explode with a loud bang and the emission of smoke. Robert purchased the exploding cigar and presented it to his boss, Jack, at a birthday party arranged for him at the office. Jack lit the cigar. When it exploded, the heat from the explosion lit Jack's beard on fire causing serious burns to his face. If a court were to recognize the rule identified in this Comment, the finder of fact might find ABC liable for the defective design of the exploding cigar even if no reasonable alternative design was available that would provide similar prank characteristics. The utility of the exploding cigar is so low and the risk of injury is so high as to warrant a conclusion that the cigar is defective and should not have been marketed at all.<sup>82</sup>

The Minnesota Supreme Court has not yet had its exploding cigar case, but the court has structured design defect law in Minnesota to provide for it when the match is lit.<sup>83</sup> That does not mean that the need for a reasonable alternative design is irrelevant in Minnesota. The court's decision in *Kallio* clearly notes the general need for that proof in a design case.<sup>84</sup> While Minnesota differs in minor respects, Minnesota law in general seems consistent with the *Restatement (Third)* position on design defect cases. The *Restatement* does not take a position on "the specifics of how a jury should be instructed."<sup>85</sup> As long as the instructions "are generally consistent with the rule of law set forth in Subsection (b), their specific form

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81. *Id.* cmt. e.

82. *Id.* illus. 5.

83. *See Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96 (Minn. 1987).

84. *See id.*

85. *See Proposed Final Draft, supra* note 6, § 2 cmt. f.

and content are matters of local law."<sup>86</sup> Minnesota's instructions seem to incorporate the important elements of the *Restatement* view.

### Failure to Warn

The *Restatement* requires a seller to warn only of dangers that were or should have been known by the manufacturer.<sup>87</sup> The *Bilotta* court stated that in design defect and failure to warn cases "knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer."<sup>88</sup> The supreme court's decisions in failure to warn cases, however, are equivocal. The supreme court has stated that strict liability principles apply in failure to warn cases and has required claimants to elect between negligence and strict liability theories. Yet, the court has also stated that negligence principles apply in strict liability context.<sup>89</sup> As a result, absent any indication that the court intends to establish real distinctions between negligence and strict liability in failure to warn cases, the underlying basis of recovery is the same, regardless of the label. At a minimum, it seems clear that the court's statement that negligence principles govern in failure to warn cases means that knowledge of the risks created by the product will not be imputed to the product manufacturer.<sup>90</sup>

The duality of the court's approach to failure to warn theory is reflected in the pattern jury instructions. The instructions state that a claimant is entitled to a single instruction on failure to warn theory and receives the same instruction for either a strict liability or negligence claim.<sup>91</sup> The instructions attempt to accommodate the court's requirement that plaintiffs elect one theory by the close of the case,<sup>92</sup> where a distinction between the theories has not been

86. *Id.*

87. *See id.* § 2.

88. *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984).

89. *See Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 661 (Minn. 1989); *Huber v. Niagara Mach. and Tool Works*, 430 N.W.2d 465, 467 n.1 (Minn. 1988); *Germann v. F.L. Smithe Co.*, 395 N.W.2d 922, 926 n.4 (Minn. 1986).

90. *See supra* note 34 and accompanying text.

91. *See* JURY INSTRUCTION GUIDES, *supra* note 18, JIG 119, at 91.

92. *See Hauenstein v. Loctite Corp.*, 347 N.W.2d 272 (Minn. 1984):

[W]e hold that . . . where a plaintiff seeks damages for both negligence and strict liability based solely upon failure to warn, the plaintiff may submit the case to the jury on only one theory. The plaintiff can plead and prove at trial either or both theories, but by the time the parties rest, the plaintiff must announce whether the case will be submitted to the jury on negligence or strict liability.

*Id.* at 275. The *Hauenstein* court faced an inconsistent verdict when the jury found



clearly established.<sup>93</sup>

The warning obligation under the *Restatement (Third)* requires the instructions to inform users and consumers on ways to avoid risks. It also requires warnings that inform of the existence and nature of product risks.<sup>94</sup> Minnesota law is substantially similar.<sup>95</sup>

The *Restatement* declares that generally, a product seller is not subject to liability for failure to warn or instruct as to "risks and risk avoidance measures that should be obvious to, or generally known by, foreseeable product users."<sup>96</sup> The comment explains:

When a risk is obvious or generally known, the prospective addressees of a warning will or should already know of its existence. Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally. When reasonable minds may differ as to whether the risk was obvious or generally known, the issue is to be decided by the trier of fact. The obviousness of risk may bear on the issue of design defect rather than failure to warn.<sup>97</sup>

The Minnesota courts take the same position, typically holding that warnings are not required in such cases as a matter of law.<sup>98</sup>

the product in question was not defective, but the manufacturer was negligent in causing the injury. *See id.* at 275. The *Hauenstein* court held that the verdict was not reconcilable, but that the jury's finding of no causation on the negligence question made the inconsistency irrelevant. *See id.* at 276.

93. The *Hauenstein* court held that under both strict liability and negligence theories a manufacturer's duty to warn extends to all reasonably foreseeable users. *See id.* at 275.

94. *See* Proposed Final Draft, *supra* note 6, § 2 cmt. i.

95. *See* *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787 (Minn. 1977) (stating that the duty to warn consists of the duty to give adequate instructions for safe use and to warn of dangers inherent in improper usage); JURY INSTRUCTION GUIDES, *supra* note 18, JIG 119, at 90.

96. Proposed Final Draft, *supra* note 6, § 2 cmt. j.

97. *Id.*

98. *See* *Mix v. MTD Products, Inc.*, 393 N.W.2d 18, 19-20 n.2 (Minn. Ct. App. 1986) (referring to *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207, 212 (Minn. 1982), which states that obviousness of the risk is only one factor to consider in a design defect case, does not apply in a failure to warn case); *Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830, 835 (Minn. Ct. App. 1985) (explaining that plaintiff had knowledge of risk, and as a question of fact, the jury was instructed

There is probably no duty to warn a sophisticated product user of the dangers associated with the product.<sup>99</sup> The *Restatement (Third)* notes that in an appropriate case the manufacturer may have a duty to warn the ultimate user of the product, rather than an intermediary, such as the plaintiff's employer.<sup>100</sup> Minnesota law is to the same effect.<sup>101</sup>

Under Minnesota law, the supreme court has held that the existence of a duty to warn is a question of law for the court.<sup>102</sup> The adequacy issue is then for the jury.<sup>103</sup> Under the *Restatement (Third)* standard, the plaintiff has the burden of proving that adequate instructions were not provided.<sup>104</sup> The *Restatement* states that 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 . . . and the omission of the instructions or warnings renders the product not reasonably safe."<sup>105</sup>

The *Restatement* does not indicate how the standard would be structured for jury instruction purposes, nor does it intend to do so. It does not state the issue in terms of either negligence or strict liability theory. Instead, the standard focuses on whether the foreseeable risks of harm created by the product could have been avoided by the provision of reasonable warnings or instructions.<sup>106</sup> Arguably, the standard requires a focus on adequacy of the warning, once a foreseeable risk of injury is presented by the product. In addition, one could argue that because the issue is whether the provision of reasonable warnings or instructions would reduce or

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there is no duty to warn where the user knows the danger, which the court held was a jury issue as a matter of law).

99. See, e.g., *Minneapolis Soc'y of Fine Arts v. Parker-Klein Assoc. Architects, Inc.*, 354 N.W.2d 816, 821 (Minn. 1984); *Todalén v. United States Chem. Co.*, 424 N.W.2d 73, 78 (Minn. Ct. App. 1988), *overruled on other grounds by Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54 (Minn. 1993).

100. See Proposed Final Draft, *supra* note 6, § 2 cmt. i.

101. See *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 341-45, 156 N.W.2d 898, 902-04, (1968); *Todalén*, 424 N.W.2d at 80; *Cf. Huber v. Niagara Mach. & Tool Works*, 430 N.W.2d 465, 468 n.2 (Minn. 1988) (recognizing the obligation to warn ultimate users, but holding that no duty existed in the instant case to warn the ultimate user of the consequences of the failure of the plaintiff's employer to follow certain safety regulations).

102. See, e.g., *Huber*, 430 N.W.2d at 467; *Minneapolis Soc'y of Fine Arts*, 354 N.W.2d at 821; *Todalén*, 424 N.W.2d at 78.

103. See JURY INSTRUCTION GUIDES, *supra* note 18, JIG 119, at 90.

104. See Proposed Final Draft, *supra* note 6, § 2 cmt. i.

105. *Id.* § 2(c).

106. See *id.* § 2.

avoid the risk, the question must be one of the reasonableness of the warning. That, of course, is how adequacy is measured.

The *Restatement* does not appear to say in the black letter of section 2 that liability for failure to warn is judged by a reasonable manufacturer or seller standard, one similar to a risk-utility standard. There are, however, situations where the *Restatement* clearly takes the position that warnings are not required.<sup>107</sup> For example, a warning is not mandated where the danger is obvious and generally known.<sup>108</sup> Another example is the *Restatement's* approach to a product manufacturer's responsibility in cases involving post-sale warning obligations.<sup>109</sup>

Minnesota's standard seems to be consistent with the *Restatement (Third)* standard. However, under both negligence and strict liability standards, adequacy is the only issue the jury will resolve. The jury will not determine whether a reasonable manufacturer would have provided warnings and if so, what warnings would have been adequate. The pattern jury instructions use the following language:

A product (manufacturer) (seller) must

(Provide adequate warnings of dangers inherent in improper use of the product, if the use is one that the (manufacturer) (seller) should reasonably foresee.)

(Provide adequate instructions for the safe use of the product.)

For a warning to be adequate it must be set out in such a way that heeding the warning will make the product reasonably safe for use. [The warning must be in a form which could reasonably be expected to catch the attention of, and be understood by, the ordinary user.]<sup>110</sup>

The issue is whether the warnings render the product reasonably safe for consumer use.

Justice Simonett, writing later on the warning issue, thought the key to the warning issue to be relatively simple. He stated:

The trial court must decide, of course, based on the evidence, whether to submit the issue of failure to warn to the jury. This is a question of law for the court. Put another way, it is a question of law for the judge whether

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107. *See id.*

108. *See id.* cmt. j.

109. *See id.* § 10.

110. JURY INSTRUCTION GUIDES, *supra* note 18, JIG 119, at 90.

there is a question of fact for the jury. In submitting a failure to warn claim to the jury, the trial court ordinarily is instructing the jury to determine from all the evidence if, in fact, the risk to be warned against was reasonably foreseeable, so that a duty to warn was necessary; and if so, whether any warnings were adequate or could have been effective (which relates to the scope of the duty); and, finally, whether the duty was breached and causation was present. In a particular case, one or more of these questions may be decided by the trial court as a matter of law and the jury so told. But otherwise, generally, the jury decides if a duty to warn exists and if it was breached.<sup>111</sup>

If Justice Simonett's approach is taken, the trial court will decide whether there is sufficient evidence to submit the warning issue to the jury. If so, the jury would then decide whether a reasonable product manufacturer would have provided a warning, and if warnings were provided, whether they were adequate. The key conceptual question that has to be answered is whether the manufacturer's choices with respect to warnings will be evaluated according to the same risk-utility standard that is utilized to evaluate the reasonableness of its design choices.

If warning cases are treated similarly, the trial court's initial determination that a manufacturer has a duty to act reasonably with respect to product warnings means that the jury will be entitled to evaluate the reasonableness of the manufacturer's actions with respect to product warnings, including any decision not to give a warning, unless, of course, the case is strong enough that the trial court would be prepared to direct a verdict on the warning issue in cases where the manufacturer has not provided a warning.<sup>112</sup>

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111. John E. Simonett, *Dispelling the Products Liability Syndrome: Tentative Draft No. 2 of the Restatement (Third)*, 21 WM. MITCHELL L. REV. 361, 365 (1995).

112. See George W. Soule & Jacqueline M. Moen, *Failure to Warn in Minnesota, The New Restatement on Products Liability, and the Application of the Reasonable Care Standard*, 21 WM. MITCHELL L. REV. 389, 403-04 n.61 (1995) (citation omitted). The authors suggested the following instruction:

A manufacturer has a duty to use reasonable care in providing an adequate warning of any danger involved in the use of a product which poses an unreasonable risk of harm to persons or property when the product is put to its intended use or to any use that is unintended but is reasonably foreseeable.

What constitutes reasonable care will vary with the surrounding circumstances. Reasonable care is the care that a reasonably prudent person would exercise under the same or similar circumstances.

In determining whether reasonable care requires the manufacturer to provide a warning, you may consider all the facts and circumstances,

The *Restatement (Third)* says that there should not be separate instructions on multiple theories of recovery where there is a single allegation of design defect or failure to warn.<sup>113</sup> If the plaintiff asserts a design defect theory, the plaintiff should be entitled to a single instruction on that theory, not one based on strict liability and one based on negligence.<sup>114</sup> Minnesota takes the same position.<sup>115</sup> However, if the plaintiff asserts separate theories of defect, one based on design defect and the other on failure to warn, the plaintiff is entitled to instructions on both theories.<sup>116</sup> In manufacturing flaw cases, the plaintiff is entitled to both negligence and strict liability instructions on the theory.<sup>117</sup> Those cases do not involve the risk-utility balancing approach that is at the core of both negligence and strict liability analysis in design and warning cases.<sup>118</sup>

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including, among others, the likelihood and seriousness of harm and the feasibility, burden and effectiveness of a warning.

A manufacturer may be required to provide a warning only if the manufacturer knew or through the exercise of reasonable care could have discovered the danger involved in the use of the product. A manufacturer is not required to warn of a danger which would ordinarily be known and appreciated by those who would be expected to use the product.

For a warning to be adequate it must be set out in such a way that heeding the warning will make the product reasonably safe for use. The warning must be in a form which could reasonably be expected to catch the attention of, and be understood by, the ordinary user.

If the manufacturer did not use reasonable care in providing an adequate warning, then the manufacturer is negligent.

*Id.* (citation omitted).

113. See Proposed Final Draft, *supra* note 6, § 2 cmt. n.

114. See *id.*

115. See JURY INSTRUCTION GUIDES, *supra* note 18, JIG 117, Authorities at 81-87, and JIG 119, Authorities at 90-93. Implied warranty of merchantability is also merged with strict liability and negligence in design defect cases. See *Westbrock v. Marshalltown Mfg. Co.*, 473 N.W.2d 352, 356 (Minn. Ct. App. 1991); *Gross v. Running*, 403 N.W.2d 243, 245 (Minn. Ct. App. 1987). The Eighth Circuit has taken the same position in interpreting Minnesota law. See *Piotrowski v. Southworth Prod. Corp.*, 15 F.3d 748, 751 (8th Cir. 1994).

116. See Proposed Final Draft, *supra* note 6, § 2 cmt. n; *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 94 n.2 (Minn. 1987).

117. See Proposed Final Draft, *supra* note 6, § 2 cmt. n; JURY INSTRUCTION GUIDES, *supra* note 18, JIG 118, Authorities at 88-89, and Special Verdict Form No. 2, at 455-56.

118. See Proposed Final Draft, *supra* note 6, § 2 cmt. n; JURY INSTRUCTION GUIDES, *supra* note 18, JIG 118, Authorities at 88-89, and Special Verdict Form No. 2, at 455-56.

### § 3. CIRCUMSTANTIAL EVIDENCE SUPPORTING INFERENCE OF PRODUCT DEFECT

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

(a) was of a kind that ordinarily occurs as a result of product defect; and

(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.<sup>119</sup>

#### Commentary

Minnesota law is the same.<sup>120</sup> In *Holkestad v. Coca-Cola Bottling Co.*,<sup>121</sup> the Minnesota Supreme Court explained:

When a plaintiff has proved that he was injured by a product claimed to have been defective, and where the claimed defect is such that there is circumstantial evidence from which it can be inferred that it is more probable than not that the product was defective when it left defendant's hands, absent plaintiff's own want of care or misuse of the product, there is an evidentiary basis for submitting the issue of liability to the jury on both the theory of negligence and strict liability in tort. Of course, the factor essential to the application of *res ipsa loquitur*—that it must be the kind of event which does not occur in the absence of negligence—is a circumstance tending to prove a defect and not a prerequisite for the application of strict liability in tort. However, the inference from the circumstantial evidence taken as a whole, which we repeat is the underlying basis of the doctrine of *res ipsa*, would permit recovery against both manufacturer

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119. Proposed Final Draft, *supra* note 6, § 3.

120. See *Lee v. Crookston Coca-Cola Bottling Co.*, 290 Minn. 321, 328-30, 188 N.W.2d 426, 432 (1971); *Holkestad v. Coca-Cola Bottling Co. of Minnesota*, 288 Minn. 249, 254-55, 180 N.W.2d 860, 864-65 (1970); *Kerr v. Corning Glass Works*, 284 Minn. 115, 117, 169 N.W.2d 587, 588 (1969); *Western Sur. & Cas. Co. v. General Elec. Co.*, 433 N.W.2d 444, 447 (Minn. Ct. App. 1988), *review denied*, (Minn. Feb. 22, 1989).

121. 288 Minn. 249, 180 N.W.2d 860 (1970).

and retail seller on the theory of strict liability. . . .<sup>122</sup>

The supreme court, however, has noted restrictions on the use of the *res ipsa* concept. In *Cerepak v. Revlon, Inc.*,<sup>123</sup> the plaintiff was injured while attempting to open the cap of a deodorant bottle manufactured by Revlon.<sup>124</sup> The injury occurred when the bottle broke while she was trying to twist off the cap.<sup>125</sup> The plaintiff alleged that the bottle was defective and that the defendant was negligent in its manufacture and design.<sup>126</sup> The jury found that Revlon was negligent and that the plaintiff was not.<sup>127</sup>

The plaintiff offered no affirmative evidence demonstrating that Revlon was negligent in the manufacture of the bottle.<sup>128</sup> There was no expert testimony to establish any defect in the bottle.<sup>129</sup> The only evidence was that introduced by the plaintiff and her mother concerning the purchase and use of the bottle, which showed that they had done nothing to cause the bottle to break.<sup>130</sup> The court distinguished the exploding bottle cases in holding that the plaintiff had not met her burden of proof on the *res ipsa* issue:

The dispositive issue is whether plaintiffs met their burden of proof on the factual issue of negligence where the issue was submitted solely on theory of *res ipsa loquitur*, absent any affirmative evidence that the deodorant bottle was negligently manufactured. Plaintiff had the burden of proving that there was a defect in the bottle which caused it to break under normal use, that this defect was present when defendant surrendered possession of the bottle to the retailer, and that the defect was the result of defendant's negligence in its manufacture. Although the burden of proof has been less strict in cases of spontaneous explosion of carbonated beverage bottles than in the case of other glass containers, no case based on negligence has wholly removed this burden of proof or held it discharged merely by proof that the plaintiff had not mishandled the product.

The reason for less strictness in adhering to this bur-

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122. *Id.* at 257, 180 N.W.2d at 865-66.

123. 294 Minn. 268, 200 N.W.2d 33 (1972).

124. *See id.* at 269; 200 N.W.2d at 34.

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

den of proof in exploding bottle cases is more pragmatic than conceptual. Dean Page Keeton . . . after reviewing some of the defective bottle cases, concludes that courts have been less strict in requiring proof of negligence in cases involving explosions of beer bottles and carbonated beverage bottles. It is his view that 'the existence of a defective in a bottle cannot be inferred simply from evidence on the part of plaintiff of careful conduct coupled with an explosion or break' and that plaintiff, in order to get to the jury, must introduce 'direct evidence of a defect by an expert who examined the bottle . . . . He suggests that requiring that requiring less proof in cases involving explosions of beer bottles or carbonated beverage bottles may be justified by the fact that often the explosion destroys the bottle, making it more difficult for plaintiff to prove that it was defective.<sup>131</sup>

In *Cerepak*, the plaintiff had possession of the bottle and the ability to establish a specific defect in the bottle.<sup>132</sup> Under the circumstances, the absence of direct evidence on the defect issue precluded the plaintiff from recovering. The moral of the story is clear. If the plaintiff has the ability to establish the existence of a defect by direct evidence, *res ipsa loquitur* will not be available. The *Restatement (Third)* approach, mirrored in Minnesota, does not create an exception to the liability rules of section 2 that will be read or applied broadly by the courts.

#### § 4. NONCOMPLIANCE AND COMPLIANCE WITH PRODUCT SAFETY STATUTES OR REGULATIONS

In connection with liability for defective design or inadequate instructions or warnings:

(a) a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and

(b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regula-

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131. *Id.* at 270-71, 200 N.W.2d at 35 (citations omitted).

132. *See id.* at 273, 200 N.W.2d at 36.



tion, but such compliance does not preclude as a matter of law a finding of product defect.<sup>133</sup>

### Commentary

In Minnesota, violation of a statute is negligence per se if the statute satisfies the standard statutory purpose analysis:

It is well settled that breach of a statute gives rise to negligence per se if the persons harmed by that violation are within the intended protection of the statute and the harm suffered is of the type the legislation was intended to prevent.<sup>134</sup>

The violation of regulations or ordinances may also result in negligence per se.<sup>135</sup>

The black letter of the *Restatement (Third)* refers to an “applicable product safety statute or administrative regulation.”<sup>136</sup> The Reporters’ Note makes clear that the standard statutory purpose analysis must be followed for a violation of the statute or regulation to justify a finding of product defect as a matter of law.<sup>137</sup>

The statute or regulation has to do more, however:

[T]he safety statute or administrative regulation must be such that compliance reduces the risk that caused the plaintiff’s harm. Thus, when a plaintiff complains that the design of a product should have been more stable to prevent the product from tipping over, a safety statute or regulation is relevant if it addresses the issue of stability in such a way that compliance with the statute or regulation reduces the risk of the product tipping over in the manner that caused the plaintiff’s harm.<sup>138</sup>

Compliance with a statute or ordinance is not conclusive evidence on the negligence issue, but rather is only evidence of reasonable care.<sup>139</sup> The comments, however, suggest that in certain circumstances it may be appropriate for a court to hold that a

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133. Proposed Final Draft, *supra* note 6, § 4.

134. *Alderman’s Inc. v. Shanks*, 536 N.W.2d 4, 8 (Minn. 1995).

135. *See id.* at 7.

136. *See* Proposed Final Draft, *supra* note 6, § 4.

137. *See id.* Reporters’ Note, at 145 (stating that, “[i]n order for the violation to support a conclusion of defectiveness as a matter of law, the safety regulation in question must relate both to the risk that materializes in harm and to the person or persons who suffer that harm”).

138. *Id.* § 4 cmt. c.

139. *See id.* § 4(b).

product in compliance with a statute or regulation is not defective as a matter of law:

Such a conclusion may be appropriate when the safety statute or regulation was promulgated recently, thus supplying currency to the standard therein established; when the specific standard addresses the very issue of product design or warning presented in the case before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise. Conversely, when the deliberative process that led to the safety standard with which the defendant's product complies was tainted by the supplying of false information to, or the withholding of necessary and valid information from, the agency that promulgated the standard or certified or approved the product, compliance with regulation is entitled to little or no weight.<sup>140</sup>

Minnesota has taken the position that compliance with a statute only evidences reasonable care and is not conclusive on the issue.<sup>141</sup> No Minnesota court has yet taken the position suggested in the *Restatement* comment, but such a position is not inconsistent with any settled principles in Minnesota products liability law.

#### § 5. LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR OF PRODUCT COMPONENTS FOR HARM CAUSED BY PRODUCTS INTO WHICH COMPONENTS ARE INTEGRATED

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:

- (a) the component is defective in itself, under §§ 1-4, and the defect causes the harm; or
- (b) (1) the seller or distributor of the component substantially participates in the integration of the component into

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140. *Id.* cmt. e.

141. *See, e.g.,* *Hellman v. Julius Kolesar, Inc.*, 399 N.W.2d 654, 655-56 (Minn. Ct. App. 1987) (holding a party may be negligent while complying with a statutory standard if special circumstances require additional instructions); *Steinbrecher v. McLeod Coop. Power Ass'n*, 392 N.W.2d 709, 712 (Minn. Ct. App. 1986) (holding safety statute setting out requirements does not constitute final word on necessary measures).

the design of the product; and

(2) the integration of the component causes the product to be defective as defined under §§ 1-4; and

(3) the defect in the product causes the harm.<sup>142</sup>

### Commentary

Section 5 includes as product components “raw materials, bulk products, and other constituent products sold for integration into other products.”<sup>143</sup> In general, the *Restatement (Third)* says that component sellers should not be held liable unless the component itself is defective according to sections 1-4 of the *Restatement*. Comment b notes:

If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective. Imposing liability would require the component seller to scrutinize another’s product which the component seller has no role in developing. This would require the component seller to develop sufficient sophistication to review the decisions of the business entity that is already charged with responsibility for the integrated product.

The refusal to impose liability on sellers of nondefective components is expressed in various ways, such as the “raw material supplier defense” or the “bulk sales/sophisticated purchaser rule.” However expressed, these formulations recognize that component sellers who do not participate in the integration of the component into the design of the product should not be liable merely because the integration of the component causes the product to become dangerously defective.<sup>144</sup>

The same principles apply when the issue concerns the component seller’s obligation to warn.

The component seller is required to provide instructions and warnings regarding risks associated with the use of the component product . . . . However, when a sophisti-

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142. Proposed Final Draft, *supra* note 6, § 5.

143. *Id.* cmt. a.

144. *Id.*

cated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it. To impose a duty to warn in such a circumstance would require that component sellers monitor the development of products and systems into which their components are to be integrated . . . . Courts have not yet confronted the question of whether, in combination, factors such as the component purchaser's lack of expertise and ignorance of the risks of integrating the component into the purchaser's product, and the component supplier's knowledge of both the relevant risks and the purchaser's ignorance thereof, give rise to a duty on the part of the component supplier to warn of risks attending integration of the component into the purchaser's product. Whether the seller of a component should be subject to liability for selling its product to one who is likely to utilize it dangerously is governed by principles of negligent entrustment.<sup>145</sup>

Minnesota products liability law permits the imposition of liability on component parts manufacturers.<sup>146</sup> The problems that arise are indicative of the concerns expressed in the *Restatement (Third)*. The predominant problem is in failure to warn cases.<sup>147</sup> Minnesota's solutions have been based on a common sense resolution of the ability of a manufacturer to warn of dangers in varied circumstances. The law seems to be consistent with the *Restatement*.

#### § 6. LIABILITY OF SELLER OR OTHER DISTRIBUTOR FOR HARM CAUSED BY DEFECTIVE PRESCRIPTION DRUGS AND MEDICAL DEVICES

(a) A manufacturer of a prescription drug or medical device who sells or otherwise distributes a defective drug or medical device is subject to liability for harm to persons caused by

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145. *Id.* cmt. b.

146. *See* *Huber v. Niagara Mach. & Tool Works*, 430 N.W.2d 465, 467 (Minn. 1988); *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 342-44, 156 N.W.2d 898, 903-04 (1968).

147. *See, e.g., Huber*, 430 N.W.2d at 467 (holding that component part manufacturer only has a legal duty to warn against foreseeable misuses); *Hill*, 279 Minn. at 344, 156 N.W.2d at 904 (holding that where plaintiff had adequate knowledge of the dangerous propensities of the component product, defendant had no further duty to give an additional warning).

the defect. A prescription drug or medical device is one that may be legally sold or otherwise distributed only pursuant to a health care provider's prescription.

(b) For purposes of liability under Subsection (a), a prescription drug or medical device is defective if at the time of sale or other distribution the drug or medical device:

(1) contains a manufacturing defect as defined in § 2(a); or

(2) is not reasonably safe due to defective design as defined in Subsection (c); or

(3) is not reasonably safe due to inadequate instructions or warnings as defined in Subsection (d).

(c) A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its 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.

(d) A prescription drug or medical device is not reasonably safe because of inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risks of harm are not provided to:

(1) prescribing and other health care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; or

(2) the patient when the manufacturer knows or has reason to know that health care providers will not be in a position to reduce the risk of harm in accordance with the instructions or warnings.

(e) A retail seller or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device if:

(1) at the time of sale or other distribution the drug or medical device contains a manufacturing defect as defined in § 2(a); or

(2) at or before the time of sale or other distribution of the drug or medical device the retail seller or other distributor fails to exercise reasonable care and such failure causes harm to persons.<sup>148</sup>

### Commentary

Section 6 encompasses both traditional and nontraditional approaches to the question of manufacturer liability for the sale of drugs or medical devices.<sup>149</sup> It incorporates liability for manufacturing defects and recognizes that manufacturers may also be held liable for failure to properly warn health care providers or, where appropriate, directly warn patients.<sup>150</sup> It incorporates a new provision that justifies the imposition of liability on manufacturers for defective design,<sup>151</sup> but on the basis of legal principles separate and distinct from section 2(b). The rationale for the difference in treatment is as follows:

The obligation of a manufacturer to warn about risks attendant to the use of drugs and medical devices that may be sold only pursuant to a health care provider's prescription traditionally has required warnings directed to health care providers and not to patients. The rationale supporting this "learned intermediary" rule is that only health care professionals are in a position to understand the significance of the risks involved and to assess the relative advantages and disadvantages of a given form of prescription-based therapy. The duty then devolves on the health care provider to supply to the patient such information as is deemed appropriate under the circumstances so that the patient can make an informed choice as to therapy. Subsection (d)(1) retains the "learned intermediary" rule. However, in certain limited therapeutic relationships the physician or other health care provider has a much diminished role as an evaluator or decision-maker. In these instances it may be appropriate to impose on the manufacturer the duty to warn the patient directly. See Subsection (d)(2).

The traditional refusal by courts to impose tort liability for defective designs of prescription drugs and medical

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148. Proposed Final Draft, *supra* note 6, § 6.

149. *See id.* cmt. a.

150. *See id.*

151. *See id.*

devices is based on the fact that a prescription drug or medical device entails a unique set of risks and benefits. What may be harmful to one patient may be beneficial to another. Under Subsection (c) a drug is defectively designed only when it provides no net benefit to any class of patients. Courts have concluded that as long as a drug or medical device provides net benefits to some persons under some circumstances, the drug or device manufacturer should be required to instruct and warn health care providers of the foreseeable risks and benefits. Courts have also recognized that the regulatory system governing prescription drugs is a legitimate mechanism for setting the standards for drug design. In part, this deference reflects concerns over the possible negative effects of judicially imposed liability on the cost and availability of valuable medical technology. This deference also rests on two further assumptions: first, that prescribing health care providers, when adequately informed by drug manufacturers, are able to assure that the right drugs and medical devices reach the right patients; and second, that governmental regulatory agencies adequately review new prescription drugs and devices, keeping unreasonably dangerous designs off the market.

Nevertheless, unqualified deference to these regulatory mechanisms is considered by a growing number of courts to be unjustified. An approved prescription drug or medical device can present significant risks without corresponding advantages. At the same time, manufacturers must have ample discretion to develop useful drugs and devices without subjecting their design decisions to the ordinary test applicable to products generally under § 2(b). Accordingly, Subsection (c) imposes a more rigorous test for defect than does § 2(b), which does not apply to prescription drugs and medical devices. The requirement for establishing defective design of a prescription drug or medical device under Subsection (c) is that the drug or device have so little merit compared with its risks that reasonable health care providers, possessing knowledge of risks, would not have prescribed the drug or device for any class of patients. Thus, a prescription drug or medical device that has usefulness to any class of patients is not defective in design even if it is harmful to other patients. Because of the special nature of prescription drugs and medical devices, the determination of whether such

products are not reasonably safe is to be made under Subsections (c) and (d) rather than under §§ 2(b) and 2(c).<sup>152</sup>

The standard for manufacturing defects is section 2(a), which questions whether the product departed from its intended design.<sup>153</sup> There are separate standards for determining liability for inadequate warnings or instructions and design defects. The design standard does not incorporate section 2(b)'s design standard, which states that a product is defective "when the foreseeable risks of harm posed by the product 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."<sup>154</sup> Section 6 of the *Restatement (Third)* differs. It asserts that a prescription drug or medical device is not reasonably safe because of defective design only when the foreseeable risks of harm are sufficiently great in relation to its therapeutic benefits and when a reasonable health care provider would not prescribe the drug or device for any class of patients.<sup>155</sup>

The rationale for the difference is as follows:

Subsection (c) reflects the judgment that, as long as a given drug or device provides net benefits for a class of patients, it should be available to them, accompanied by appropriate warnings and instructions. Learned intermediaries must generally be relied upon to see that the right drugs and devices reach the right patients. However, when a drug or device provides net benefits to no class of patients—when reasonable, informed health care providers would not prescribe it to any class of patients—then the design of the product is defective and the manufacturer should be subject to liability for the harm caused.

A defendant prescription drug or device manufacturer defeats plaintiff's design claim by establishing one or more contexts in which its product would be prescribed by reasonable, informed health care providers. That some individual providers do, in fact, prescribe defendant's product does not in itself suffice to defeat plaintiff's claim. Evidence regarding the actual conduct of health care providers, while relevant and admissible, is not necessarily controlling. The issue is whether, objectively

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152. *Id.* cmt. b.

153. *See id.* § 2(a).

154. *Id.* § 2(b).

155. *See id.* § 6(c).



viewed, reasonable providers, possessing the knowledge that a reasonable drug manufacturer had or should have had about the risks and benefits attendant to the use of the drug or medical device, would prescribe it for any class of patients. Given this very demanding objective standard, liability is likely to be imposed only under unusual circumstances. The court has the responsibility to determine when the plaintiff has met the burden of production for this demanding standard.<sup>156</sup>

The Reporters' Note expands on the position taken in the comments:

Subsection (c) reflects the view that, as long as a given drug or device provides net benefits for some category of patients, it should be available to that group, albeit with adequate warnings and instructions supplied to learned intermediaries. Learned medical intermediaries must be relied upon to direct the appropriate drugs to the appropriate patients. However, when a drug or device provides no net benefits to any ascertainable patient class—when reasonably informed medical providers would not prescribe the drug and no reasonable, informed manufacturer would place it on the market—then the product design is defective and the manufacturer should be liable for the harm caused by selling it.

The proposed rule in § 6(c) best advances the policies and values explicated in Comment *b*. It shows appropriate deference to the regulated market, where the FDA and learned intermediaries select which drugs should be available to the public generally and which drugs should be given to individual patients, respectively. It does not, on the other hand, wholly exempt defendants from liabil-

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156. *Id.* cmt. f. The following illustration shows the application:

ABC Pharmaceuticals manufactures and distributes D, a prescription drug intended to prolong pregnancy and thus to reduce the risks associated with premature birth. Patricia, six months pregnant with a history of irregular heart beats, was given D during a hospital stay. As a result, she suffered heart failure and required open heart surgery. In Patricia's action against ABC, her expert testified that, notwithstanding FDA approval of D, the drug did not prolong pregnancy for any class of patients and posed serious risks of heart failure in patients with a history of irregular heart beats. Notwithstanding a finding by the trier of fact that ABC gave adequate warnings to the prescribing physician, the trier of fact can find that reasonably informed health care providers would not prescribe D for any class of patients, thus rendering ABC subject to liability.

ity simply because other institutions have taken steps to improve product safety. Subsection (c) is a significant departure from the general defective design rules espoused in §§ 1 and 2, in recognition of the unique characteristics of prescription drugs and medical devices. Unlike most products, which confer essentially the same benefits to all users, prescription drugs and medical devices have the capacity to do great harm or great good depending on the particular patient. Accordingly, liability will attach only if the design cannot be justified for any class of patients.<sup>157</sup>

The liability of drug manufacturers for defective design and failure to warn was covered by comment k in the *Restatement (Second) of Torts*, section 402A:<sup>158</sup>

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warnings, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot be legally sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has un-

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*Id.* illus. 1.

157. *Id.* Reporters' Note, at 186-87.

158. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

dertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.<sup>159</sup>

The Minnesota courts, while dealing with drug cases involving the failure to warn,<sup>160</sup> have not had occasion to consider a drug or medical device company's liability for defective design. The United States District Court for the District of Minnesota made that determination in a diversity case against G.D. Searle & Co. for defective design of an intrauterine device.

In *Kociemba v. G.D. Searle & Co.*<sup>161</sup> the court predicted that Minnesota would adopt comment k, given the opportunity.<sup>162</sup> The court also held that comment k was inapplicable to all prescription drugs as a matter of law,<sup>163</sup> and that the issue had to be resolved by a jury according to the following factors:

- (i) whether the product could have been designed in a safer manner;
- (ii) whether a safer alternative product could have been available [at the time of manufacture and sale] to accomplish the same intended purpose as the product in question; and
- (iii) whether the benefits of the product outweigh the interest in promoting enhanced accountability on the part of the manufacturer.<sup>164</sup>

In a second opinion on the issue, the *Kociemba* court concluded that the policy considerations underlying its first order on the question were correct.<sup>165</sup> However, in a shift, the court said that it "now finds that these policy considerations are implicitly reflected in the negligence-based 'reasonable care' balancing standard adopted by the Minnesota Supreme Court in strict liability de-

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159. *See id.*

160. *See, e.g.,* Cornfeldt v. Tongen, 262 N.W.2d 684, 698 (Minn. 1977) (affirming the trial court's dismissal of the drug manufacturer because the alleged deficiency in the manufacturer's warning did not cause the injuries); Mulder v. Parke Davis & Co., 288 Minn. 335-36, 181 N.W.2d 882, 885 (1970) (holding that a drug manufacturer was not liable for failure to warn because the doctor prescribing the drug was fully aware of the drug's hazards).

161. 680 F. Supp. 1293 (D. Minn. 1988).

162. *See id.* at 1300.

163. *See id.*

164. *Id.* at 1301 (citing Patten v. Lederle Lab., 676 F. Supp. 233 (D. Utah 1987)).

165. *See Kociemba v. G.D. Searle & Co.*, 695 F. Supp. 432, 433 (D. Minn. 1988).

sign defect cases.”<sup>166</sup> In addition, the court held that because of the importance of those policy considerations in prescription drug cases, the jury should be explicitly instructed “that it may consider the reasonable but unavoidable side effects of a prescription drug at the same time it considers the reasonableness of a design defect.”<sup>167</sup>

In its supporting analysis, the *Kociemba* court noted the history of Minnesota products liability law, beginning with the supreme court’s sanction of *Restatement (Second)*, section 402A in *McCormack*.<sup>168</sup> The court noted the policy reasons for section 402A, including the use of the *Restatement (Second)*’s consumer expectation standard to determine the defect issue, and the concern expressed in many jurisdictions about the problem of imposing unreasonable liability on drug manufacturers. The latter concern was blunted by the adoption of comment k, which in effect makes a manufacturer liable only if it fails to adequately warn of the dangers associated with the use of its drugs.<sup>169</sup> The court noted the policy reasons underlying comment k:

First, manufacturers should be encouraged to develop products such as prescription drugs even though such products are incapable of being made safe given the present state of knowledge. Such encouragement can only be accomplished by limiting the manufacturer’s liability to instances where the manufacturer acted in an unreasonable manner which, in comment k terms, occurs when the manufacturer fails to adequately warn the user of the reasonable dangers inherent in the product.

Second, holding drug manufacturers up to a consumer expectation standard for injuries caused by unavoidably unsafe but necessary prescription drugs can increase product liability insurance rates and litigation costs to the extent that drug manufacturers are not able to sell pharmaceutical products at affordable prices.<sup>170</sup>

The court noted that the Minnesota Supreme Court had not adopted comment k, but that it had adopted a balancing test much

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166. *Id.* at 433 (citing *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984) and *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207 (Minn. 1982)).

167. *Id.*

168. *See id.*

169. *See id.*

170. *Id.* at 433-34.

like the one required by comment k.<sup>171</sup> The court then concluded that the comment k policy considerations are, in effect, incorporated in Minnesota's negligence-based standards for design defects:

Analysis of the texts of JIG 117 and comment k reveals that both require a risk/utility balancing test to determine the reasonableness of the manufacturer's conduct in producing a given product. The major difference between the tests is that comment k explicitly provides that a manufacturer may act reasonably in manufacturing an unavoidably unsafe product while JIG 117 merely implies the same.

Because the balancing tests are essentially the same, it became clear that the Court should not give separate special verdict questions to reflect each balancing test. To do so would require the jury to conduct the same risk/utility balancing test twice. Moreover, the jury's possible decision to tip the balance in different directions could lead to perverse verdicts.

Rather, this Court adopted a position in which the jury can consider unavoidable but reasonable risks of a desirable product at the same time it considers the reasonableness of the manufacturer's conduct. To accomplish this, the jury received only one special verdict question on whether the Cu-7 was defectively designed. The jury was then given an instruction based on JIG 117 followed by an instruction which states:

A product prescribed by a physician is not negligently designed merely because it may have side effects.

Some products, given the present state of human knowledge cannot be made totally safe for their intended and ordinary use. Because of the nature of the ingredients or natural characteristics of the product, their use involves substantial risk of injury, and some users will necessarily be harmed. Thus a manufacturer is not negligent merely because it supplies the public with an apparently useful and desirable product that has a known but apparently reasonable risk.

In taking this course of action, the Court reduces the possibility of perverse verdicts because the jury is only

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171. See *id.* at 434.

considering one balancing test. More importantly, these instructions strike a fair balance between the policy encouraging a manufacturer to produce useful but unavoidably dangerous products and the policy that a manufacturer be held accountable for unreasonable conduct. The manufacturer of a desirable yet unavoidably unsafe product is protected in that it will not be held liable if it uses reasonable care in manufacturing an inherently dangerous product. On the other hand, the consuming public is protected in that a manufacturer continues to be held accountable for its unreasonable behavior.

The need for this balanced approach is readily apparent given the evidence of this case. Defendant has brought forth evidence that all IUDs are unavoidably dangerous in that the insertion procedure unavoidably increases the chance of pelvic infection. Plaintiffs have brought forth evidence that the specific Cu-7 design unreasonably increases the risk of infection above and beyond the risk associated with the insertion procedure. If, for example, the jury accepts the above-cited evidence as true, the jury can, and should, consider Searle's reasonable conduct in developing an unavoidably unsafe but desirable product as well as its unreasonable conduct in not developing the safest possible IUD.<sup>172</sup>

The court's prediction of the position the Minnesota courts would take on the issue of defective design in drug cases has yet to be verified. The fact that the Minnesota Supreme Court has adopted a risk-utility standard to evaluate design cases does not mean that the Minnesota courts would strike the balance the same way as the court in *Kociemba* and reject comment k in favor of the risk-utility approach.

The court's opinion in *Forster v. R.J. Reynolds Tobacco Co.*<sup>173</sup> provides some insight into *Kociemba's* prediction. *Forster* claim was brought by a plaintiff suffering lung cancer against R.J. Reynolds and others.<sup>174</sup> The suit alleged a variety of theories, including the defective design of cigarettes.<sup>175</sup> The principal issue in the case concerned the preemption of the plaintiff's tort claims by the Cigarette Labeling and Advertising Act.<sup>176</sup> The supreme court held that

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172. *Id.* at 435 (citations omitted).

173. 437 N.W.2d 655 (Minn. 1989).

174. *See id.* at 656.

175. *See id.* at 661.

176. *See id.* at 657 (citing Cigarette Labeling and Advertising Act, 15 U.S.C.

the plaintiff's claim for defective design was not preempted by the federal act.<sup>177</sup> The defendant argued that the Minnesota design claim was preempted because Congress had performed its own risk-utility analysis and concluded that cigarettes could be used.<sup>178</sup> The court saw no conflict, however, because the congressional policy differed from "what products liability has in mind." The court noted:

Strict liability assumes the product is useable and asks only if it has been safely designed. So understood we see no conflict between the state tort action and the Act. We hold that plaintiff's claim in strict liability for unsafe design is not preempted. The complaint also alleges that defendant's product was in a defective condition unreasonably dangerous for use. It is unclear what plaintiffs have in mind here, but if plaintiffs can prove a defective condition or a defective design—apart from any claim of inadequacy of warning—we see no conflict with the federal Act.<sup>179</sup>

In a footnote, the court explored the relationship between the plaintiff's claim and the *Restatement (Second)*:

The claims of unsafe design and defective condition remain exposed to defendants' asserted defense, yet to be ruled on, that they fail to state a claim for relief under state law. Defendants, for example, point to the discussion of a defective condition for food and drink products in *Restatement (Second) of Torts* § 402A (1965). The *Restatement* takes the position that products like tobacco and whiskey, though addictive and harmful to health, are not "defective," unless foreign substances are added. *Id.* comment i. In any event, the parties have not yet set out their positions on unsafe design and defective condition beyond the pleading stage . . . .<sup>180</sup>

The court in *Forster* noted that the risk-utility approach is used in Minnesota to decide design cases.<sup>181</sup> That fact alone seems insufficient to speculate on the issue of whether the Minnesota courts would adopt the *Restatement (Second)* position or reject it, whether the issue is comment k or comment i of the *Restatement*.

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§§1331–1339 (1994)).

177. *See id.* at 661.

178. *See id.*

179. *Id.*

180. *Id.* at 661 n.8.

181. *See id.* at 661.

The Minnesota Supreme Court would assess its position in light of what other jurisdictions have done. There is support elsewhere for use of a risk-utility balancing approach,<sup>182</sup> perhaps stronger and more in accord with the risk-utility approach than that taken in Minnesota. However, any analysis of what the supreme court might do remains a prediction. *Kociemba* is a studied prediction, but nothing more.

#### § 7. LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR FOR HARM CAUSED BY DEFECTIVE FOOD PRODUCTS

One engaged in the business of selling or otherwise distributing food products who sells or distributes a defective food product under § 2, § 3, or § 4 is subject to liability for harm to persons or property caused by the defect. Under § 2(a) a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.<sup>183</sup>

#### Commentary

The ordinary rules applicable to other defective products are also applicable to claims arising out of harm caused by defects in commercially distributed food products.<sup>184</sup> The potential defects in food are the same as in other products. Food products can contain manufacturing flaws or design defects, or they may be sold with inadequate warnings. Section 3 may permit recovery when the plaintiff is unable to point to a specific injury-causing defect, and section 4 may apply if a food product does not conform to applicable safety regulations.<sup>185</sup> If the plaintiff claims the harm suffered resulted from the presence of foreign matter in food, a pebble in a can of peas for example, then the claim is readily handled under section 2(a). Section 2(a) deals with liability for manufacturing flaws.<sup>186</sup>

There are special problems, however, when the plaintiff is injured by an ingredient in a food product and it is unclear whether the injury-causing ingredient is an inherent aspect of the product

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182. See Proposed Final Draft, *supra* note 6, § 6 Reporters' Note, at 183-84.

183. *Id.* § 7.

184. See *id.* cmt. a.

185. See *id.*

186. See *id.* cmt. b.



or an unanticipated adulteration of the product.<sup>187</sup> The *Restatement (Third)* uses the example of a one-inch chicken bone in a chicken enchilada and asks whether it is a manufacturing defect or simply an inherent aspect of the product:

The analytical problem stems from the circumstance that food products in many instances do not have specific product designs that may be used as a basis for determining whether the offending product component constitutes a departure from design, and thus a manufacturing defect. Food recipes vary over time, within the same restaurant or other commercial food-preparation facility, from facility to facility, and from locale to locale.

Faced with this indeterminacy, some courts have attempted to rely on a distinction between “foreign” and “natural” characteristics of food products to determine liability. Under that distinction, liability attaches only if the alleged adulteration is foreign rather than natural to the product. Most courts have found this approach inadequate, however. Although a one-inch chicken bone may in some sense be “natural” to a chicken enchilada, depending on the context in which consumption takes place, the bone may still be unexpected by the reasonable consumer, who will not be able to avoid injury, thus rendering the product not reasonably safe. The majority view is that, in this circumstance of uncertainty, the issue of whether a food product containing a dangerous but arguably natural component is defective under § 2(a) is to be determined by reference to reasonable consumer expectations within the relevant context of consumption. A consumer expectations test in this context relies upon culturally defined, widely shared standards that food products ought to meet. Although consumer expectations are not adequate to supply a standard for defect in other contexts, assessments of what consumers have a right to expect in various commercial food preparations are sufficiently well-formed that judges and triers of fact can sensibly resolve whether liability should be imposed using this standard.<sup>188</sup>

Standards aside, the food cases present difficult proof problems. One of the issues is whether the defendant may introduce evidence that its quality control methods were such that the food

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187. *See id.*

188. *Id.*

could not have been adulterated or contaminated.<sup>189</sup> The Reporters' Note indicates that a substantial number of courts permit quality control evidence to be introduced as circumstantial proof that the food product was not contaminated at the time of sale.<sup>190</sup>

The Minnesota Supreme Court has not yet taken a position on the question of standards in this line of cases. The court of appeals visited the issue in *Kneibel v. RRM Enterprises*,<sup>191</sup> but without taking a clear position on the issue. The plaintiff in the case suffered dental injuries when he bit down on a hard object while eating ribs at a restaurant.<sup>192</sup> He was unable to identify the object that allegedly broke his tooth because he reflexively swallowed the evidence after he was injured.<sup>193</sup> His negligence suit against the restaurant was dismissed by the trial court, apparently because of his inability to satisfy the foreign-natural test.<sup>194</sup>

The court of appeals noted both the foreign-natural and reasonable expectations tests.<sup>195</sup> The foreign natural test distinguishes "between injury caused by spoiled, impure, or contaminated food or food containing a foreign substance, and injury caused by a substance natural to the product sold."<sup>196</sup> If the substance is natural, there is no liability.<sup>197</sup> The reasonable expectation test determines the consumer's reasonable expectations of the food as it is served, rather than the natural occurrences in the food ingredients before preparation.<sup>198</sup> The issue is usually decided by a jury.<sup>199</sup>

The court of appeals failed to take a position on the appropriate test for Minnesota because of its conclusion that the plaintiff failed to satisfy either test.<sup>200</sup> The plaintiff argued that the tests differ because under the reasonable expectations test the plaintiff need not identify the harmful object.<sup>201</sup> He argued that there was a genuine issue of material fact as to whether a person eating ribs

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189. *See id.* Reporters' Note, at 194.

190. *See id.*

191. 506 N.W.2d 664 (Minn. Ct. App. 1993).

192. *See id.* at 665.

193. *See id.*

194. *See id.*

195. *See id.* at 666-67.

196. *Id.* at 666 (quoting *Hunt v. Ferguson-Paulus Enters.*, 415 P.2d 13, 14 (Or. 1966)).

197. *See id.*

198. *See id.*

199. *See id.* (citing *Betehia v. Cape Cod Corp.*, 103 N.W.2d 64, 69 (Wis. 1960)).

200. *See id.*

201. *See id.* at 667.

would expect to chew on a hard object that would break a tooth.<sup>202</sup>

The court of appeals concluded that where the reasonable expectations test is used in a negligence action, there must be a way of determining whether the defendant had breached its duty of ordinary care to eliminate or remove harmful objects in the preparation of the food.<sup>203</sup> The court concluded that in absence of evidence identifying the harmful object there was no way to prove that the restaurant breached its duty of care.<sup>204</sup> The plaintiff relied on the exploding bottle cases to support his claim.<sup>205</sup> The court of appeals, however, distinguished those cases on the basis that explosion of a bottle is circumstantial evidence that the product was defective when it left the manufacturer's hands, but "it cannot be said that an order of spare ribs is clearly defective because an unidentified hard object causes harm."<sup>206</sup>

*Kneibel* is framed in terms of a negligence claim, but the standards appear to be equally applicable to claims based on strict liability. The supreme court's exploding bottle cases certainly demand circumstantial proof of the defect that caused injury.<sup>207</sup> However, it is also arguable that in referring to the foreseeability of the harm and the defendant's obligation to exercise ordinary care to eliminate or remove harmful bones in the preparation of food, the court of appeals understates the defendant's duty. Because there is no indication in the case that the plaintiff bit down on a piece of bone, the reasonable expectation test perhaps was inapplicable. Arguably, the case simply involved a defect resolvable under section 2(a) of the *Restatement (Third)*, the provision applicable to manufacturing defects.<sup>208</sup> If so, the court's concluding analysis is correct, and the preceding analysis is unnecessary.

The court focused on the use of the reasonable expectations standard in a negligence action, concluding that there must be a way to determine whether the defendant breached its duty of ordinary care to eliminate or remove harmful objects in the preparation of the food.<sup>209</sup> The court held that there was no way to prove

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202. See *id.*

203. See *id.*

204. See *id.*

205. See *id.* (citing *Lee v. Crookston Coca-Cola Bottling Co.*, 290 Minn. 321, 188 N.W.2d 426 (1971)).

206. See *id.*

207. See, e.g., *Lee v. Crookston Coca-Cola Bottling Co.*, 290 Minn. 321, 333, 188 N.W.2d 426, 434 (1971).

208. See Proposed Final Draft, *supra* note 6, § 2(a).

209. See *Kneibel*, 506 N.W.2d at 667.

the defect without evidence identifying the harmful object.<sup>210</sup> If the plaintiff pled the case as a strict liability claim, the issue is whether the standards would have differed or only the burden of proof on the reasonable care issue.

The court's principal focus was on whether the object in the ribs was a foreign or natural substance.<sup>211</sup> Requiring the plaintiff to prove a "clear defect" seemed unduly harsh under the circumstances. This may be a case that would be better handled under section 3 of *Restatement (Third)*, under which the plaintiff might have been entitled to recover.

*Kneibel* presents problems because it is unclear just exactly what caused the plaintiff's injury. The foreign-natural test presents problems because the plaintiff may have been injured by either a foreign substance or a piece of bone.<sup>212</sup> A reasonable expectations test may create a jury issue as to whether he should reasonably expect such an injury while eating ribs. The trial court apparently used the foreign-natural test, which the plaintiff on appeal argued was improperly applied.<sup>213</sup> The court of appeals affirmed the trial court, but on the basis that under either of standard the plaintiff was not entitled to recover because of his inability to show that the defendant breached its duty of due care.<sup>214</sup> The flaw in the plaintiff's case, according to the court of appeals, was the plaintiff's failure to identify the harmful object.<sup>215</sup> Absent that proof, there was no proof of breach of duty.<sup>216</sup>

A question arises as to whether the plaintiff's claim would have failed under a strict liability theory as well, and whether it would have received different treatment under the *Restatement (Third)*. Had the case proceeded under a strict liability theory, there still would have been a question as to the appropriate standard for resolution of the food cases. Assuming the *Restatement's* consumer expectation standard applies, the issue is whether the case would have been decided differently. In *Kneibel*, the court concluded that the plaintiff's inability to identify the harm-causing agent in the ribs foreclosed his ability to prove that the defendant failed to ex-

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210. *See id.*

211. *See id.*

212. *See id.* at 665.

213. *See id.* at 667.

214. *See id.*

215. *See id.*

216. *See id.*

ercise reasonable care.<sup>217</sup> In a negligence case, the plaintiff has the burden of proving lack of due care on the part of the food seller. In a case under section 7, the plaintiff should be entitled to recover simply by proving that “a reasonable consumer would not expect the food product to contain” the ingredient that caused harm.<sup>218</sup> The defendant may introduce evidence that it exercised reasonable care, but only to prove that its exercise of reasonable care made it unlikely that the product that injured the plaintiff was not contaminated at the time of sale.<sup>219</sup>

Section 7 of the *Restatement (Third)* notes that section 2(a) may be used to establish the existence of a manufacturing defect.<sup>220</sup> If section 2(a) applied, the issue would be whether the plaintiff had sufficient circumstantial proof of the existence of the defect.<sup>221</sup> Of course, under section 3 the plaintiff need not prove the specific defect that caused the injury.<sup>222</sup> In *Kneibel* the plaintiff was not responsible for the destruction of the evidence,<sup>223</sup> and the critical issue is then whether the plaintiff’s circumstantial evidence of the existence of a defect in the ribs was sufficient to take the case to the jury.

There are two possible causes of the plaintiff’s injury. One is a foreign object, in which case there would be a clear case under section 2(a). The other is that the plaintiff was injured by biting down on a piece of bone. Bones are common in spareribs. The probabilities seem to be equally balanced. Even though the plaintiff may not have bitten a piece of bone, one potential explanation is that the plaintiff simply bit down on one of the ribs or a piece of rib. With respect to the circumstantial proof in the case, the issue is whether the plaintiff made a claim that a trier of fact should have resolved.

The court of appeals rejected the *Lee* approach, concluding that explosion of a bottle is circumstantial evidence that the product was defective when it left the defendant’s hands, but that “it cannot be said that an order of spare ribs is clearly defective be-

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217. *See id.*

218. Proposed Final Draft, *supra* note 6, § 7.

219. *See id.* Reporters’ Note, at 194.

220. *See id.* cmt. b.

221. *See id.* § 2(a).

222. *See id.* § 3.

223. *See Kneibel v. RRM Enterprises*, 506 N.W.2d 664, 665 (Minn. Ct. App. 1993). When the plaintiff bit down on the hard object, he swallowed reflexively and destroyed the evidence. *See id.*

cause an unidentified hard object causes harm.”<sup>224</sup> The discussion of the burden of proof is somewhat confusing because of the court’s note that there is no evidence in the case suggesting that the ribs were “clearly defective.”<sup>225</sup> The usual issue is not whether the plaintiff is able to prove that a harmful agent is “clearly defective,” but rather whether the facts justify an inference that the product is defective.

Section 7 of the *Restatement* seems to assume that the harm-causing ingredient, whether foreign or natural, is identified. If it is not, then perhaps section 2(a), coupled with section 3, is appropriately applied. If so, using the *Restatement* standard, the plaintiff would arguably have created a jury issue on the question.

The Minnesota Supreme Court has indicated the continuing validity of the consumer expectation standard in cases involving manufacturing flaws.<sup>226</sup> There is no reason to think that the court will adopt a foreign-natural test instead of a consumer expectation standard in these kinds of cases.

#### § 8. LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR OF DEFECTIVE USED PRODUCTS

One engaged in the business of selling or otherwise distributing used products who sells or distributes a defective used product is subject to liability for harm to persons or property caused by the defect if the defect:

(a) results from the seller’s failure to exercise reasonable care; or

(b) is a manufacturing defect under § 2(a) or a defect that may be inferred under § 3 and the seller’s marketing of the product would cause a reasonable person in the position of the buyer to expect the used product to present no greater risk of defect than if the product were new; or

(c) is a defect under § 2 or § 3 in a used product remanufactured by the seller or a predecessor in the commercial chain of distribution of the used product.

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224. *Id.* at 667.

225. *Id.*

226. *See* *Indep. Sch. Dist. No. 441 v. Bunn-O-Matic Corp.*, No. C0-96-594, 1996 WL 689768, at \*7 (Minn. Ct. App. Dec. 3, 1996) (affirming the trial court’s use of consumer expectation jury instructions as being appropriate for cases involving manufacturing flaws), *review denied*, (Minn. Jan. 29, 1997).

A used product is a product that, prior to the time of sale or other distribution referred to in this Section, is commercially sold or otherwise distributed to a buyer not in the commercial chain of distribution and used for some period of time.<sup>227</sup>

### Commentary

The comments explain the reason for the deviation from the basic liability standards in section 2:

American courts have struggled with the question of whether to hold commercial sellers of used products to the same legal standards of responsibility for defects as commercial sellers of new products. Judicial responses have varied. Some courts hold used-product sellers strictly liable for harm caused by product defects existing at the time of sale. A greater number of courts hold commercial sellers of used products to lesser standards of responsibility. Liability rules applicable to used-product sellers are less stringent than those applicable to new product sellers due to the wide variations in the type and condition of used products. For example, even in the minority of jurisdictions that generally hold commercial used-product sellers strictly liable for defects, disclaimers of liability may more readily be given effect in connection with sales of used products than in connection with sales of new products. Even in jurisdictions that generally apply more relaxed standards of responsibility for used products, factors that tend to raise a buyer's expectations regarding product quality, such as a seller's advertising a used product as "re-built" or "re-conditioned," correspondingly tend to raise the level of the sellers' responsibilities for product defects.<sup>228</sup>

There are several variations in the rules. The rules apply only when a used product is involved.<sup>229</sup> To be "used" within the meaning of the section, the product must have been commercially sold or otherwise distributed to a buyer who is not in the commercial chain of distribution, and it must have been used for some period of time, before the time of the sale or other distribution covered in section 8.<sup>230</sup> The fact that a product has been tested, such as a mo-

227. Proposed Final Draft, *supra* note 6, § 8.

228. *Id.* cmt. a.

229. *See id.* § 8.

230. *See id.*

tor vehicle test-driven at a dealership, does not cast the product as used within the meaning of section 8.<sup>231</sup> Once a new product has been sold or distributed, "any use of the product by the buyer or other person not in the chain of distribution, for however short a period of time, transforms the product into a used product."<sup>232</sup>

Section 8 applies only to commercial sellers who are engaged in the business of selling used products.<sup>233</sup> The section is inapplicable to noncommercial private owners of used products who sell those products to others, nor is it applicable to commercial establishments that make only occasional sales of used equipment outside the regular course of business.<sup>234</sup> However, even though those sellers outside the scope of the *Restatement (Third)* may be liable under general negligence principles.<sup>235</sup>

A seller or distributor of used products is subject to liability under subpart (a) for harm caused by a used product that results from the seller's failure to exercise reasonable care.<sup>236</sup> Even if strict liability does not apply, the seller must exercise reasonable care, and a consumer of used products has a right to expect that the seller will do so.<sup>237</sup>

Subsections (b) and (c) subject a commercial seller of used products to liability only under limited circumstances.<sup>238</sup> The reason is that consumers generally do not, and should not, expect most used products that are sold in obviously used condition to perform as safely as new products.<sup>239</sup> Several factors influence consumer expectations with respect to used products:

For example, the age and condition of used products and the commensurate lower prices paid for such products alert reasonable buyers to the possibility of defects and the need to monitor the safety aspects of such products over time according to their age and condition. Given the awareness of buyers generally regarding the risks of harm presented by used products in varying stages of physical deterioration, primary responsibility for allocating these risks may, in the absence of fault on the part of

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231. *See id.* cmt. d.

232. *Id.*

233. *See id.* cmt. c.

234. *See id.*

235. *See id.*

236. *See id.* § 8(a).

237. *See id.* cmt. b.

238. *See id.*

239. *See id.*



the used-product seller or some special circumstance that justifies strict liability, be delegated to commercial markets for used products, in which the terms of sale vary widely depending on the apparent condition of such products at the time of sale.<sup>240</sup>

However, when the used product is sold under circumstances where a reasonable buyer would expect the product to perform as a new product, the *Restatement* takes a different position:

[U]nder the circumstances described in Subsection (b), many of the same rationales that support strict liability for harm caused by mechanical defects in new products support strict liability for mechanical defects in like-new used products. This section does not adopt the “consumer expectations test” as the governing standard for defining product defect. This Restatement has rejected that test as the sole test for defect in § 2 and does not adopt it in this Section . . . . The question addressed in this Section is under what circumstances a plaintiff may hold the seller of a used product to the liability standard applicable to sellers of new products. When dealing with this more limited question, Subsection (b) takes the position that when the seller’s marketing of the product would lead a reasonable consumer to expect the product to present no greater risk of defect than if the product were new that the law may treat the used product sale as the functional equivalent of the sale of a new product.<sup>241</sup>

For similar reasons, the remanufacture of a used product will subject the seller to strict liability. Subsection (c) includes manufacturing defects, design defects and defects that are based on inadequate instructions or warnings.<sup>242</sup> The Reporters’ Note following section 8 discusses the difficulty in concluding with any certainty the exact degree of support for section 8 rules because of the varied opinion applicability of strict liability to the sale of used products.<sup>243</sup> Minnesota products liability law is filled with cases involving used products,<sup>244</sup> although they have not raised the same

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240. *Id.*

241. *Id.*

242. *See id.*

243. *See id.* Reporters’ Note, at 213.

244. *See, e.g.,* Andrew v. White-Rodgers Co., 465 N.W.2d 102 (Minn. Ct. App. 1991) (discussing the products liability issues arising from an accident involving a used space heater); Riens v. International Harvester Co., 346 N.W.2d 359 (Minn. Ct. App. 1984) (discussing products liability issues arising from an accident involving a used tractor).

issues presented in section 8 of the *Restatement*.

In *Gorath v. Rockwell International, Inc.*,<sup>245</sup> the plaintiff suffered injuries when the blade of a guillotine paper cutter into which he was feeding paper at his place of employment spontaneously turned around and cut off his hand.<sup>246</sup> The plaintiff claimed he did not touch either of the two hand levers that activated the blade.<sup>247</sup> The paper cutter was manufactured and sold in 1947, and the first owner of the machine used it for over twenty years with no mishaps.<sup>248</sup> In 1972, the seller sold the paper cutter with a thirty-day warranty to Gorath's employer, where it was used for over nine years before the accident in question occurred.<sup>249</sup>

A two-handed start mechanism was the primary safety device on the machine.<sup>250</sup> The right lever moved the blade, and the left lever was a safety feature that insured the operator could not operate the blade with one hand while the other was under the blade.<sup>251</sup> Three component parts of the safety lever were not the originally manufactured components.<sup>252</sup>

The plaintiff's experts attributed the accident to the product's defective design rather than to the parts that had been replaced on the paper cutter. The manufacturer's expert, however, testified that the replaced parts could have both prevented the effective use of the left-hand safety lever and prevented the safety lever from returning to its proper position.<sup>253</sup> The seller in the case denied having ever replaced any component parts.<sup>254</sup>

The plaintiff brought suit against both the manufacturer and seller of the paper cutter.<sup>255</sup> The trial court granted the seller's motion for summary judgment on plaintiff's strict liability, negligence, and implied warranty claims against the seller.<sup>256</sup>

On appeal, the court of appeals noted that Minnesota Statutes section 544.41 permitted the dismissal of nonmanufacturing de-

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245. 441 N.W.2d 128 (Minn. Ct. App. 1989).

246. *See id.* at 130.

247. *See id.*

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.*

253. *See id.*

254. *See id.*

255. *See id.* at 129.

256. *See id.* at 129-30.

fendants, including sellers of used products,<sup>257</sup> from strict liability claims where the product manufacturer is solvent and subject to jurisdiction in Minnesota.<sup>258</sup> The trial court, however, may not enter a dismissal order against a defendant if the plaintiff establishes one of the three following statutory exceptions:

- (a) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage;
- (b) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or
- (c) That the defendant created the defect in the product which caused the injury, death or damage.<sup>259</sup>

The court of appeals concluded that because the paper cutter manufacturer's correct identity was known, the seller was not subject to strict liability in tort absent a finding that one of the statutory exceptions was applicable.<sup>260</sup>

The court held that the seller did not exercise significant control over the product.<sup>261</sup> The plaintiff argued that the seller's alteration constituted the exercise of significant control, although the seller denied any alteration and there was no evidence to the contrary.<sup>262</sup> In a related argument, the plaintiff also argued that a factual dispute existed as to whether the original product defect was due to the manufacturer's design or the seller's modification.<sup>263</sup> According to the court of appeals, the argument failed on the facts because the plaintiff did not present evidence that tended to show the seller made any modifications. Also, it failed because it did not establish a reasonable inference that any modification caused the plaintiff's injury.<sup>264</sup> Without showing that the product seller created the defect, the plaintiff also failed to show that the seller had actual knowledge of any defect in the product.<sup>265</sup> As a result, the

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257. *See id.* at 132.

258. *See id.* at 131.

259. MINN. STAT. § 544.41, subd. 3 (1996).

260. *See Gorath*, 441 N.W.2d at 134.

261. *See id.* at 131.

262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

plaintiff did not meet the exception in subpart (b) of subdivision 3.<sup>266</sup>

The court found its interpretation of the statute to be consistent with the treatment of used product sellers in other jurisdictions.<sup>267</sup> The court noted that case law from other jurisdictions "holds that the seller of used products should be held in the case if the salesperson was more than a passive middleman and had some involvement with the condition of the product."<sup>268</sup> The cases noted by the court of appeals, *Peterson v. Lou Bachrodt Chevrolet Co.*,<sup>269</sup> a 1975 Illinois Supreme Court case, and *Crandell v. Larkin and Jones Appliance Co.*,<sup>270</sup> decided by the South Dakota Supreme Court in 1983, take the general position that sellers of used products should not be held strictly liable based on the fact that they, unlike retailers and wholesalers of new products, are ordinarily not in a position to apply pressure on the product manufacturer to make its products safer.<sup>271</sup> The South Dakota Supreme Court noted in *Crandell* that a product manufacturer of a reconditioned or rebuilt product could be subject to strict liability in order to protect the consumer's reasonable expectations of safety under those circumstances.<sup>272</sup>

The plaintiff in *Gorath* also asserted that the seller was negligent in failing to inspect the cutter, in failing to warn the purchaser about the product's design defects, and in selling a dangerous product.<sup>273</sup> The court of appeals held that all three claims failed.<sup>274</sup> First, the court held that sellers do not have an obligation to inspect the products they sell unless they either know or have reason to know the products are dangerous.<sup>275</sup> The statement is consistent with the position taken by the *Restatement (Second) of Torts* in section 402. It provides:

A seller of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the dangerous character or condition

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266. See *id.* at 132.

267. See *id.* (citations omitted).

268. See *id.* (citations omitted).

269. 329 N.E.2d 785, 787 (Ill. 1975).

270. 334 N.W.2d 31, 34 (S.D. 1983).

271. See *Peterson*, 329 N.E.2d at 787; *Crandell*, 334 N.W.2d at 34.

272. See *Crandell*, 334 N.W.2d at 34.

273. See *Gorath*, 441 N.W.2d at 132, 133.

274. See *id.*

275. See *id.* at 132.

of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it.<sup>276</sup>

In *Crothers v. Cohen*,<sup>277</sup> also cited authority in *Gorath*,<sup>278</sup> the court of appeals held that the seller could be held liable for failing to inspect the used car for latent defects before selling it to the plaintiff.<sup>279</sup> The trial court instructed the jury that a seller "has a duty to use ordinary care to discover obvious defects which would constitute a menace or source of danger. The seller is not required to disassemble the vehicle to make this observation."<sup>280</sup> The court of appeals approved the instruction because it was based on *Kothe v. Tysdale*,<sup>281</sup> a 1951 Minnesota Supreme Court case that established the basic duty of a vendor or lessor who intends to use the vehicle on the public highways.<sup>282</sup> The duty is:

[T]o exercise reasonable care in supplying the purchaser or the lessee with a vehicle that will not constitute a menace or source of danger thereon; that liability attaches to such vendor or lessor for injuries which are the result of patent defects in the vehicle thus provided, or of defects therein which could have been discovered by the exercise of ordinary care; and that such liability exists irrespective of any contractual obligations between the parties to the original transaction.<sup>283</sup>

The *Kothe* court also approved the position taken in *Egan Chevrolet Co. v. Bruner*<sup>284</sup> by the Eighth Circuit:<sup>285</sup>

A retail dealer who takes a used truck in trade and undertakes to repair and recondition it for resale for use upon the public highways owes a duty to the public to use reasonable care in the making of tests for the purpose of detecting defects which would make the truck a menace to those who might use it or come in contact with it and in making the repairs necessary to render the truck reasonably safe for use upon the public highways, and is charged

276. RESTATEMENT (SECOND) OF TORTS § 402 (1965).

277. 384 N.W.2d 562 (Minn. Ct. App.), *review denied*, (Minn. June 13, 1986).

278. *See Gorath*, 441 N.W.2d at 132.

279. *See Crothers*, 384 N.W.2d at 562.

280. *Id.* at 565.

281. 233 Minn. 163, 46 N.W.2d 233 (1951).

282. *See id.* at 168, 46 N.W.2d at 236.

283. *Id.*

284. 102 F.2d 373 (8th Cir. 1939).

285. *See Kothe*, 233 Minn. at 168, 46 N.W.2d at 236. *See also* *McCleod v. Holt Motor Co.*, 208 Minn. 473, 477, 294 N.W. 479, 481 (1940) (approving of the Eighth Circuit's holding in *Egan*).

with knowledge of defects which are patent or discoverable in the exercise of ordinary care . . . . The rule does not mean—as the appellant seems to fear—that a dealer in used motor vehicles, who undertakes to recondition a truck for resale, becomes virtually an insurer of the safety of the truck he sells, nor does it mean that he is required to disassemble an entire truck to examine each of its parts.<sup>286</sup>

The duty noted in *Egan*, however, seems limited to used automobiles.<sup>287</sup> If so, that means that sellers of used equipment owe a duty of care not subject to the *Egan* limitation for used motor vehicles.<sup>288</sup>

The court of appeals in *Gorath* also held that the seller in the case could not be held liable on the basis of a failure to warn claim.<sup>289</sup> Because of the multiple alterations to the paper cutter over its thirty year life, the court concluded that “the connection between the sale of this used product and the accident some 9 years later is too remote to impose liability as a matter of public policy.”<sup>290</sup> The court concluded that the seller was not liable under the plaintiff’s modified part theory because under that theory, a seller is liable only for the injuries resulting directly from modifications it made to the product.<sup>291</sup> There was no evidence that the seller modified or replaced any of the parts on the paper cutter that may have caused the plaintiff’s injuries.<sup>292</sup>

Minnesota Statutes section 544.41 deviates from the general rule that a product seller in the chain of manufacture or distribution can be held strictly liable.<sup>293</sup> Its opt-out provision permits dismissal from a products liability suit of a nonmanufacturing defendant where the manufacturer is solvent and subject to jurisdiction in Minnesota.<sup>294</sup> It does not specifically state what defendants are covered by the section, and it permits dismissal only of strict liability claims, not claims based on negligence or warranty other than

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286. *Egan*, 102 F.2d at 375-76.

287. *See id.* at 375.

288. *See Sanders v. Strickler’s Research and Eng’g Co.*, No. C3-92-1181, 1993 WL 71645, at \*4 (Minn. Ct. App.), *review denied*, (Minn. April 29, 1993).

289. *See Gorath v. Rockwell Int’l, Inc.*, 441 N.W.2d 128, 133 (Minn. Ct. App. 1989).

290. *Id.*

291. *See id.*

292. *See id.*

293. *See* MINN. STAT. § 544.41, subd. 2 (1996).

294. *See id.*

implied warranty of merchantability.<sup>295</sup> However, Minnesota courts have held liable defendants who are product sellers other than manufacturers.<sup>296</sup>

To invoke section 544.41, the product manufacturer must be available and subject to suit.<sup>297</sup> The claim against the manufacturer is based on the manufacturer's sale of a defective product.<sup>298</sup> The claim against parties other than the manufacturer depends on proof that the non-manufacturing party is in the chain of distribution.<sup>299</sup>

The exceptions in subdivision 3 of section 544.41 mean that the non-manufacturing defendant may be held in on the strict liability claim asserted against it. Yet, it also means that as a preliminary matter a defendant may not be subject to Minnesota's jurisdiction unless it is part of the chain of distribution in the first place.<sup>300</sup> Furthermore, while the *Gorath* court held that the section applied to sellers of used products,<sup>301</sup> it does so only when the seller is part of the chain of distribution.<sup>302</sup> If not, the section would be inapplicable because there would be no product manufacturer who would be subject to jurisdiction in Minnesota.<sup>303</sup> If the plaintiff establishes that the used product seller is actually the manufacturer, then the used product seller would be subject to strict liability, and the original manufacturer would be off the hook, and thus section 544.41 would have no impact.<sup>304</sup>

In sum, the exceptions in subdivision 3 establish that the product seller, including a used product seller, may be held liable under a strict liability theory, along with the original product manufacturer.<sup>305</sup> If the product seller is in effect treated as the product manufacturer, then the original manufacturer would not

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295. *See id.*

296. *See, e.g.,* *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 786-87 (Minn. 1977) (holding that there was sufficient evidence to establish retail sellers' duty to warn against improper use of a space heater); *Anderson v. Shaughnessy*, 519 N.W.2d 229, 232-33 (Minn. Ct. App. 1994) (reversing district court's dismissal of a product seller), *rev'd on other grounds*, 526 N.W.2d 625 (Minn. 1995).

297. *See* MINN. STAT. § 544.41, subd. 2 (1996).

298. *See id.* subd. 1.

299. *See id.* subd. 3(a).

300. *See id.* subd. 3.

301. *See Gorath v. Rockwell Int'l, Inc.*, 441 N.W.2d 128, 133 (Minn. Ct. App. 1989).

302. *See* MINN. STAT. § 544.41, subd. 3 (1996).

303. *See id.*

304. *See id.*

305. *See id.*

be subject to liability, but the used product seller would be subject to such liability.<sup>306</sup> If the used product seller is part of the chain of distribution, but simply passed along a defective product, the seller would not be subject to strict liability because it would be able to move for dismissal of the strict liability claims against it under section 544.41.<sup>307</sup>

If the claim against the non-manufacturing defendant is based on negligence, or warranty other than implied warranty, section 544.41 has no effect.<sup>308</sup> That leaves as the general rule, for sellers of used products as well as other sellers, a general obligation to exercise reasonable care.

Melded, the Minnesota common law and statutory rules that apply to sellers of used goods are similar to the *Restatement's* rules in section 8.

#### § 9. LIABILITY OF COMMERCIAL PRODUCT SELLER OR DISTRIBUTOR FOR HARM CAUSED BY MISREPRESENTATION

One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.<sup>309</sup>

#### Commentary

The rules governing fraudulent and negligent misrepresentations are contained in sections 310 and 311 of the *Restatement (Second) of Torts*.<sup>310</sup> Section 9 provides for the imposition of liability on product sellers or distributors for fraudulent, negligent, or innocent misrepresentations concerning the product that caused personal injury or property damage.<sup>311</sup> Section 402B of the *Restatement (Second)* covers liability for innocent misrepresentations. It provides:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a

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306. *See id.*

307. *See id.*

308. *See id.*

309. Proposed Final Draft, *supra* note 6, § 9.

310. *See* RESTATEMENT (SECOND) OF TORTS §§ 310 and 311 (1965).

311. *See* Proposed Final Draft, *supra* note 6, § 9.



misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

- (a) it is not made fraudulently or negligently, and
- (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.<sup>312</sup>

In Minnesota, claims for fraud and misrepresentation are commonly mixed with other products liability claims.<sup>313</sup> Those claims are separate and distinct from products liability claims based on design defect, failure to warn, or manufacturing flaws.<sup>314</sup> Fraud and misrepresentation claims may exist even if the product is otherwise not defective.<sup>315</sup>

In Minnesota, the terms “fraud” and “misrepresentation” have been used interchangeably. As a general proposition, the term “fraud” is used where the representation is intentional, and “misrepresentation” is used where it is unintentional.<sup>316</sup>

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312. RESTATEMENT (SECOND) OF TORTS § 402B (1965).

313. See, e.g., *Hapka v. Paquin Farms*, 458 N.W.2d 683, 685 (Minn. 1990) (mixing claim of misrepresentation with claims for negligence, breach of express and implied warranties, and strict liability); *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 431 N.W.2d 528, 529 (Minn. 1988) (mixing claim of fraud with claims for negligence, breach of implied and express warranties, and strict products liability); *Brandt v. Marshall Animal Clinic*, 540 N.W.2d 870, 873 (Minn. Ct. App. 1995) (mixing claims for fraud and misrepresentation with claims for defective design, negligence, and breach of implied warranties of merchantability and fitness), *review denied*, (Minn. Feb. 9, 1996); *Parker v. MVBA Harvestore Sys.*, 491 N.W.2d 904, 905 (Minn. Ct. App. 1992) (mixing claims of fraud with claims for negligence, strict products liability, and breach of express and implied warranties).

314. See *Hapka*, 458 N.W.2d at 688. The commentary to the *Civil Jury Instruction Guides* takes a position pursuant to *Bilotta*. The comments state that: submission of a claim for express warranty, along with the design defect claim, would be appropriate where it is justified by the evidence . . . . The same result should be achieved with implied warranty of fitness for a particular purpose. In both situations, statements or representations may provide the basis for liability even if, absent the representations or statements, the product would not be defective under the reasonable care balancing approach.

JURY INSTRUCTION GUIDES, *supra* note 18, JIG 117, Authorities at 83.

315. See *Beutz*, 431 N.W.2d at 530.

316. See JURY INSTRUCTION GUIDES, *supra* note 18, JIG 610, Authorities at 407. There are eleven elements in a fraud or misrepresentation action in Minnesota. *Id.* at 408. They are as follows:

1. a representation;
2. the representation must be false;

§ 10. LIABILITY OF COMMERCIAL PRODUCE SELLER OR DISTRIBUTOR  
FOR HARM CAUSED BY POST-SALE FAILURE TO WARN

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product when a reasonable person in the seller's position would provide such a warning.

(b) A reasonable person in the seller's position would provide a warning after the time of sale when:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.<sup>317</sup>

Commentary

Section 10 imposes a post-sale duty to warn only when a reasonable person in the product seller's position would provide the warning.<sup>318</sup> The standard is objective. As applied to the parties in

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3. the representation must deal with past or present fact;
  4. the fact must be material;
  5. the fact must be susceptible of knowledge;
  6. the representer must know the fact is false or assert it as of is own knowledge;
  7. the representer must intend to have the other person induced to act or justified in acting on it;
  8. the other person must be induced to act or justified in acting;
  9. that person's actions must be in reliance upon the representation;
  10. that person must suffer damages; and
  11. the misrepresentation must be the proximate cause of injury.

*Id.*

317. Proposed Final Draft, *supra* note 6, § 10.

318. *See id.* The Reporters state in their notes that they:

the chain of distribution, the reasonableness standard may require one entity in the chain to provide a warning and not another.<sup>319</sup> A manufacturer may have an obligation to provide a warning, but a retailer who does not have knowledge of the dangers created by the product may not.<sup>320</sup> If a retailer gains knowledge of the risk, the issue then becomes whether a reasonable person in the retailer's position would provide a warning.<sup>321</sup> That determination requires the application of the factors in subpart (b).<sup>322</sup>

The *Restatement (Third)* position is similar to that taken in Minnesota. In *Hodder v. Goodyear Tire & Rubber Co.*,<sup>323</sup> the supreme court considered the issue of whether Goodyear had a post-sale obligation to warn about the dangers created by its multi-piece rim assembly.<sup>324</sup> The court held that it did. Specifically, the court found:

On the facts of this case, we hold that a continuing post-sale duty to warn existed and was adequately submitted. Hundreds of thousands of K-rims have been used in millions of tire changes over the years without incident; of the 134 or so K-rim explosions which did occur, many are explained by improper servicing or misuse. Goodyear steadfastly maintains its K-rim is a safe product if used properly. Nevertheless, it became evident by the late 1950s that K-rims could be temperamental . . . . [W]hen explosions did occur, serious injury or death usually resulted; and, therefore, that great care was required in the handling and servicing of K-rims. Further, Goodyear has continued over the years in the tire rim business, and, although all K-rim production was discontinued by 1969, Goodyear continued to advertise its K-rims as late as 1977, and has continued to sell tires and tubes for use with used K-rims. Finally, Goodyear undertook a duty to warn of K-rim dangers. Under these circumstances, it seem to us

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have not drawn a sharp distinction between failure to warn of risk and failure to inform about safety improvements. Where a newly discovered risk imposes risk of serious harm and safety improvements can be practically implemented there may in certain instances be a duty to inform the buyer of the availability of such safety improvements.

*Id.* Reporters' Note, at 240.

319. *See id.* cmt. b.

320. *See id.* § 10 cmt. b.

321. *See id.*

322. *See id.*

323. 426 N.W.2d 826 (Minn. 1988), *cert. denied*, 492 U.S. 926 (1989).

324. *See id.* at 832-33.

that Goodyear had a continuing duty to instruct and to warn, so that users of used K-rims would be apprised of safety hazards which, at an earlier time, were not fully appreciated. A continuing duty to warn arises only in special cases. We think this is such a case.<sup>325</sup>

The court's position follows the *Restatement (Third)*, at least in part. At a minimum, the seller either must know or reasonably should know that the product poses a substantial risk of harm.<sup>326</sup> In *Hodder*, the defendant knew as early as the late 1950s that there were problems with the rims, including the risk of serious injury or death.<sup>327</sup> The defendant continued in business and continued to employ the K-rims.<sup>328</sup> Although it stopped production of the rims in 1969, Goodyear continued advertising the K-rim and to sell tires and rims for use with existing rims until 1977; it also provided warnings of K-rim dangers at that time.<sup>329</sup> Prior warnings of the dangers involved in using of the K-rims were quite graphic.<sup>330</sup>

The limitation of the theory to "special" cases has required subsequent courts faced with the issue to determine the breadth of the duty the court contemplated in *Hodder*. The three factors were critical to the United States District Court for the District of Minnesota in its consideration of the continuing duty to warn issue in *Kociemba*, an intrauterine device case.<sup>331</sup>

In *Ramstad v. Lear Siegler Diversified Holdings Corp.*<sup>332</sup> a farmer sustained injuries when his foot slipped into the intake of a grain auger. The United States District Court for the District of Minnesota held that there was no continuing duty to warn on the part of the manufacturer.<sup>333</sup> The court read the "special circumstances" in *Hodder* slightly differently. It found:

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325. *Id.* at 833 (citations omitted).

326. *See id.* at 832.

327. *See id.* at 833.

328. *See id.*

329. *See id.*

330. *See id.* at 835.

331. *See Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1528 (D. Minn. 1989). The court also held that a continuing duty to test could be imposed on the manufacturer, although it would, of course, also be limited to "special cases." The court noted:

Courts should only apply a continuing duty to test when the type of special circumstances identified by the *Hodder* court exist: knowledge of a problem with the product, continued sale or advertising of the product, and a pre-existing duty to warn of dangers associated with the product.

*Id.*

332. 836 F. Supp. 1511 (D. Minn. 1993).

333. *See id.* at 1517.

The special circumstances in *Hodder* included: (1) the defendant's knowledge of problems with the product since the late 1950s, including the knowledge that the product might explode with little provocation; (2) the hidden nature of the danger; (3) the fact that when explosions did occur, serious injury or death usually resulted; (4) defendant remained in that line of business, continued to sell parts for use with the product and had advertised the product within five years of the plaintiff's injury; and (5) defendant had undertaken a duty to warn of product dangers.<sup>334</sup>

The court's analysis of the special factors led it to conclude that there was no duty to warn of the dangers presented by the grain auger:

The court concludes that the special factors which warranted a continuing duty to warn in *Hodder* do not exist in the instant case. Hutchinson had notice of only a handful of other accidents. The danger associated with the auger was not hidden and was known to users. There is no evidence that Hutchinson had undertaken a duty to warn. Hutchinson also adopted a new intake design and ceased marketing a shield for grain augers. The only factor that favors imposing a continuing duty to warn in this case is the gravity of the resulting harm. That factor alone, however, is insufficient to satisfy the special circumstances required by *Hodder*.<sup>335</sup>

In *T.H.S. Northstar Associates v. W.R. Grace and Co.*,<sup>336</sup> an asbestos removal case, the Eighth Circuit held that the defendant manufacturer of fireproofing material had a continuing duty to warn under the circumstances of the case.<sup>337</sup> The defendant argued that the necessary "special circumstances" required by *Hodder* were not present in the case,<sup>338</sup> but the court disagreed:

In *Hodder*, the Minnesota Supreme Court imposed such a duty based upon the following facts: (1) the manufacturer insisted its product was safe if used properly; (2) it became evident to the manufacturer over time that great care was required in the handling and servicing of the product, or serious injury would occur; and (3) the manu-

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334. *Id.*

335. *Id.*

336. 66 F.3d 173 (8th Cir. 1995).

337. *See id.* at 177.

338. *See id.*

facturer continued in the business of selling related products and undertook a duty to warn users of post-sale hazards . . . . We agree with the district court that the evidence in this case justified submitting the continuing-duty-to-warn issue to the jury. In particular, Grace's pamphlets, letters, and extensive publicity discussing the risks of asbestos-containing materials and purporting to advise building owners on how to manage that risk raise a jury issue under *Hodder* whether to impose a continuing legal duty to warn.<sup>339</sup>

The *T.H.S. Northstar* interpretation differs slightly from that of the district courts in *Kociemba* and *Ramstad*, although the second and third factors seem to follow *Hodder*. The *Hodder* court limited its holding to serious risk of personal injury or death.<sup>340</sup> Yet, *T.H.S. Northstar* extended the duty to cases involving property damage and economic loss, although the defendant created a significant health risk by the sale of its products.<sup>341</sup>

The *Restatement (Third)* makes explicit an apparent assumption in the Minnesota cases that "those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm."<sup>342</sup> This is consistent with two general principles governing warnings in Minnesota. One limits recovery for failure to warn to nonobvious dangers.<sup>343</sup> The other gauges the obligation of a product seller to warn according to the feasibility of effectively reaching the person placed at risk.<sup>344</sup>

339. *Id.* (citations omitted).

340. *See* *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 833 (Minn. 1988), cert. denied, 492 U.S. 926 (1989). The facts of *Hodder* are limited to serious injury or death. *See id.*

341. *See T.H.S. Northstar*, 66 F.3d at 174-75.

342. Proposed Final Draft, *supra* note 6, § 10(b) (2).

343. *See* *Minneapolis Soc'y of Fine Arts v. Parker-Klein Assocs. Architects, Inc.*, 354 N.W.2d 816, 821 (Minn. 1984) (explaining "there is no duty to warn if the user knows or should know the potential danger"), *overruled on other grounds by* *Hapka v. Paquin Farms*, 458 N.W.2d 683, 687 (Minn. 1990). *See also* *Drager v. Aluminum Indus. Corp.*, 495 N.W.2d 879, 884 (Minn. Ct. App.) (holding that there is no duty to warn when the user is aware of the risk), *review denied*, (Minn. April 20, 1993); *Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830, 835 (Minn. Ct. App. 1985) (holding there is no duty to warn when a user is aware of product dangers), *review denied*, (Minn. Feb. 14 and 19, 1986); *Dahlbeck v. DICO Co.*, 355 N.W.2d 157, 163 (Minn. Ct. App. 1984) (no duty to warn when product dangers are within user's professional knowledge) (citing *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 687 (8th Cir. 1981), *review denied*, (Minn. Feb. 6, 1985).

344. *See* *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 341, 156 N.W.2d 898, 902 (1968) (holding that a manufacturer of an ingredient had no duty to warn

The third factor in section 10 provides that a warning can be effectively communicated to and acted on by those to whom a warning might be provided. It intends to ensure that the seller is reasonably able "to communicate the warning to those identified as appropriate recipients."<sup>345</sup> If there are sales records identifying the purchasers, then a direct warning might be feasible.<sup>346</sup> If records are not available, the seller may have to rely on the public media for warnings.<sup>347</sup> In addition, as the size of the group to be warned increases, so does the cost.<sup>348</sup> The ability of the seller to warn seems implicit in Minnesota law.<sup>349</sup> As such, the seller's ability to warn is a question of law for the courts in Minnesota.<sup>350</sup> The courts use feasibility as one factor to make that determination.<sup>351</sup>

The fourth factor in the *Restatement (Third)* analysis questions whether the risk of harm is sufficiently great to justify a warning.<sup>352</sup> This issue seems implicit in Minnesota cases emphasizing that the duty to warn is a question of law for the courts to decide in the first instance.<sup>353</sup> In *Hodder*, the court concluded that liability could be based on a post-sale obligation to warn. This decision is clearly based on a balancing of the interests.<sup>354</sup> The balancing act

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the ultimate consumer where the manufacturer of the final product knew of the ingredient's dangerous propensities and placed the product on the market with a warning label).

345. Proposed Final Draft, *supra* note 6, § 10 cmt. g.

346. *See id.*

347. *See id.*

348. *See id.*

349. *See Hill*, 279 Minn. at 341, 156 N.W.2d at 902.

350. *See, e.g., Huber v. Niagara Mach. & Tool Works*, 430 N.W.2d 465, 467 (Minn. 1988) (determining that a manufacturer's duty to warn is a question of law); *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987) (holding that the existence of a duty to warn is a legal question); *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986) (holding that whether a duty to warn exists is a legal issue).

351. *See Balder*, 399 N.W.2d at 81 (no duty to warn where no particular hazard to warn about potential harm); *Hill*, 279 Minn. at 341, 156 N.W.2d at 902 (no duty to warn where no contract with and no opportunity to warn the ultimate consumer).

352. *See* Proposed Final Draft, *supra* note 6, § 10(b)(4).

353. *See, e.g., Balder*, 399 N.W.2d at 81; *Germann*, 395 N.W.2d at 924-25.

354. *See Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 832-34 (Minn. 1988), *cert. denied*, 492 U.S. 926 (1989). In *Bilotta*, Justice Simonett's concurring opinion forthrightly balances the interests involved in a design defect case. *See Bilotta v. Kelley Co.*, 346 N.W.2d 616, 626 (Minn. 1984) (Simonett, J., concurring specially). He has taken the same approach in other areas of tort law. *See, e.g., Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165 (Minn. 1989). In *Erickson*, he applied a risk-utility inquiry that involved the use of various policy factors, including a cost-benefit analysis, to determine the liability of a hotel owner for a parking

prompted the court's conclusion that the post-sale duty to warn should be imposed only in special cases and that this was one of them.<sup>355</sup> The *Restatement* makes explicit what is implicit in the Minnesota and federal cases involving post-sale duty to warn issues. It is explicit in the design cases, where risk versus utility is a critical issue.

Comment a following section 10 states that:

As with all rules that raise the question whether a duty exists, courts must make the threshold decisions that, in particular cases, triers of fact could reasonably find that product sellers can practically and effectively discharge such an obligation and that the risks of harm are sufficiently great to justify what is typically a substantial post-sale undertaking. In deciding whether a claim based on breach of a post-sale duty to warn should reach the trier of fact, the court must determine whether the requirements in Subsection (b)(1) through (4) are supported by proof. The legal standard is whether a reasonable person would provide a post-sale warning. In light of the serious potential for overburdening sellers in this regard, the court should carefully examine the circumstances for and against imposing a duty to provide a post-sale warning in a particular case.<sup>356</sup>

Blending Minnesota products liability law with section 10 means that the initial determination of whether there is a jury issue on post-sale failure to warn first has to be made by the court, keeping in mind the supreme court's cautionary note in *Hodder*. Once the court decides that there is a jury issue the case would be submitted to the jury pursuant to instructions that would incorporate the *Bilotta*<sup>357</sup> risk-utility standard, inviting an evaluation of the reasonableness of the manufacturer's conduct.

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ramp assault. He wrote:

Presumably we do not live in a risk-free society; if this is so, a cost-benefit analysis is unavoidable. To post security guards at each parking ramp level 24 hours a day might be the most effective crime deterrent, but the cost may be prohibitive for both the property owner and the customer. A parking ramp cannot be a fortress. In this case, for example, plaintiff apparently considered cost as a factor in choosing the Curtis ramp for parking rather than another ramp or taking the bus. The question of how much security is adequate raises, therefore, the further question of how much risk is an acceptable risk for members of the public.

*Id.* at 169.

355. See *Hodder*, 426 N.W.2d at 833.

356. Proposed Final Draft, *supra* note 6, § 10 cmt. a.

357. See *Bilotta*, 346 N.W.2d at 626 (Simonett, J., concurring specially).



§ 11. LIABILITY OF COMMERCIAL PRODUCT SELLER OR DISTRIBUTOR  
FOR HARM CAUSED BY POST-SALE FAILURE TO RECALL PRODUCT

One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:

(a) (1) a statute or other governmental regulation specifically requires the seller or distributor to recall the product;  
or

(2) the seller or distributor, in the absence of a recall requirement under Subsection (1), undertakes to recall the product; and

(b) the seller or distributor fails to act as a reasonable person in recalling the product.<sup>358</sup>

Commentary

The *Restatement (Third)* imposes liability only when a statute or regulation requires a recall.<sup>359</sup> If a recall is voluntarily initiated, the seller or distributor is required to act as a reasonable person in recalling the product.<sup>360</sup> The restrictive position on recalls is based on the excessive burden that could be imposed on product sellers or distributors if any improvement in product safety triggered a recall.<sup>361</sup> Even if a product is deemed defective under sections 2 - 4, the *Restatement* leaves recalls to government agencies best equipped to make the determination.<sup>362</sup>

If recall is specifically required by a statute or regulation, liability may not be imposed under section 11, unless a specific recall order is initiated by the responsible agency. This is so even though the agency possesses the unexercised power to do so.<sup>363</sup> If the statute or regulation specifically provides for a product recall, then violation by the seller constitutes negligence under section 4 of the *Restatement*.<sup>364</sup>

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358. Proposed Final Draft, *supra* note 6, § 11.

359. *See id.*

360. *See id.*

361. *See id.* cmt. a.

362. *See id.* § 11.

363. *See id.* cmt. b.

364. *See id.*

The Reporters' Note regarding section 11 cites *Gregory v. Cincinnati, Inc.*,<sup>365</sup> a 1995 Michigan Supreme Court decision, as the most significant case that supports the general rule of nonliability for failure to recall a product.<sup>366</sup> In *Comstock v. General Motors Corp.*<sup>367</sup> the Michigan Supreme Court held that once a manufacturer discovers a postmanufacture latent defect, the manufacturer has a duty to warn of those defects.<sup>368</sup> In *Gregory*, the court questioned whether the obligation should be extended to include product recalls.<sup>369</sup> The differences, however, convinced the *Gregory* court to reject the plaintiff's argument. The court noted:

In this case, plaintiff does not allege that the press brake should have had a point-of-manufacture warning attached to it, nor does he contend that Cincinnati breached the duty to warn of a latent defect in accordance with *Comstock*. Instead, he maintains that Cincinnati had a duty to repair, fix, or recall the product, reasoning that, if a duty to warn exists under *Comstock*, a duty to repair also must exist. We disagree.

We find *Comstock* substantially different from this case because *Comstock* premised the postmanufacture duty to warn on the basis of latency. In the case at bar, *plaintiff did not allege that the defect was latent*, but instead contended that Cincinnati knew or should have known of the dangerous condition of this product absent certain safety devices. We are persuaded that resolution of this risk-utility test (knew or should have known) forecloses consideration of a latent defect discovered post manufacture. If the manufacturer should have known of the problem, liability attaches at that point, not post manufacture.

In *Prentis*, we held that design defect cases require a risk-utility balancing test. With the focus on conduct rather than simply the product, proof of a defect by the risk-utility test resolves any issue of latency because the result of the test is a finding that the manufacturer either knew or should have known of the danger at the point of manufacture. Accordingly, a design defect cannot, practically speaking, be deemed undiscoverable at the point of manufacture. In other words, constructive knowledge

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365. 538 N.W.2d 325 (Mich. 1995).

366. See Proposed Final Draft, *supra* note 6, § 11 Reporters' Note, at 248.

367. 99 N.W.2d 627 (Mich. 1959).

368. See *id.* at 634.

369. See *Gregory*, 538 N.W.2d at 330.

imputed to the manufacturer under the state of the art at the time of design renders the concept of latency at issue in *Comstock* moot in a design defect case. There being no issue of latency, the question becomes whether any post-manufacture duty is imposed.

Because a *prima facie* case is established once the risk-utility test is proven, we are persuaded that it is unnecessary and unwise to impose or introduce an additional duty to retrofit or recall a product. Focusing on postmanufacture conduct in a negligent design case improperly shifts the focus from point-of-manufacture conduct and considers postmanufacture conduct and technology that accordingly has the potential to taint a jury's verdict regarding a defect.

Moreover, we believe the duty to repair or recall is more properly a consideration for administrative agencies and the Legislature who "are better able to weigh the benefits and costs involved in locating, recalling, and retrofitting products," as well as other economic factors affecting businesses and consumers. Courts have traditionally not been suited to consider the economic effect of such repair or recall campaigns. In this case, with liability premised on the risk-utility test, a continuing duty instruction adds nothing to plaintiff's case but potential confusion.

In any event, when appropriate, *i.e.*, when the protection of vital interests was deemed necessary, policymakers have explicitly delegated such authority to administrative agencies. Plaintiff did not rely on and cites no statute imposing such a duty to repair or recall so as to provide a basis for a legal duty in a negligence action. If he had, and in the appropriate case, failure to follow a recall order mandated by statute and agency might provide the basis for a duty to recall in a negligence action.

Cases that have imposed a duty to repair or recall have been few and have primarily been reserved for extraordinary cases, *i.e.*, airplane safety, in which the potential danger is severe and widespread. We elect not to follow such precedent in the instant case. Indeed, other courts have been unwilling to impose such an onerous duty except where there is an assumption of the duty or some special, controlling relationship between the manufac-

turer and the owner of the machine.<sup>370</sup>

One of the "extraordinary cases" noted by the Michigan Supreme Court was *Kociemba*<sup>371</sup> from the United States District Court for the District of Minnesota.<sup>372</sup> The *Kociemba* court discussed the duty to recall in the context of a discussion of a continuing duty to test an intrauterine device. The court stated:

This Court has already held that the duty to test is a subpart of the duty to warn. It is logical that a continuing duty to warn would have as a subpart a continuing duty to test. Although Minnesota courts have up until now only recognized a continuing duty to warn, recognizing a continuing duty to test which is subsumed as a part of the continuing duty to warn is a consistent extension of existing law. Therefore, this Court holds that its instructions to the jury concerning a manufacturer's continuing duty to test is not erroneous.

Of course, any continuing duty to test would also be limited to "special cases." Courts should only apply a continuing duty to test when the type of special circumstances identified by the *Hodder* court exist: knowledge of a problem with the product, continued sale or advertising of the product, and a pre-existing duty to warn of dangers associated with the product.

Limiting the continuing duty to test to cases where the manufacturer has knowledge of problems with a product alleviates defendant's concern that this duty will impose a crushing burden on manufacturers to retest products. If a manufacturer has no information concerning potential dangers associated with a product, it will be under no duty to continually test the product. Conversely, if a manufacturer does obtain sufficient credible information that a product already in use is potentially dangerous, the manufacturer should test that product to determine the extent of any danger, and then issue an appropriate warning or product recall.<sup>373</sup>

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370. *Id.* at 333-35 (citations and footnotes omitted).

371. *Kociemba* is known as the intrauterine device case. *See Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1528 (D. Minn. 1989).

372. *See Gregory*, 538 N.W.2d at 334-35 n.33. Other "extraordinary cases" have been those with potential severe and widespread danger, such as airplane safety cases. *See id.* at 334-35 and n.34 (citing *Noel v. United Aircraft Corp.*, 342 F.2d 232 (3d Cir. 1964); *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451 (2d Cir. 1969)).

373. *Kociemba*, 707 F. Supp. at 1528-29.

As the *Gregory* court noted, *Kociemba's* discussion is only a "suggestion" that the obligation to recall would be imposed by the Minnesota Supreme Court.<sup>374</sup> The suggestion is based on the court's opinion in *Hodder*.<sup>375</sup> The caution expressed by the court in *Hodder* and other post-sale obligation to warn cases, however, indicate that the court would perhaps take a conservative approach on the question.

#### § 12. LIABILITY OF SUCCESSOR FOR HARM CAUSED BY DEFECTIVE PRODUCTS SOLD COMMERCIALY BY PREDECESSOR

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

- (a) is accompanied by an agreement for the successor to assume such liability; or
- (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
- (c) constitutes a consolidation or merger with the predecessor; or
- (d) results in the successor's becoming a continuation of the predecessor.<sup>376</sup>

#### Commentary

The *Restatement* rule is derived from both products liability and corporate law principles.<sup>377</sup> Where a successor purchases the assets of the predecessor piecemeal, and there is no subsequent continuity of operations between the two corporations or other business entities, the successor is not liable for harm caused by a defective product sold by the predecessor.<sup>378</sup> The rule of nonliability is based primarily on the fact that the successor does not fall within the basic rule in section 1 of the *Restatement*. Section 1 applies only to

374. See *Gregory*, 538 N.W.2d at 334-35 n.33.

375. See *Kociemba*, 707 F. Supp. at 1528 (citing *Hodder*, 426 N.W.2d at 833).

376. Proposed Final Draft, *supra* note 6, § 12.

377. See *id.* cmt. a.

378. See *id.*

"[o]ne . . . *who sells or distributes* a defective product is subject to liability for harm . . . ." <sup>379</sup>

Corporate law will provide protection, within limits, to a tort plaintiff with a judgment against the predecessor corporation at the time of a transfer of assets and dissolution of that corporation. <sup>380</sup> However, tort claimants who attempt to recover only after the transfer of assets to a successor company will face difficulty in bringing their claims within the applicable law. <sup>381</sup> Their claims usually accrue after the lawful distribution of assets by the predecessor, and as such, they were not judgment creditors at the time of the transfer of assets. These claimants usually have no recourse against the shareholders of the predecessor. <sup>382</sup> If they are unable to sue the successor corporation, or reach other funds provided by existing insurance or statute, the tort claimants' only remedy may be against retailers and wholesalers in the chain of distribution. <sup>383</sup>

The *Restatement* enumerates the limited circumstances under which the successor corporation may be held liable for a defective product sold by the predecessor corporation. The circumstances include:

Few precedents recognize tort claims against the successor corporation for harm caused by defective products sold by the predecessor unless the transaction by which productive assets are acquired meets criteria established by one of several traditional exceptions. These exceptions apply generally to creditors whose claims accrue after dissolution of the predecessor, and are not limited to products liability claimants. They fall into two basic categories: those in which some conduct of the successor, in addition to acquiring the predecessor's assets, justifies holding the successor responsible (the successor either contractually agrees to be liable or knowingly participates in a fraudulent asset transfer); and those in which the successor itself can be said to have sold or distributed the defective products because the successor constitutes the same juridical entity as the predecessor, perhaps in somewhat different form (the successor merges with, or constitutes a "mere continuation" of, the predecessor). Under this Section, a products liability claimant has a recognized claim against

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379. *Id.* (emphasis in original).

380. *See id.*

381. *See id.*

382. *See id.*

383. *See id.*

a successor for harm caused by defective products distributed by the predecessor in these circumstances.<sup>384</sup>

The *Restatement's* rationale is based on efficiency and fairness considerations.<sup>385</sup> Minnesota law governing successor liability was provided by the Minnesota Supreme Court in *Niccum v. Hydra Tool Corp.*,<sup>386</sup> which followed the earlier decision of *J.F. Anderson Lumber Co. v. Myers*.<sup>387</sup> Both cases parallel the *Restatement*. *Niccum* specifically notes:

[W]here one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts.<sup>388</sup>

The *Niccum* court also concluded that the legislature, through the enactment of a 1981 statute governing transferee liability, intended to limit any additional expansion of successor liability beyond the traditional exceptions established by the supreme court in *J.F. Anderson*.<sup>389</sup> The statute, subdivision 4 of section 302A.661, reads as follows:

The transferee is liable for the debts, obligations, and liabilities of the transferor only to the extent provided in the contract or agreement between the transferee and the transferor or to the extent provided by this chapter or other statutes of this state.<sup>390</sup>

The Reporters' Note to the statute demonstrated the limitation:

Subdivision 4 of this section is aimed at limiting the civil liabilities of transferors assumed by transferees to those agreed to between the parties or imposed by law, even if the transferee is operating the corporation in exactly the same manner as it was operated by the transferor. This

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384. *Id.*

385. *See id.* cmt. b.

386. 438 N.W.2d 96 (Minn. 1989).

387. 296 Minn. 33, 206 N.W.2d 365 (1973).

388. *Niccum*, 438 N.W.2d at 98.

389. *See id.* at 99.

390. MINN. STAT. § 302A.661, subd. 4 (1996).

limits, for example, exposure to product liability claims for items manufactured by the transferor.<sup>391</sup>

In *Niccum*, the plaintiffs asked the court to expand the third exception, the mere continuation rule, to include cash-for-assets sales.<sup>392</sup> The court rejected the argument,<sup>393</sup> and instead applied the liberal products liability case of *Turner v. Bituminous Casualty Co.*, a Michigan Supreme Court decision.<sup>394</sup> The *Niccum* court also rejected the product line exception adopted by the California Supreme Court in *Ray v. Alad Corp.*<sup>395</sup> The exception holds a successor, who continues to manufacture a product of the business it acquired, strictly liable for products manufactured by the predecessor, regardless of the means of acquiring the predecessor or any possible assignment of fault.<sup>396</sup>

### § 13. LIABILITY OF SUCCESSOR FOR HARM CAUSED BY SUCCESSOR'S OWN POST-SALE FAILURE TO WARN

(a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in § 12, is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor when:

(1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and

(2) a reasonable person in the position of the successor would provide a warning.

(b) A reasonable person in the position of the successor would provide a warning when:

(1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or

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391. MINN. STAT. ANN. § 302A.661, General Comment (West 1985).

392. See *Niccum*, 438 N.W.2d at 99.

393. See *id.* at 100.

394. 244 N.W.2d 873 (Mich. 1976).

395. 560 P.2d 3 (Cal. 1977).

396. See *Niccum*, 438 N.W.2d at 99-100.



property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted upon by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.<sup>397</sup>

### Commentary

Unlike section 12, this section of the *Restatement* imposes liability on a successor corporation for its own failure to warn when the specified conditions are met and when a reasonable person in the successor's position would provide a warning.<sup>398</sup> Liability under section 13 is similar to the liability imposed by section 10 for post-sale failure of a product seller to warn, even when the product was not defective at the time of sale.<sup>399</sup> The rationale for imposing liability on the successor under these circumstances is based on the fact that the successor is frequently in a favorable position to discover problems with the use of the predecessor's product and to act in preventing harm to consumers or their property.<sup>400</sup> Furthermore, "[w]hen the relationship between the successor and pre-transfer purchasers of the predecessor's products gives rise to actual or potential economic benefit to the successor, it is both fair and efficient to require the successor to act reasonably to prevent such harm."<sup>401</sup>

In *Niccum*, the supreme court held that *Hodder* was inapplicable to post-sale failure to warn claims brought against a successor.<sup>402</sup> Instead, the court followed *Travis v. Harris Corp.*,<sup>403</sup> in which the Seventh Circuit listed factors to use in determining whether to impose a duty to warn on a successor:

Succession to a predecessor's service contracts, coverage

397. Proposed Final Draft, *supra* note 6, § 13.

398. *See id.* cmt. a.

399. *See id.*

400. *See id.*

401. *Id.*

402. *See Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 100 (Minn. 1989).

403. 565 F.2d 443 (7th Cir. 1977).

of the particular machine under a service contract, service of that machine by the purchaser corporation, a purchaser corporation's knowledge of defects and of the location or owner of that machine, are factors which may be considered in determining the presence of a nexus or relationship effective to create a duty to warn.<sup>404</sup>

*Niccum* arose out of injuries sustained by the plaintiff while operating a press brake.<sup>405</sup> The press brake was designed by the Wisconsin Machine Corporation, which in February of 1973 sold certain designs and patents, including the press brake design, to the Wisconsin Equipment Corporation.<sup>406</sup> The Wisconsin Machine Company dissolved in December of 1973.<sup>407</sup> In May of 1973, Wisconsin Equipment manufactured and sold a press brake to Alloy Hard Facing & Engineering.<sup>408</sup> In 1985, it was owned by the plaintiff's employer, but the chain of previous ownership is unknown.<sup>409</sup>

After the sale of the press brake, HTC, Inc., purchased all the assets of Wisconsin Equipment.<sup>410</sup> HTC was a wholly owned subsidiary of Hydra Tool Corp., the defendant in the suit.<sup>411</sup> The purchase agreement between HTC and Wisconsin Equipment was structured as a purchase of assets for cash.<sup>412</sup> The agreement specifically stated that HTC would not assume liability for injuries caused by Wisconsin Equipment products already on the market.<sup>413</sup> Rather, Wisconsin Equipment was to retain liability for those injuries.<sup>414</sup> Wisconsin Equipment dissolved in 1977, but HTC had no prior knowledge that Wisconsin Equipment would dissolve.<sup>415</sup>

Applying the *Travis* list to the facts of the case, the *Niccum* court held that no duty to warn existed. It specifically noted:

Hydra Tool never succeeded to any service contracts held by WEC and never serviced any of the press brakes under a service contract. Hydra Tool was not aware of any particular defects associated with the press brake. Hydra Tool did not know the location of the machine at the time

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404. *Id.* at 449.

405. *See Niccum*, 438 N.W.2d at 97.

406. *See id.*

407. *See id.*

408. *See id.*

409. *See id.*

410. *See id.* at 98.

411. *See id.*

412. *See id.*

413. *See id.*

414. *See id.*

415. *See id.*

Niccum was injured. Hydra Tool also developed its own customer lists and did not use those supplied by WEC. Under these facts we find no independent duty to warn on the part of respondent Hydra Tool.<sup>416</sup>

The Reporters' Note indicates that the Reporters:

have not made the existence of a service contract a *sine qua non* for the imposition of a duty to warn on a successor corporation. Other similar relationships with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor may suffice to create a duty to act reasonably and provide warnings.<sup>417</sup>

It is not clear if the Minnesota courts would make the existence of service contracts an absolute prerequisite for imposition of a duty to warn on a successor corporation. The *Restatement (Third)* approach, however, is consistent with the supreme court's willingness to engage in balancing the relevant factors in deciding duty issues.

#### § 14. SELLING OR OTHERWISE DISTRIBUTING AS ONE'S OWN A PRODUCT MANUFACTURED BY ANOTHER

One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer.<sup>418</sup>

#### Commentary

The rule in section 14<sup>419</sup> is derived from section 400 of the *Restatement (Second) of Torts*.<sup>420</sup> The rule is recognized in a clear majority of jurisdictions.<sup>421</sup> The rules governing manufacturer liability of chattels in the *Restatement (Second) of Torts* were fault-based and treated product manufacturers differently from other sellers in the

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416. *Id.* at 100-01.

417. Proposed Final Draft, *supra* note 6, § 13 Reporters' Note, at 278.

418. *Id.* § 14.

419. See Proposed Final Draft, *supra* note 6, § 14 cmt. a (citing RESTATEMENT (SECOND) OF TORTS § 400 (1965)).

420. See RESTATEMENT (SECOND) OF TORTS § 400 (1965) (stating that "[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer").

421. See Proposed Final Draft, *supra* note 6, § 14 Reporters' Note, at 281.

chain of manufacture and distribution.<sup>422</sup>

Section 400 incorporates sections 394-398 of the *Restatement (Second) of Torts* by reference to outline the manufacturer's potential liability.<sup>423</sup>

The adoption of section 402A subjected all sellers to strict liability claims. As such, section 400 had questionable validity. However, Minnesota and other states have special rules limiting the liability of nonmanufacturer parties in the chain of distribution under a strict liability theory. These states may use the negligence rules of the *Restatement* to prevent the nonmanufacturer parties from opting out of liability.

Section 544.41 of the Minnesota Statutes distinguishes sellers in the chain of distribution from product manufacturers and exempts them from liability if the product manufacturer is solvent and subject to jurisdiction in Minnesota.<sup>424</sup> However, there are specific exceptions to the rule. These exceptions follow:

Subd. 3. A court shall not enter a dismissal order relative to any certifying defendant even though full com-

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422. See *id.* cmt. a.

423. See RESTATEMENT (SECOND) OF TORTS § 400 (1965). Section 394 states that "a manufacturer of a chattel which he knows or has reason to know to be, or to be likely to be, dangerous for use . . . subject to the liability of a supplier of chattels with such knowledge." *Id.* § 394. Section 395 sets out the standard negligence formula, making a manufacturer who fails to exercise reasonable care in the manufacture of a chattel liable if the manufacturer recognizes that the chattel, unless carefully made, will involve an "unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used . . ." *Id.* § 395. Section 396 makes the manufacturer subject to liability under sections 394 and 395 even though the dangerous character of the chattel is discoverable "by an inspection which the seller or any other person is under a duty to the person injured to make." *Id.* § 396. Section 397's rule is a special application of the rule in section 395. See *id.* § 397. It imposes an obligation to warn on the manufacturer of a chattel compounded under a secret formula or a formula which, although disclosed, is not likely to be understood by users of the chattel. See *id.* Section 398, which is also a special application of the general negligence rule in section 395, applies to chattels manufactured under a plan or design that makes the chattel dangerous for the uses for which it is manufactured. See *id.* § 398. It makes the manufacturer liable for physical harm caused by the manufacturer's "failure to exercise reasonable care in the adoption of a safe plan or design," and extends the manufacturer's liability "to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm." *Id.* § 398. Section 399, which stands independent of section 400, makes the seller of a chattel that is manufactured by a third person subject to liability when the seller sells the chattel, "knowing that it is, or is likely to be, dangerous." *Id.* § 399. Section 399 incorporates the rules in sections 388 - 390 of the *Restatement (Second)* by reference. See *id.*

424. See MINN. STAT. § 544.41, subd. 3 (1996).

pliance with subdivision 1 has been made where the plaintiff can show one of the following;

(a) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which has caused the injury, death or damage;

(b) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(c) That the defendant created the defect in the product which caused the injury, death or damage.<sup>425</sup>

These exceptions apply to prevent dismissal on the strict liability claim asserted against the nonmanufacturing defendant. It seems clear that the negligence rules set out in section 400, and by reference, sections 394-398, establish liability rules that are broader than the specific exceptions in subdivision 3 of section 544.41. Section 400 uses standard negligence rules to impose liability on sellers who offer as their own products manufactured by others.<sup>426</sup> Those rules do not require that a defendant exercise "some significant control over the design or manufacture of the product,"<sup>427</sup> nor do they require a showing that the defendant provided instructions or warnings to the manufacturer concerning the alleged defect in the product that caused the injury, death, or damage.<sup>428</sup> The rules do not require a showing of actual knowledge of the defect, nor do they require a showing that the defendant created the defect in the product.<sup>429</sup>

Minnesota has not specifically adopted section 400 of the *Restatement (Second)*. However, an earlier case, *Tiedje v. Haney*,<sup>430</sup> was cited in the *Restatement Appendix* as one of the decisions that supported a broadening of the early rule in the *Restatement of Torts* covering the liability of product sellers.<sup>431</sup> *Tiedje* arose out of the sale of a drug that contained poison which, when ingested by the plaintiff, caused severe injuries.<sup>432</sup> The plaintiff brought suit

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425. *Id.*

426. See RESTATEMENT (SECOND) OF TORTS § 400 (1965).

427. MINN. STAT. § 544.41, subd. 3(a) (1996).

428. See *id.* subd. 3(b).

429. See *id.* subd. 3(c).

430. 184 Minn. 569, 239 N.W. 611 (1931).

431. See RESTATEMENT (SECOND) OF TORTS § 400 app. at 449 (1965).

432. See *Tiedje*, 184 Minn. at 570, 239 N.W. at 612.

against all the defendants who manufactured and sold the plaintiff the harmful tablets.<sup>433</sup> The druggist argued that the evidence conclusively established that the drug he sold was a proprietary medicine, and that he was relieved by statute from liability for selling the drug.<sup>434</sup> The statute provided that a druggist was liable for the quality of all drugs, chemicals, and medicine he sold other than proprietary medicines and other articles sold in their original packages.<sup>435</sup> The court explained the common law liability of a druggist as follows:

At common law, a druggist is bound to exercise toward his patrons that degree of care which is commensurate with the hazards and dangers to which his patrons are exposed . . . . It has been said that the ordinary care which a druggist is bound to exercise in filling his prescriptions and in the sale of drugs and medicines is the highest possible degree of prudence, thoughtfulness, and diligence, and the employment of the most exact and reliable safeguards consistent with the reasonable conduct of the business, in order that human life may not be exposed to the danger following the substitution of deadly poison for harmless medicine . . . . As to the quality of nonproprietary medicines, the statute has now imposed responsibility upon the vendor. In other respects, and as to proprietary medicines, the law requires the same degree of care which was required prior to the enactment of section 5813.

In connection with the sale of proprietary medicines in the original package, the druggist is not required to analyze the medicine or drug when sold for the purpose for which compounded, and if the manufacturer is a reputable one, he may rely, under ordinary circumstances, on the rectitude of the manufacturer and the correctness of his compound. Ordinary care under such circumstances does not require a greater degree of diligence.<sup>436</sup>

The rules are different with respect to the druggist's sale of drugs sold under his own name. Those rules state:

[W]here the druggist obtains from a manufacturer tablets or medicine which he does not sell under the name of the manufacturer, but under his own name, accompanied by a statement that it was manufactured or prepared for him,

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433. *See id.*

434. *See id.* at 573, 239 N.W. at 613.

435. *See id.*

436. *Id.* at 573-74, 239 N.W. at 613.

in our opinion the druggist assumes a responsibility equivalent to that of the manufacturer of the drugs, and the rule in that regard laid down in *Willson v. Faxon* . . . applies. It is true that in that case the druggist sold a harmful preparation under a label which indicated that the druggist was the manufacturer thereof, but we think that he is equally responsible where he sells the medicine as prepared or manufactured for himself and does not disclose the name of the manufacturer.<sup>437</sup>

Minnesota has also adopted, in general terms, the negligence principles in the *Restatement (Second) of Torts* in a variety of pre-*McCormack* cases.<sup>438</sup> Those cases establish bedrock products liability law in Minnesota. Coupled with *Tiedje*, the cases would support application of section 14. Given that background, there is no reason to presume that the Minnesota courts would decline to follow the rule in section 14 in an appropriate case, or that the negligence theory it adopts would be insufficient to block dismissal of a non-manufacturing product seller in a case involving section 544.41 of the Minnesota Statutes.

#### § 15. GENERAL RULE GOVERNING CAUSAL CONNECTION BETWEEN PRODUCT DEFECT AND HARM

Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.<sup>439</sup>

#### Commentary

Sections 1, 5, 6, 7, and 8 of the *Restatement (Third) of Torts* require the purported defect in the product to cause injury to person or property.<sup>440</sup> The *Restatement* takes the position that the rules generally governing causation in tort law also apply in products liability cases. This does not include the exception for the special rule on causation in section 16, which covers cases involving an in-

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437. *Id.* (citation omitted).

438. *See, e.g.,* *Jacobs v. Draper*, 274 Minn. 110, 117, 142 N.W.2d 628, 633 (1966) (adopting RESTATEMENT (SECOND) OF TORTS §§ 298, 302-303 (1965) for negligence in products liability cases in Minnesota); *Gresser v. Taylor*, 276 Minn. 440, 444, 150 N.W.2d 869, 872 (1967) (citing RESTATEMENT (SECOND) OF TORTS § 344 (1965)) (holding that a golf course was negligent for failing to exercise reasonable care toward invitees).

439. Proposed Final Draft, *supra* note 6, § 15.

440. *See id.* §§ 1, 5-8.

creased risk of harm created by a product defect.<sup>441</sup> In Minnesota, the standard causation rule in negligence cases also applies to strict liability cases.<sup>442</sup>

The last two comments to section 15 cover two issues. The first concerns the relationship of misuse, alteration, and modification of a product to the causation issue.<sup>443</sup> The second concerns causation and proportionate liability.<sup>444</sup> Comment b covers misuse, alteration, and modification of a product. It notes that once the plaintiff establishes the existence of a product defect, an issue may arise as to whether a third party's misuse, alteration, or modification of the product "contributed to the plaintiff's harm in such a way as to absolve the defendant from liability, in whole or in part."<sup>445</sup> The issue should be determined "under the prevailing rules and principles governing causation or the prevailing rules and principles governing comparative responsibility, as the case may be."<sup>446</sup>

The Reporters' Note following section 15 notes the differing ways in which product misuse, alteration, and modification have been treated in products liability cases involving misuse or proximate cause issues.<sup>447</sup> Factual variances make the cases difficult to reconcile, which typically creates a jury question.<sup>448</sup> Furthermore, while the plaintiff has the burden of persuasion, the Note recognizes that "more often than not as a practical matter the defendant must raise the issue of causation and argue that even if the design had been different the same harm would have occurred anyway."<sup>449</sup>

In Minnesota, the misuse, alteration, or modification of a product may prevent the plaintiff from proving the existence of a defect for which the product manufacturer is liable, either because the defect may have arisen due to alterations after manufacture,<sup>450</sup>

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441. See *id.* §§ 15-16.

442. See JURY INSTRUCTION GUIDES, *supra* note 18, JIG 116, at 80. The instruction uses the direct cause instruction in JIG 140. See *id.* (citing JURY INSTRUCTION GUIDES, *supra* note 18, JIG 140, at 113). A direct cause is "a cause which had a substantial part in bringing about the" accident. *Id.*

443. See Proposed Final Draft, *supra* note 6, § 15 cmt. b.

444. See *id.* cmt. c.

445. *Id.* cmt. b.

446. *Id.*

447. See *id.* Reporters' Note, at 286.

448. See *id.*

449. *Id.* at 286-87.

450. See, e.g., *Rients v. International Harvester Co.*, 346 N.W.2d 359, 362-63 (Minn. Ct. App. 1984) (holding that a plaintiff must prove that the product reached him without substantial change in the condition in which it was sold by the manufacturer).



or because the plaintiff's misuse of the product was so unforeseeable that the manufacturer neither owed a duty to design the product to make it safe for that use<sup>451</sup> nor to warn against the misuse.<sup>452</sup> However, if the plaintiff establishes that the product is defective, the misuse issue arises again, but as an aspect of contributory negligence under the Comparative Fault Act.<sup>453</sup>

Because the misuse, alteration, or modifications issues usually go to the issue of whether a product is defective in the first place, and if it is, whether the plaintiff was contributorily negligent in using the product, only in unusual cases is it likely that those issues will relate to the causation question. Two examples, however, illustrate how proximate cause could be implicated. In *Laubach v. Isaacson*,<sup>454</sup> a thirteen-year-old boy was burned when he and three of his friends poured gasoline antifreeze on a skateboard and ignited it.<sup>455</sup> The court of appeals concluded that the manufacturer of the antifreeze owed no duty to warn that antifreeze was explosive because the use the boys made of it was not foreseeable.<sup>456</sup> The plaintiffs, however, also argued that the design of the antifreeze bottle was defective because the bottle could be resealed and stood upright, which allowed storage of a partially used bottle. They also argued that the shape of the bottle acted as a "flamethrower," which made it an unreasonably dangerous product.<sup>457</sup> The court rejected the argument on causation grounds:

While a different design may have precluded storage of a partially used bottle and may have caused the contents to behave differently while burning, we conclude these alleged defects are not causally related to Daniel's injuries.

An act or a failure to act is a "proximate cause" when

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451. See *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 626 n.2 (Minn. 1984) (Simonett, J., concurring specially).

452. See, e.g., *Huber v. Niagara Mach. & Tool Works*, 430 N.W.2d 465, 468 (Minn. 1988) (holding it not foreseeable that safety device permanently attached to fully assembled machine would be removed and manufacturer therefore had no duty to warn against such misuse); *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 925 (Minn. 1986) (finding that manufacturer had duty to warn where it was foreseeable that detachable safety device would be removed and that there was a risk it might be reattached improperly).

453. See MINN. STAT. § 604.01, subd. 1a (1996) (mandating that misuse is subject to comparison as an element of "fault" under the Comparative Fault Act).

454. No. C0-91-1984, 1992 WL 31367 (Minn. Ct. App.), *review denied*, (Minn. Apr. 29, 1992).

455. See *id.* at \*1.

456. See *id.* at \*2.

457. See *id.*

the consequences naturally follow in unbroken sequence without an intervening cause. Further, proximate cause exists if the negligent conduct was a substantial factor in bringing about the harm . . . .

The boys admitted they were looking for something to burn and were attracted to the antifreeze bottle because it said "FLAMMABLE." An unopened bottle differently designed would not have deterred them from prying the cap off and lighting the contents on fire. The design of the bottle was not a substantial factor in bringing about Daniel's injuries.<sup>458</sup>

In the second case, *Rients v. International Harvester Co.*,<sup>459</sup> the plaintiff was injured when a tractor manufactured by International Harvester overturned while he rode it.<sup>460</sup> The tractor was manufactured in 1955 and bought by the plaintiff from a dealer in used farm implements in 1972.<sup>461</sup> In 1977, after numerous alterations to the tractor, including replacement of the narrow front wheels with a wide front axle, the accident occurred.<sup>462</sup> The court of appeals noted the plaintiff's obligation to prove a causal link between the alleged defect and the injury.<sup>463</sup> The plaintiff introduced expert testimony that the axle was defective because it used a cotter key to hold the tie rod pins, and that other, safer designs existed to perform the function.<sup>464</sup> The court of appeals noted the impact of the other modifications of the tractor:

It is uncontroverted . . . that numerous modifications and repairs had been made on the axle. The brakes were worn. The steering gear arm, previously modified by removal of a piece with a cutting torch, broke at a weld. The grease fitting on the steering arm, abraded by the added rock box, was not accessible or functional. The tie rods and steering knuckles were bent. Considering this uncontroverted evidence, even if a jury found a design defect, it would be sheer speculation for a jury to find that the design defect caused the accident rather than any of these other possible causes.<sup>465</sup>

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458. *Id.* at \*2 (citations omitted).

459. 346 N.W.2d 359 (Minn. Ct. App. 1984).

460. *See id.* at 360.

461. *See id.*

462. *See id.* at 360-61.

463. *See id.* at 362.

464. *See id.*

465. *Id.*

The second issue addressed in the comments to section 15 is proportionate liability.<sup>466</sup> In cases involving generic toxic substances, plaintiffs are unable to identify which manufacturer among several made the product that caused the plaintiff's injuries. Some courts have altered traditional causation rules and have permitted the plaintiff to recover without identifying the manufacturer who was the causal producer. These courts instead permit recovery against all producers of the product, according to their relative market shares.<sup>467</sup> The comment notes that courts have considered a variety of factors in determining whether a proportional liability rule should be adopted. Those factors include:

- (1) the generic nature of the product; (2) the long latency period of the harm; (3) the inability of plaintiffs to discover which defendant's product caused plaintiff's harm, even after exhaustive discovery; (4) the clarity of the causal connection between the defective product and the harm suffered by plaintiffs; (5) the absence of other medical or environmental factors that could have caused or materially contributed to the harm; and (6) the availability of sufficient "market share" data to support a reasonable apportionment of liability.<sup>468</sup>

The American Law Institute "leaves to developing law the question of whether, given the appropriate factors, a rule of proportional liability should be adopted."<sup>469</sup> However, the comment states that if a court does decide to adopt such a theory, "the liability of each defendant is properly limited to the individual defendant's share of the market."<sup>470</sup>

Proportional liability in the form of alternative liability has been rejected by the Minnesota Court of Appeals<sup>471</sup> and the Eighth Circuit, applying Minnesota law.<sup>472</sup> The Minnesota Court of Ap-

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466. See Proposed Final Draft, *supra* note 6, § 15 cmt. c.

467. See *id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. See *Bixler v. Avondale Mills*, 405 N.W.2d 428, 432 (Minn. Ct. App. 1987).

472. See *Souder v. Owens-Corning Fiberglas Corp.*, 939 F.2d 647, 650 (8th Cir. 1991). The issue was also raised in *Erickson v. Whirlpool Corp.*, 731 F. Supp. 1426, 1430 (D. Minn. 1990), but the court declined to rule on it. See *id.* at 1431. In dictum, the court discussed the theory but found it lacking because the defendants in the case had not been found to be negligent. See *id.* at 1431. Also, because the primary impact of the alternative liability theory in *Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948) is to shift the burden of proof to the defendants, and because the plaintiff had not previously suggested that the case be submitted to the

peals rejected an alternative liability theory in *Bixler v. Avondale Mills*,<sup>473</sup> a case where severe burns were sustained by a minor wearing a homemade cotton flannelette nightshirt that caught on fire.<sup>474</sup> The plaintiffs brought suit against the retailer of the material and five fabric mills that were possible suppliers of the material.<sup>475</sup> The retailer and one of the mills settled pursuant to *Pierringer*-type releases.<sup>476</sup> The other four mills remained.<sup>477</sup>

Prior to the settlements, the plaintiffs moved to amend their complaint to add the other four mills and to add a count in market-share liability.<sup>478</sup> The supreme court reversed the trial court's grant of summary judgment for the defendants on the market-share liability issue, ruling that consideration of the issue was premature.<sup>479</sup> Following additional discovery, which failed to identify the manufacturer of the material, the defendants again moved for summary judgment. This time, the trial court granted summary judgment, concluding that alternative liability was inapplicable in the case.<sup>480</sup> The court of appeals affirmed, concluding that the elements of the alternative liability theory, as defined by the Michigan Supreme Court in *Abel v. Eli Lilly and Co.*,<sup>481</sup> were not met.<sup>482</sup> The *Abel* court listed three primary elements for alternative liability:

First, it must be shown that all the defendants have acted tortiously . . . . [S]econd, that the plaintiffs have been harmed by the conduct of one of the defendants (in or-

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jury on that basis, the court refused to allow the plaintiff a "second bite at an altogether different apple," after having litigated the case instead on an aggregation theory. *Erickson*, 731 F. Supp. at 1430-31.

473. 405 N.W.2d 428 (Minn. Ct. App. 1987).

474. *See id.* at 429.

475. *See id.*

476. *See id.* *Pierringer* releases address the problem of piecemeal settlements. *See* Peter B. Knapp, *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, 20 WM. MITCHELL L. REV. 1, 13 (1994). Generally under such releases, a plaintiff settles with those defendants so willing, but preserves all causes of actions against any nonsettling defendants. *See id.* In return, the plaintiff releases all settling defendants, agrees to discharge the claim to the extent a jury later determines the settling defendants are partially responsible for the injuries, and agrees to indemnify all settling defendants against future claims of contribution. *See id.*

477. *See Bixler*, 405 N.W.2d at 429.

478. *See id.*

479. *See id.*

480. *See id.* at 430.

481. 343 N.W.2d 164, 171 (Mich.1984), *cert denied sub nom.*, *E.R. Squibb & Sons, Inc. v. Abel*, 469 U.S. 833 (1984).

482. *See Bixler*, 405 N.W.2d at 430-31.

der to support this second requirement, the plaintiffs must bring before the court all the actors who may have caused the injury in fact); third, that the plaintiffs, through no fault of their own, are unable to identify which actor causes the injury.<sup>483</sup>

First, the court of appeals in *Bixler* concluded that the evidence failed to establish that the manufacture of one hundred percent cotton flannelette is a tortious act.<sup>484</sup> Second, the court concluded that not all of the companies that supplied cotton flannelette to J.C. Penney were before the court.<sup>485</sup> Third, the court noted that one of the tortfeasors, J.C. Penney, was identified, and that the plaintiff was not faultless.<sup>486</sup> Unlike the DES cases, where the danger was not discoverable until years later,<sup>487</sup> the court noted that the plaintiffs had ample opportunity to initiate discovery to attempt to discover the manufacturer of the flannelette.<sup>488</sup>

In *Souder v. Owens-Corning Fiberglas Corp.*,<sup>489</sup> the Eighth Circuit also rejected alternative liability in a wrongful death action brought against several asbestos manufacturers for the death of a pipefitter who died of lung cancer.<sup>490</sup> Ten defendants moved for summary judgment in the case on the ground that the plaintiff failed to show specific evidence that the pipefitter was exposed to their materials.<sup>491</sup> The plaintiff argued that she demonstrated causation pursuant to the alternative liability theory, which, she argued, justified shifting the burden of proof on the causation issue to the defendants.<sup>492</sup> Without citing *Bixler*, the Eighth Circuit noted that in *Leuer v. Johnson*,<sup>493</sup> the Minnesota Court of Appeals specifically rejected the alternative liability theory<sup>494</sup> as formulated by the California Supreme Court in *Summers v. Tice*.<sup>495</sup> The *Summers* court

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483. *Abel*, 343 N.W.2d at 173 (citations and footnote omitted). In this case, the plaintiffs were daughters of woman who had taken DES, a synthetic estrogen product, during pregnancy. *See id.* at 166. They were suing the manufacturers of the synthetic estrogen product known. *See id.*

484. *See Bixler*, 405 N.W.2d at 431.

485. *See id.*

486. *See id.*

487. *See, e.g., Abel*, 343 N.W.2d at 166. DES is a synthetic estrogen product. *See id.*

488. *See id.*

489. 939 F.2d 647 (8th Cir. 1991).

490. *See id.* at 649.

491. *See id.* at 650.

492. *See id.*

493. 450 N.W.2d 363, 365 (Minn. Ct. App. 1990).

494. *See Souder*, 939 F.2d at 650.

495. 199 P.2d 1 (Cal. 1948).

shifted the burden of proof on the causation issue to two hunters who negligently fired their shotguns in the direction of a third hunter, when it was unclear which hunter fired the shot that struck the plaintiff.<sup>496</sup> While the Minnesota Supreme Court had not yet ruled on the issue, the Eighth Circuit was not convinced that the supreme court would rule differently than the court of appeals on the alternative liability theory.<sup>497</sup>

That leaves alternative liability at least as a possibility in Minnesota. However, as the Eighth Circuit noted in *Souder*, the Minnesota Supreme Court has only incidentally cited *Summers* on two occasions, neither adopting nor rejecting it as an appropriate theory in products liability cases.<sup>498</sup> In *Hoven v. Rice Memorial Hosp.*,<sup>499</sup> the supreme court rejected the California Supreme Court's opinion in *Ybarra v. Spangard*.<sup>500</sup> This decision was a significant factor for the court of appeals in rejecting *Summers v. Tice* in the *Leuer* case.<sup>501</sup>

In general, the appellate courts in Minnesota have demonstrated continuing antipathy to burden of proof shifting devices. The only case in which the supreme court shifted the burden of proof where there were several potential wrongdoers was *Mahowald v. Minnesota Gas Co.*<sup>502</sup> *Mahowald* involved a natural gas explosion caused by a pipe leak that could have been caused by any one of several defendants who worked near the gas line.<sup>503</sup> Using the doctrine of *res ipsa loquitur*, the court shifted the burden of proof on the negligence issue to the gas company. In so doing, it found that the gas company had not caused the injury because the company possessed superior knowledge of its gas distribution system, inspected the system, and was responsible for the system's safety.<sup>504</sup> So far, *Mahowald* has been confined to its facts.<sup>505</sup>

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496. *See id.* at 4.

497. *See Souder*, 939 F.2d at 650.

498. *See id.*

499. 396 N.W.2d 569 (Minn. 1986) (refusing to adopt the *Ybarra* analysis).

500. 154 P.2d 687 (Cal. 1944) (shifting the burden of proof on the negligence issue to health care professionals who all attended the plaintiff in the course of a surgical procedure that resulted in an unexplained injury to his arm).

501. *See Leuer v. Johnson*, 450 N.W.2d 363, 365 (Minn. Ct. App. 1990) (noting that "because the *Summers* decision had as its basis *Ybarra*, and because *Ybarra* has been consistently rejected by the Minnesota Supreme Court, we must reject *Summers* as well").

502. 344 N.W.2d 856 (Minn. 1984).

503. *See id.* at 858.

504. *See id.* at 863.

505. *See Leuer*, 450 N.W.2d at 366.

### § 16. INCREASED HARM DUE TO PRODUCT DEFECT

(a) When a product is defective at the time of sale and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes the product seller is subject to liability for the increased harm.

(b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited to the increased harm attributable solely to the product defect.

(c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.

(d) A seller of a defective product who is held liable for part of the harm suffered by the plaintiff under Subsection (b), or all of the harm suffered by the plaintiff under Subsection (c), is jointly and severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.<sup>506</sup>

#### Commentary

Section 16 requires the plaintiff in an enhanced injury case to prove the existence of a product defect under the rules established in sections 1-4 of the Restatement.<sup>507</sup> If the plaintiff alleges a design defect, the factors provided in the *Restatement* control.<sup>508</sup> Under the rule in section 16(a), the plaintiff must prove that the defect was a substantial factor in increasing the harm suffered by the plaintiff when compared to potential harm from other causes.<sup>509</sup> Under subsection (b), if the proof supports a finding of the harm that the plaintiff would have suffered from other causes absent the product defect, then the liability of the product seller is limited only to the increased harm that is attributed solely to the product defect.<sup>510</sup> Under subsection (c), if the proof does not support that determination, the product seller is liable both for the harm attributed to

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506. Proposed Final Draft, *supra* note 6, § 16 (emphasis in original).

507. *See id.*

508. *See id.* § 2 cmt. f.

509. *See id.* § 16(a).

510. *See id.* § 16(b).

the product defect and the other causes.<sup>511</sup> The Reporters' Note explains that section 16(c) "does not formally shift any burden of proof to the defendant."<sup>512</sup> If the plaintiff proves that a defect in the product increased the plaintiff's harm beyond what would have occurred if the product had not been defective, and at the close of the case the proof is insufficient to support a determination of what harm the plaintiff would have suffered in absence of a product defect, the defendant then is liable for all of the harm the plaintiff suffered.<sup>513</sup>

Subsection (d) finds the seller of a defective product, who is liable for part of the plaintiff's harm as determined according to subsection (b) or all the harm under subsection (c), jointly and severally liable with the other parties who caused harm to the plaintiff.<sup>514</sup> The rule of joint and several liability is required because of the lack of another practical method to apportion responsibility that reflects the causal contributions of the tortfeasors who caused the plaintiff's injuries.<sup>515</sup> The joint and several liability determination is, of course, subject to any applicable state limitations of the rule.<sup>516</sup> Under Minnesota's Comparative Fault Act, a defendant's joint and several liability is limited to no more than four times its percentage of fault when its fault is 15 percent or less.<sup>517</sup> Therefore, a defendant whose fault is 10 percent, would be liable to the plaintiff for no more than 40 percent of the plaintiff's damages.<sup>518</sup> In the products liability context, however, if a party in the chain of manufacture and distribution is unable to pay its fair share of the judgment, that share is reallocated only to the remaining parties in the chain, and not to the plaintiff or other parties in the suit.<sup>519</sup>

The position taken in section 16(c), the majority view, is referred to in the Reporters' Note as the *Fox-Mitchell* view. This view is named after two early cases that outlined the position now pro-

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511. See *id.* § 16(c).

512. *Id.* Reporters' Note, at 300.

513. See *id.*

514. See *id.* § 16(d).

515. See *id.*

516. See *id.* § 16 cmt. e.

517. MINN. STAT. § 604.02, subs. 2-3 (1996).

518. The application of the rules limiting joint and several liability is not entirely clear in Minnesota law. See Michael K. Steenson, *Joint and Several Liability Minnesota Style*, 15 WM. MITCHELL L. REV. 969 (1989).

519. MINN. STAT. § 604.02, subd. 3 (1996); *Marcon v. Kmart Corp.*, No. C2-97-1319, 1998 WL 49162 (Minn. Ct. App. Feb. 10, 1998).



vided in section 16(c): *Fox v. Ford Motor Co.*,<sup>520</sup> a 1978 Tenth Circuit case, and *Mitchell v. Volkswagenwerk, AG*,<sup>521</sup> a 1982 Eighth Circuit case applying Minnesota law.<sup>522</sup> In *Mitchell*, the court rejected the defendant's argument that the plaintiff in an enhanced injury case should be required to prove the designer was the sole cause of the enhanced injury; it also rejected that the plaintiff would not otherwise have suffered injuries absent a defect. The *Mitchell* court stated:

By placing the burden of proof on a plaintiff to prove that the designer was the sole cause of not only an enhanced indivisible injury, but, in addition, that he would not otherwise have received injuries absent a defect, the injured victim is relegated to an almost hopeless state of never being able to succeed against a defective designer. The public interest is little served. We write to reaffirm that *Larsen* was not intended to create a rule which requires the plaintiff to assume an impossible burden of proving a negative fact. A rule of law which requires a plaintiff to prove what portion of indivisible harm was caused by each party and what might have happened in lieu of what did happen requires obvious speculation and proof of the impossible. This approach converts the common law rules governing principles of legal causation into a morass of confusion and uncertainty.<sup>523</sup>

After examining Minnesota law on the rule of joint and several liability, the court's assessment of Minnesota law was as follows:

[U]nder Minnesota law the plaintiffs' burden of proof should be deemed satisfied against the manufacturer if it is shown that the design defect was a substantial factor in producing damages over and above those which were probably caused as a result of the original impact or collision. Furthermore, the extent of the manufacturer's liability depends upon whether or not the injuries involved are divisible such that the injuries can be clearly separated and attributed either to the manufacturer or the original tortfeasor. If the manufacturer's negligence is found to be a substantial factor in causing an indivisible injury such as paraplegia, death, etc., then absent a reasonable basis to determine which wrongdoer actually caused the harm,

520. 575 F.2d 774 (10th Cir. 1978).

521. 669 F.2d 1199 (8th Cir. 1982).

522. See Proposed Final Draft, *supra* note 6, § 16 Reporters' Note, at 300.

523. *Mitchell*, 669 F.2d at 1204-05.

the defendants should be treated as joint and several tortfeasors.<sup>524</sup>

The court concluded that under Minnesota law, the defendants seeking apportionment of damages have the burden of proof on the issue. The burden of proof is as follows:

[T]his placement of the burden of proof is justified by considerations of fairness. If we were to impose upon an injured party the necessity of proving which impact in a chain collision did which harm, we would actually be expressing a judicial policy that it is better that a plaintiff, injured through no fault of his own, take nothing, than that a wrongdoer pay more than his theoretical share of the damages arising out of a situation which his wrong has helped to create. In other words, the rule is a result of a choice made as to where a loss due to failure of proof shall fall—on an innocent plaintiff or on defendants who are clearly proved to have been at fault.<sup>525</sup>

The position of the *Mitchell* court differs from the *Restatement* on the burden of proof issue.

*Mitchell* has not specifically been adopted by the Minnesota Supreme Court, although it was cited with approval in *Rebehn v. General Motors Corp.*,<sup>526</sup> an unpublished court of appeals decision. During the course of trial in *Rebehn*, both parties presented extensive evidence on the issue of whether the plaintiff would have suffered his spinal cord injury if certain components of the truck, such as the seat back and steering column, had been designed differently.<sup>527</sup> The plaintiff requested the following jury instruction at trial:

You are instructed that the term "crashworthiness" means the protection that a motor vehicle affords its passengers against a personal injury or death as a result of a motor vehicle accident.

A manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision. Collisions with or without the fault of the user are clearly

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524. *Id.* at 1206 (citing *Mathews v. Mills*, 288 Minn. 16, 178 N.W.2d 841 (1970)).

525. *Id.* at 1208.

526. No. CX-94-1568, 1995 WL 146662, at \*1 n.2 (Minn. Ct. App.), *review denied*, (Minn. May 31, 1995) (citing *Mitchell*).

527. *See id.* at \*1. The plaintiff's pickup truck hit a bridge, causing his injuries. *See id.*

foreseeable by the manufacturer and are statistically inevitable. This duty of reasonable care and design rests on common law negligence that a manufacturer of an article should use reasonable care in the design and manufacture of his product to eliminate any unreasonable risk of foreseeable injury. The duty of reasonable care in design should be viewed in light of the risk. While all risks cannot be eliminated, nor can a crash-proof vehicle be designed under the current state of the art, there are many common sense factors in design which are or should be well known to the manufacturer that will minimize or lessen the injurious effects of a collision. The standard of reasonable care as applied in other negligent situations is also applicable to the plaintiff's claim that the motor vehicle in issue did not provide reasonable occupant protection to plaintiff John Rebehn.

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You are instructed that the plaintiff has the burden of proving that the alleged defect was a substantial factor in producing damages over and above those which were probably caused as the result of the original impact or collision. The plaintiff does not have the burden of proving what injuries plaintiff John Rebehn would have incurred in the absence of the alleged defect(s) in the motor vehicle in issue. Thus, in this case, plaintiff must present sufficient evidence for the trier of fact to reasonably find that the vehicle contained one or more defects and that the defects were substantial factors in producing the injuries which ultimately resulted in damage to the spinal cord that caused Mr. Rebehn's paralysis and/or paraplegic condition. If the plaintiff fails to show that the defects were a substantial factor, there can be no recovery against defendant General Motors Corporation relative to plaintiff's claim that the motor vehicle was not "crashworthy" or that the vehicle did not provide reasonable occupant protection. However, if the defects are shown to be a substantial factor, then and in that event, defendant General Motors Corporation is considered to be a joint tortfeasor and you should not attempt to apportion the plaintiff's total damages between defendant General Motors Corporation, plaintiff John Rebehn, and other entities who may be found to be at fault who are not parties to this litiga-

tion.<sup>528</sup>

The trial court rejected the requested instruction in favor of the standard design defect instruction in JIG 117.<sup>529</sup> The trial court also used a special verdict form that asked the jury to determine whether the truck was in a defective condition and if so, whether the defect was a direct cause of the plaintiff's spinal cord injury.<sup>530</sup> In addition, the jury was also asked to determine whether the plaintiff was at fault, and if so, whether his fault was a direct cause of his own injury.<sup>531</sup> Assuming the questions were answered in the affirmative, the jury was then asked to apportion fault between the defendant and plaintiff.<sup>532</sup> However, the jury found that the truck was not defective.<sup>533</sup> The court of appeals accepted *Mitchell*, but determined that the trial court did not err in giving the general design defect instruction over the specific crashworthiness instruction requested by the plaintiff. The court held that the general instruction adequately incorporated the plaintiff's theory of defect.<sup>534</sup>

The seat belt issue in products liability cases has prompted a variety of legislative and judicial approaches, particularly on the issue of plaintiff fault.<sup>535</sup> By statute, proof of seat belt evidence is inadmissible in Minnesota:

Proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.<sup>536</sup>

The statute consequently bars the introduction of seat belt evidence to establish the plaintiff's contributory negligence in an enhanced injury case.<sup>537</sup> However in *Olson v. Ford Motor Co.*,<sup>538</sup> the Minnesota Supreme Court also held that the statute precludes the

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528. *Id.* at \*1 n.2.

529. *Id.* at \*2.

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.*

534. *Id.* at \*4.

535. See Proposed Final Draft, *supra* note 6, § 16 Reporters' Note, at 313-14.

536. MINN. STAT. § 169.685, subd. 4 (1996).

537. See *id.*

538. 558 N.W.2d 491 (Minn. 1997).

plaintiff in an enhanced injury case from introducing evidence that properly worn seat belts were defective and resulted in increased injuries.<sup>539</sup> In *Olson*, the plaintiff was injured in a two-car collision.<sup>540</sup> The plaintiff alleged he was wearing his seat belt at the time of the accident and the seat belt failed, materially contributing to his injuries.<sup>541</sup> He argued that the seat belt statute was inapplicable to crashworthiness claims. The court, however, rejected the argument because it found the statute clearly worded; it prohibited the introduction of any seat belt evidence.<sup>542</sup>

The Comparative Fault Act takes the position that an “unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.”<sup>543</sup> That means that the plaintiff’s negligent failure to avoid an injury by using a safety device that would have reduced injuries is not compared to the defendant’s fault in causing the accident. However, the plaintiff’s fault will be compared to the defendant’s with respect to the damages the plaintiff sustained.<sup>544</sup> The plaintiff would thus be entitled to recover even if more at fault than the defendant.

#### § 17. APPORTIONMENT OF RESPONSIBILITY BETWEEN OR AMONG PLAINTIFF, SELLERS AND DISTRIBUTORS OF DEFECTIVE PRODUCTS, AND OTHERS

(a) A plaintiff’s recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff’s conduct fails to conform to generally applicable rules establishing appropriate standards of care.

(b) The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff’s recovery among multiple defendants are governed by generally applicable rules apportioning responsibility.<sup>545</sup>

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539. *See id.* at 497.

540. *See id.* at 493.

541. *See id.*

542. *See id.* at 497.

543. MINN. STAT. § 604.01, subd. 1a (1996).

544. *See* *Foley v. City of West Allis*, 335 N.W.2d 824, 829 (Wis. 1983).

545. Proposed Final Draft, *supra* note 6, § 17.

## Commentary

The comments to section 17 make a number of points concerning defenses in products liability cases, while leaving the form of comparative fault up to each jurisdiction.<sup>546</sup> Section 17 and its comments coincide with Minnesota law on most issues. The comments note that product misuse, product alteration, and product modification relate to three different issues in products liability cases.<sup>547</sup> They relate to the issue of whether the product is defective, and if so, whether the defect was a direct cause of the plaintiff's injury.<sup>548</sup> They also relate to the plaintiff's contributory negligence if the plaintiff in some way alters, misuses, or modifies the product.<sup>549</sup> The *Restatement* does not allocate the burden of proof for the misuse, modification, and alteration issues; it leaves the issue to local law.<sup>550</sup>

Comment d addresses the issue of whether there should be separate treatment for certain forms of plaintiff misconduct in products liability cases. Comment d notes:

Some courts accord different treatment to special categories of plaintiff conduct. For example, some decisions hold that when the plaintiff's negligence consists in the failure to discover a product defect, reduction of damages on the basis of apportionment of responsibility is improper, reasoning that a consumer has a right to expect a defect-free product and should not be burdened with a duty to inspect for defects. Other decisions hold that apportionment of responsibility is improper when the product lacked a safety feature that would protect against the risk that resulted in the injury in question, reasoning that defendant's responsibility should not be diminished when the plaintiff engages in the very conduct that the product design should have prevented. On the other hand, some decisions hold that a plaintiff's assumption of the risk is a complete defense to a products liability action, not merely a basis for apportionment of responsibility. Product misuse, alteration, and modification have been treated by some courts as an absolute bar to recovery and by others as a form of plaintiff fault that should be compared with

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546. *See id.* cmts. a-d.

547. *See id.* cmt. c.

548. *See id.*

549. *See id.*

550. *See id.*

that of other parties to reduce recovery.<sup>551</sup>

Under the *Restatement* approach, all forms of plaintiff misconduct when the plaintiff fails to conform to the applicable standard of care are subject to apportionment.<sup>552</sup> The purpose of the approach is twofold: it is first intended to avoid the stilted approach to defenses that has produced a significant amount of appellate litigation devoted to pigeonholing the plaintiff's conduct into an exempted category,<sup>553</sup> and second, to facilitate the allocation of fault in multiple party litigation where parties other than the plaintiff and product seller are involved.<sup>554</sup> Although the *Restatement* refuses to slot plaintiff misconduct into separate categories, the trier of fact is nonetheless able to take varying degrees of plaintiff misconduct into consideration in its allocation of fault.<sup>555</sup>

Minnesota's basic approach to products liability defenses is set out in the Comparative Fault Act.<sup>556</sup> Minnesota has a Wisconsin-modified form of comparative fault<sup>557</sup> in which a plaintiff is barred from recovery only if the plaintiff's fault is greater than the party from whom recovery is sought.<sup>558</sup> While the act requires individual comparisons of fault,<sup>559</sup> aggregation of fault is permitted in joint duty cases, such as joint ventures.<sup>560</sup> Whether aggregation of the fault of parties in the chain of manufacture and distribution has not yet been answered by the supreme court.<sup>561</sup>

The broad definition of "fault" in the Comparative Fault Act aligns Minnesota with the *Restatement*. It defines:

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express

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551. *Id.* cmt. d.

552. *See id.*

553. *See id.*

554. *See id.*

555. *See id.*

556. *See* MINN. STAT. § 604.01, subd. 1 (1996).

557. *See* *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 393 (Minn. 1977).

558. *See* MINN. STAT. § 604.01, subd. 1 (1996).

559. *See* *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 798 (Minn. 1982).

560. *See* *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 208-09, 203 N.W.2d 841, 846-47 (1973).

561. In *Marcon v. Kmart Corp.*, No. C2-97-1319, 1998 WL 49162 (Minn. Ct. App. Feb. 10, 1998), the court of appeals treated parties in the chain of distribution as a unit for purposes of applying the loss reallocation statute, MINN. STAT. § 604.02, subd. 3 (1996). *See id.* at \*4.

consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.<sup>562</sup>

The Act makes negligence, strict liability, and implied warranty subject to comparison, along with various aspects of contributory negligence, including secondary assumption of risk, product misuse, unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under the Civil Damages Act.<sup>563</sup> The listing of potential defenses does not mean that the defenses are separately considered in litigation, however. The defenses collapse into the single defense of contributory negligence making the single defense issue in products liability cases whether plaintiffs have exercised reasonable care for their own safety<sup>564</sup> leaving defendants free to prove and argue the ways in which the plaintiffs failed to do so.

Minnesota is somewhat equivocal about whether there should be exceptions to the general rule that all forms of contributory negligence, either by act or omission, are subject to comparison. In *Busch v. Busch Construction, Inc.*,<sup>565</sup> a pre-Comparative Fault Act case, the Minnesota Supreme Court tailored the available defenses in products liability cases to protect "the consumer's reliance on the product's safety." The court stated:

To insure protection of this interest, we hold that a consumer's negligent failure to inspect a product or to guard against defects is not a defense and thus may not be compared with a distributor's strict liability. All other types of consumer negligence, misuse, or assumption of the risk

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562. MINN. STAT. § 604.01, subd. 1a (1996).

563. See MINN. STAT. § 604.01, subd. 1a (1996) (citing section 340A.801 of the Civil Damages Act, MINN. STAT. §§ 340A.801-.802 (1996)).

564. See JURY INSTRUCTION GUIDES, *supra* note 18, JIG 202, Authorities at 55-58 (Supp. 1997).

565. 262 N.W.2d 377 (Minn. 1977).



must be compared with the distributor's strict liability under the statute.<sup>566</sup>

The *Busch* exception may no longer be good law in light of the Comparative Fault Act's language requiring the comparison of "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others."<sup>567</sup> The failure to inspect or to guard against product defects is certainly an "omission" that may be subject to comparison under the Act.<sup>568</sup>

While the continued viability of the *Busch* exception is questionable after the passage of the Comparative Fault Act in 1978, the Minnesota Supreme Court clearly perceives that it has the authority to alter the rules governing comparative fault to except from the comparison certain forms of plaintiff misconduct. In *Tomfohr v. Mayo Foundation*,<sup>569</sup> the Minnesota Supreme Court responded to a certified question from the United States District Court for the District of Minnesota concerning a wrongful death case resulting from the suicide of a psychiatric patient at the defendant hospital. The question was whether it is error, as a matter of law, "for the trial court not to submit a capacity based instruction to the jury concerning the patient's comparative fault?"<sup>570</sup>

In response, the supreme court noted the liberal application of comparative fault principles in Minnesota, even in situations where other jurisdictions have refused to apply comparative fault.<sup>571</sup> As examples, the court noted the Comparative Fault Act's inclusion of the defenses of consumer negligence, assumption of risk, and misuse in products liability cases,<sup>572</sup> the flexible standard applied to gauge the fault of injured children,<sup>573</sup> and its limitation of defenses in cases involving the breach of statutes intended to protect a specific class of persons.<sup>574</sup> The court also noted its willingness to use a reduced capacity standard in comparative fault assessments where

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566. *Id.* at 394.

567. MINN. STAT. § 604.01, subd. 1a (1996).

568. *See id.*

569. 450 N.W.2d 121 (Minn. 1990).

570. *Id.* at 122.

571. *See id.* at 123.

572. *See id.* (citing MINN. STAT. § 604.01, subd. 1a. (1988); *Seim v. Garavalia*, 306 N.W.2d 806, 809 (Minn. 1981)).

573. *See id.* (citing *Toetschinger v. Inhot*, 312 Minn. 59, 63-65, 250 N.W.2d 204, 207-08 (1977)).

574. *See id.* at 124. (citing *Seim v. Garavalia*, 306 N.W.2d 806, 811 (Minn. 1981)); *Zerby v. Warren*, 297 Minn. 134, 140-41, 210 N.W.2d 58, 64 (1973); *Dart v. Pure Oil Co.*, 223 Minn. 526, 535, 27 N.W.2d 555, 561 (1947)).

the plaintiff suffers from a mental deficiency or mental disorder.<sup>575</sup>

Having established its credentials for flexible comparative fault interpretation, the court concluded that because the hospital owed a duty to protect against the very harm that occurred (the patient's suicide), it could not assert the patient's contributory negligence as a defense in the wrongful death action.<sup>576</sup> However, the court hastened to add that while the certified question was answered in the negative, the ruling was limited to the fact paradigm presented in the case: "an attempted suicide committed by a mentally ill patient admitted to a locked hospital ward where the medical staff was aware of his suicidal ideations."<sup>577</sup>

The court also cautioned that its decision should not be construed as a *per se* rejection of a "capacity-based comparative fault standard" in other settings:

[O]ur holding today only stands for the proposition that cases may exist, such as this one, where a trial judge may rule, as a matter of law, that the patient could not be at fault because he lacked the capacity to be responsible for his own well being, and that the obligation of self care was transferred to the health care provider when it admitted the patient into its care.<sup>578</sup>

Whether *Tomfohr's* approach would be applied by the court in a case where the *Busch* exception is directly presented is uncertain. The factual differences and attendant policy distinctions between the two cases, together with the court's apparent intent to hold the line in establishing these sorts of exceptions, likely invalidate the *Busch* exception.

#### § 18. DISCLAIMERS, LIMITATIONS, WAIVERS, AND OTHER CONTRACTUAL EXCULPATIONS AS DEFENSES TO PRODUCTS LIABILITY CLAIMS FOR HARM TO PERSONS

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other dis-

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575. *See id.* at 124. (citing *Quick v. Benedictine Sisters Hosp. Ass'n*, 257 Minn. 470, 485, 102 N.W.2d 36, 47 (1960)).

576. *See id.* at 125.

577. *Id.*

578. *Id.*

tributors of new products for harm to persons.<sup>579</sup>

### Commentary

Section 18 of the *Restatement (Third)* states that disclaimers and limitations of liability by product sellers or other distributors will not bar or reduce otherwise valid products liability claims against sellers or distributors of new products.<sup>580</sup> Section 21 covers disclaimers for harm to property or economic loss.<sup>581</sup>

Comment d notes that section 18 applies in cases where “commercial product sellers attempt unfairly to disclaim or otherwise limit their liability to the majority of users and consumers who are presumed to lack information and bargaining power adequate to protect their interests.”<sup>582</sup>

Section 18 is limited, however:

This Section does not address whether consumers, especially when represented by informed and economically powerful consumer groups or intermediaries, with full information and sufficient bargaining power, may contract with product sellers to accept curtailment of liability in exchange for concomitant benefits, or whether such consumers might be allowed to agree to substitute alternative dispute resolution mechanisms in place of traditional adjudication. When such contracts are accompanied by alternative nontort remedies that serve as an adequate quid pro quo for reducing or eliminating rights to recover in tort, arguments may support giving effect to such agreements. Such contractual arrangements raise policy questions different from those raised by this Section and require careful consideration by the courts.<sup>583</sup>

The Reporters’ Note refers to various sources that suggest alternatives to products liability litigation to resolve disputes, some legislative and some private.<sup>584</sup> Section 18 takes no position on the

579. Proposed Final Draft, *supra* note 6, § 18.

580. *See id.*

581. *See id.* § 18 cmt. a & § 21.

582. *Id.* § 18 cmt. d.

583. *Id.*

584. *See id.* Reporters’ Note, at 331-32 (citing Jeffrey O’Connell, *Elective No-Fault Liability by Contract: With or Without an Enabling Statute*, 1975 U. ILL. L.F. 59, 65-71 (1975); Jeffrey O’Connell, *Offers that Can’t be Refused: Foreclosure of Personal Injury Claims by Defendants’ Prompt Tender of Claimants’ Net Economic Losses*, 77 NW. U. L. REV. 589 (1982); 2 A.L.I., REPORTERS’ STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 517-536 (1991); The National Childhood Vaccine Injury Act of

prudence of the proposals. Rather, it covers “only . . . traditional disclaimers that function *unfairly* to deny or limit liability to persons who lack either information or bargaining power to protect their interests.”<sup>585</sup>

Minnesota law is the same. While the Minnesota Supreme Court has not had the occasion to specifically hold disclaimers of liability invalid in products liability cases, the principles supporting the adoption of strict liability as enunciated by the court in *McCormack v. Hanksraft Co.*,<sup>586</sup> and as applied in cases involving property damage claims,<sup>587</sup> make it certain that Minnesota would adopt the same position with respect to disclaimers in personal injury cases.

### § 19. DEFINITION OF “PRODUCT”

For purposes of this Restatement:

(a) A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.

(b) Services, even when provided commercially, are not products.

(c) Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement.<sup>588</sup>

### Commentary

Section 19 of the *Restatement (Third)* defines a product for purposes of its liability rules.<sup>589</sup> The plaintiff may diminish the significance of the issue when the theory of recovery is design defect or

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1986, 42 U.S.C. §§ 300aa-1-300aa-24 (1994); Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 OHIO ST. L.J. 387 (1987)).

585. *Id.* Reporters' Note, at 332.

586. 278 Minn. 322, 154 N.W.2d 488 (1967). For the policy justifications *see supra* note 21 and accompanying text.

587. *See* Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 14-16 (Minn. 1992).

588. Proposed Final Draft, *supra* note 6, § 19.

589. *See id.* cmt. a.

failure to warn, since risk-utility principles apply to those claims,<sup>590</sup> but the issue nonetheless remains important because of the continuing viability of strict liability theory in cases involving manufacturing defects.<sup>591</sup> Whether or not something is a “product” is a question of law for the court.<sup>592</sup>

Under the definition most products will be tangible personal property:

Component parts are products, whether sold or distributed separately or assembled with other component parts. An assemblage of component parts is also, itself, a product. Raw materials are products, whether manufactured, such as sheet metal; processed, such as lumber; or gathered and sold or distributed in raw condition, such as unwashed gravel and farm produce.<sup>593</sup>

The comments to section 19 note the division of authority on the issue of whether living animals may be products for purposes of deciding the tort liability of a commercial seller.<sup>594</sup> For example, in cases where diseased livestock are sold and have to be destroyed, the plaintiff’s claim is for the damage to the product itself.<sup>595</sup> The *Restatement (Third)* treats that claim as economic loss not covered under the its liability rules.<sup>596</sup> However, if the diseased animals cause harm to other animals, that harm to other property is compensable under the *Restatement*.<sup>597</sup>

Section 19 also distinguishes between services and products.<sup>598</sup> Services, even if provided commercially, are not deemed to be products for purposes of the *Restatement (Third)*.<sup>599</sup> It is irrelevant if the service that is performed relates to a commercially distributed product.<sup>600</sup> The comments use the example of a person who contracts to inspect, repair, and maintain machinery owned by another.<sup>601</sup> In such a case the service provider is considered separate from the provider of the product.<sup>602</sup>

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590. *See id.*

591. *See id.* Reporters’ Note, at 338.

592. *See id.* cmt. a.

593. *Id.* cmt. b.

594. *See id.*

595. *See id.*

596. *See id.*

597. *See id.*

598. *See id.* cmt. f.

599. *See id.*

600. *See id.*

601. *See id.*

602. *See id.*

Blood and human tissue, while they meet the requirements of section 19 (a), are excluded from the *Restatement (Third)* under subpart (c) for policy reasons.<sup>603</sup> Most jurisdictions address the issue legislatively, exempting sellers of blood and human tissue from strict liability. Such sellers do remain liable under negligence rules as providers of professional services, however.<sup>604</sup>

Intangible personal property includes two primary categories.<sup>605</sup> One consists of books, maps, or navigational charts.<sup>606</sup> In general, liability is not imposed for information contained in a book, although the book is clearly a product, because the plaintiff's claim is based on the information in the book and not the book itself.<sup>607</sup> Free speech concerns have led most courts to refuse to impose strict liability on book sellers.<sup>608</sup>

The second category of intangible property "involves the transmission of intangible forces such as electricity and X rays."<sup>609</sup> A majority of courts have held that the transmission of electricity becomes a product only when it is delivered to the plaintiff's house through the meter.<sup>610</sup>

In cases involving injury caused by X rays and radiation treatment, the claim is based on the improper administration of the treatments by medical technicians, rather than on an allegation that the X rays are themselves harmful.<sup>611</sup> Courts have refused to impose liability in those cases absent a showing that the X rays or forms of radiation treatment were defective or that the technicians were negligent.<sup>612</sup>

The application of products liability principles to improvements to real property has been problematic. Housing contractors who build one house at a time do not readily fit the pattern of a mass producer of products, and, according to the comments, "nor is such a builder perceived to be more capable than are purchasers of controlling or insuring against risks presented by weather conditions or earth movements."<sup>613</sup> However, courts have treated sellers

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603. *See id.* cmt. c.

604. *See id.*

605. *See id.* cmt. d.

606. *See id.*

607. *See id.*

608. *See id.*

609. *Id.*

610. *See id.*

611. *See id.*

612. *See id.*

613. *Id.* cmt. e.

of improved real property as product sellers in some contexts. An example would be a building contractor that sells a building containing appliances or other manufacturing equipment.<sup>614</sup> Under those circumstances, the builder, along with the manufacturer of the equipment and other distributors, are all held to be product sellers, though the built-in equipment may have become an attachment to real property.<sup>615</sup> A builder may also be a product seller with respect to the building itself, when, for example, the building is prefabricated and put together on- or off-site.<sup>616</sup> Courts could also impose strict liability on a mass producer of new homes, such as a contractor in a large scale housing project.<sup>617</sup>

Minnesota products liability law has tracked section 19 of the *Restatement*,<sup>618</sup> although without a formal definition of the term "product." Minnesota courts have applied products liability law, including strict liability theory, to a variety of products that fit within the definition of tangible personal property.<sup>619</sup>

In *Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co.*<sup>620</sup> two unsecured wood crates containing heavy glass panes fell off a trailer, killing one man and injuring another, while the men were assisting in unloading the trailer that held the crates.<sup>621</sup> Libby-Owens-Ford Company (LOF) manufactured and sold the glass and Harmon Contract Glazing purchased it.<sup>622</sup> Harmon purchased the glass for office building installation.<sup>623</sup> The trial court held that the crating, bracing, and shoring of the glass panes were an integral part of the product shipped by LOF.<sup>624</sup> The court therefore tried the case as a products liability case.<sup>625</sup> LOF argued that the case involved negligent loading procedures, rather than the negligent de-

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614. *See id.*

615. *See id.*

616. *See id.*

617. *See id.*

618. *See Hofstedt v. International Harvester Co.*, 256 Minn. 453, 460, 98 N.W.2d 808, 813 (Minn. 1959) (holding that a manufacturer of a chattel may be liable to those who use the chattel if the manufacturer fails to exercise reasonable care in the design of the chattel).

619. *See Proposed Final Draft, supra* note 6, § 19 Reporters' Note, at 340-44.

620. 493 N.W.2d 146 (Minn. Ct. App. 1992), *review denied*, (Minn. Feb. 12, 1993).

621. *See id.* at 148.

622. *See id.*

623. *See id.*

624. *See id.* at 149.

625. *See id.*

sign of a product.<sup>626</sup> The court of appeals agreed, holding that “a product’s packaging does not extend to the method used to secure or load it for shipment.”<sup>627</sup> The court concluded that the products involved were the glass panes, which could also include the wood crates, because LOF sold them as a unit.<sup>628</sup> Harmon argued that the crate was a part of the product’s “package,” but the court of appeals rejected the argument and decided that the glass and bracing system “were not sold as an integrated whole.”<sup>629</sup> The court viewed the bracing as simply the method of securing the load for shipping.<sup>630</sup> More generally, the court observed that the method used to secure a product for shipping cannot be viewed as an integral part of the product itself.<sup>631</sup>

In light of the *Restatement (Third)* comments noting that the significance of determining whether a product is involved is lessened because of the risk-utility principles that govern design and defect claims,<sup>632</sup> the court’s opinion in the *Harmon* case is interesting for the distinction it draws between a manufacturer’s duty as a shipper and the manufacturer’s duty as a product designer.

Distilled to its essential point, the *Harmon* court’s holding is that the manufacturer’s added responsibility to keep informed of current scientific knowledge imposes a greater duty on it as a manufacturer than as a shipper or loader of products.<sup>633</sup> The trial court’s submission of the case to the jury under a products liability failure to warn theory meant that the defendant “was allocated uncompromising duties it would not have had under simple negligence.”<sup>634</sup>

The Minnesota Supreme Court has not treated electricity as a product for products liability purposes, although the possibility remains open. The court has also determined that strict liability principles applicable to abnormally dangerous activities do not apply to electricity, although the court has held power companies to a high standard of care regarding power lines.<sup>635</sup>

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626. *See id.*

627. *Id.*

628. *See id.*

629. *Id.*

630. *See id.*

631. *See id.*

632. *See Proposed Final Draft, supra* note 6, § 19 cmt. a.

633. *See Harmon Glass Glazing*, 493 N.W.2d at 151.

634. *Id.*

635. *See Ferguson v. Northern States Power Co.*, 307 Minn. 26, 33, 239 N.W.2d 190, 194 (1976).



In *ZumBerge v. Northern States Power Co.*,<sup>636</sup> a 1992 court of appeals case, the plaintiffs brought suit against NSP for a decline in performance of, and various physical problems with, their dairy herd caused by stray voltage.<sup>637</sup> The plaintiffs sued on negligence, breach of warranty, and strict liability theories.<sup>638</sup> The court of appeals' opinion focused on the relationship between the plaintiffs and NSP.<sup>639</sup> The trial court had concluded that the provision of electricity was a sale of goods under Article 2 of the U.C.C., a question the court of appeals noted is undecided in Minnesota.<sup>640</sup> However, the court of appeals also noted that even if the sale of electricity is controlled by Article 2, that determination did not resolve the plaintiff's claim.<sup>641</sup> The court of appeals was concerned that the supreme court's limitations on the right to recover for economic loss in commercial transactions might limit the plaintiff's right to recover. The majority, however, concluded that the plaintiff's claims did not fit the prevailing definition of "economic loss" so as to bar their recovery.<sup>642</sup> There was no indication in the case that the electricity failed to perform according to the purposes for which it was sold.<sup>643</sup> Rather, the plaintiffs' claim was based on NSP's failure to control or to warn the plaintiffs of injurious stray voltage.<sup>644</sup> Therefore, their claim arose independent of the transaction, entitling the plaintiffs to recover for their losses free from the limitations on recovery for economic loss imposed by the supreme court in cases involving commercial transactions.<sup>645</sup>

Minnesota products liability cases involving real property or improvements to real property frequently involve the Minnesota statutes of repose and limitations for improvements to real property.<sup>646</sup> If the plaintiff seeks to recover, either under a strict liability

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636. 481 N.W.2d 103 (Minn. Ct. App. 1992).

637. *See id.* at 105.

638. *See id.*

639. *See id.* at 106-07.

640. *See id.* at 107.

641. *See id.* at 108.

642. *See id.*

643. *See id.*

644. *See id.*

645. *See id.*

646. *See* MINN. STAT. § 541.051 (1996) (containing a statute of limitations and repose for actions based on improvements to real property). The statute reads as follows:

Subd. 1. (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death,

or negligence claims, and the basis for the claim is an improvement to real property, the two-year statute of limitations and ten-year outside statute of repose present significant obstacles to recovery.<sup>647</sup> There is an exception, adopted in 1990, for manufacturers or suppliers of "any equipment or machinery installed upon real prop-

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arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

(b) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury or, in the case of an action for contribution or indemnity, upon payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.

(c) Nothing in this section shall apply to actions for damages resulting from negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession.

(d) The limitations prescribed in this section do not apply to the manufacturer or supplier of any equipment or machinery installed upon real property.

Subd. 2. Notwithstanding the provisions of subdivision 1, in the case of an action which accrues during the ninth or tenth year after substantial completion of the construction, an action to recover damages may be brought within two years after the date on which the action accrued, but in no event may an action be brought more than 12 years after substantial completion of the construction.

Subd. 3. Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

Subd. 4. This section shall not apply to actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express written warranty, provided such actions shall be brought within two years of the discovery of the breach.

*Id.*

647. See *Farnham v. Nasby Agri-Systems, Inc.*, 437 N.W.2d 759 (Minn. Ct. App. 1989); *Thorp v. Price Bros. Co.*, 441 N.W.2d 817 (Minn. Ct. App. 1989); *O'Connor v. M.A. Mortenson Co.*, 424 N.W.2d 92 (Minn. Ct. App. 1988); *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988); *Citizen's Sec. Mut. Ins. Co. of Red Wing v. General Elec. Corp.*, 394 N.W.2d 167 (Minn. Ct. App. 1986); *Kemp v. Allis-Chalmers Corp.*, 390 N.W.2d 848 (Minn. Ct. App. 1986); *Moen v. Rexnord, Inc.*, 659 F. Supp. 988 (D. Minn. 1987), *aff'd*, 845 F.2d 1027 (8th Cir. 1988).

erty.”<sup>648</sup> The exception was intended to exclude routine products liability cases from the scope of section 541.051.<sup>649</sup>

The statutes of repose and limitations aside, products liability claims have been brought in Minnesota for a defective manufactured home,<sup>650</sup> a defective sprinkler system,<sup>651</sup> and an improperly installed furnace.<sup>652</sup> In the last case, *O’Laughlin v. Minnesota Natural Gas Co.*,<sup>653</sup> the Minnesota Supreme Court cited *Schipper v. Levitt & Sons, Inc.*,<sup>654</sup> a landmark 1965 New Jersey Supreme Court case holding a mass producer of homes liable for failure to properly install a mixing valve for hot water delivery to sink taps.<sup>655</sup> While Minnesota has not formally articulated a rule for the application of products liability principles to real estate improvements, the supreme court has imposed liability under varying theories for defects in those improvements.<sup>656</sup>

The Minnesota Supreme Court has not firmly decided if it will apply products liability theory to services that are improperly performed. The court appeared to apply strict liability in *O’Laughlin* for the services that a contractor performed in installing a furnace,<sup>657</sup> but in *Valley Farmers’ Elevator v. Lindsay Brothers Corp.*,<sup>658</sup> the court examined hybrid transactions in greater detail. The *Valley Farmers’* case involved a dispute over a grain storage system the

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648. Act of May 3, 1990, ch. 555, § 13, 1990 Minn. Laws 1562 (amending MINN. STAT. § 541.051, subd. 1).

649. See MINNESOTA INJURY COMPENSATION STUDY COMMISSION, REPORT TO THE LEGISLATURE 20-21 (1990).

650. See *Zimprich v. Stratford Homes, Inc.*, 453 N.W.2d 557 (Minn. Ct. App. 1990).

651. See *Red Wing Motel Investors v. Red Wing Fire Dep’t*, 552 N.W.2d 295 (Minn. Ct. App. 1996), *review denied*, (Minn. Oct. 29, 1996).

652. See *O’Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826 (Minn. 1977).

653. 253 N.W.2d 826 (Minn. 1977).

654. See *id.* at 831 n.3 (citing *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965)).

655. See *Schipper*, 207 A.2d at 321-23.

656. See, e.g., *Fudally v. Ching Johnson Builders, Inc.*, 360 N.W.2d 436, 439 (Minn. Ct. App. 1985) (affirming a jury verdict based on a breach of contract claim for negligent construction of a porch); *Patton v. Yarrington*, 472 N.W.2d 157, 161 (Minn. Ct. App. 1991) (holding that smoke detectors were “improvements” within the meaning of MINN. STAT. § 541.051 and that wrongful death action based on defect in the improvement was brought in a timely fashion).

657. See *O’Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826, 830-31 (Minn. 1977).

658. 398 N.W.2d 553 (Minn. 1987).

plaintiff purchased from the defendant.<sup>659</sup> Flaws in the system resulted in damage to one of the storage bins.<sup>660</sup> Valley alleged negligent design of the system and failure to warn about the need for an automatic switch to control the aeration fans in the system, and strict liability for the damage to the grain storage bin.<sup>661</sup> The plaintiff argued on appeal that the economic loss it sustained was compensable under negligence and strict liability theories because the transaction between it and the defendant was a hybrid commercial transaction involving the provision of services and the sale of goods.<sup>662</sup>

The court noted that it could discern virtually no distinction between the plaintiff's claim that Lindsay should have installed an automatic shut-off device to stop the aeration fan after frost accumulation, and the claims advanced in *O'Laughlin*, which involved a furnace that was improperly installed by a contractor who failed to include a metal liner in the chimney.<sup>663</sup> To clarify the law in Minnesota, the supreme court adopted the "predominant factor" test, the application of which is usually a question of law for the court.<sup>664</sup> As applied, the court concluded that the transaction between the plaintiff and defendant was predominantly a sale of goods.<sup>665</sup>

The impact of the decision on *O'Laughlin* is not clear. It may be that the court's decision in *O'Laughlin*, which appeared to impose strict liability on a contractor for the services he performed,<sup>666</sup> is now suspect because of *Valley Farmers*.<sup>667</sup> After all, the supreme court noted that the two cases were indistinguishable on their facts, although *O'Laughlin* involved property damage and not personal injury.<sup>668</sup> In addition, *O'Laughlin* can be viewed as a case involving a product that was defective as installed.<sup>669</sup> The plaintiff paid for a finished product that should have worked as intended, but because of installation defects did not.<sup>670</sup>

However, even if the supreme court continues to impose strict

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659. See *id.* at 554.

660. See *id.*

661. See *id.* at 555.

662. See *id.*

663. See *O'Laughlin*, 253 N.W.2d at 830-31.

664. See *Valley Farmers*, 398 N.W.2d at 556.

665. See *id.*

666. See *O'Laughlin*, 253 N.W.2d at 826.

667. See *Valley Farmers*, 398 N.W.2d at 555-56.

668. See *id.*

669. See *O'Laughlin*, 253 N.W.2d at 832.

670. See *id.*

liability for the kinds of services performed by contractors in personal injury cases, then classification of the case as involving sales or services would be irrelevant, because strict liability theory can apply to both, depending on the circumstances. Conversely, in cases involving economic loss, classification of a case as involving the sale of goods rather than services makes the case subject to the Uniform Commercial Code and its limitations on liability. In fact, the plaintiff in *Valley Farmers'*, once subject to the U.C.C., lost because the four-year statute of limitations on its claim had run,<sup>671</sup> whereas the statute of limitations for improvements to real property would not have run.<sup>672</sup>

The supreme court has held that strict liability does not apply in pure professional services cases.<sup>673</sup> However, in *City of Mounds View v. Walijarvi*,<sup>674</sup> a city sued an architect for negligence and breach of express and implied warranties for an addition to the city hall designed by the architect and his firm.<sup>675</sup> One of the issues on appeal was whether an architect's agreement to design a structure includes an implied warranty that the structure will be fit for its intended purpose.<sup>676</sup>

The reasoning underlying the majority rule applied to architects and other vendors of professional services, including doctors, engineers, attorneys, and others, is that such professionals are constantly required to exercise skilled judgment in dealing with somewhat inexact sciences.<sup>677</sup> The uncertainty makes complete accuracy impossible in every instance. Following the majority rule, the supreme court concluded that liability could not be imposed except according to the prevailing standard of care applicable to professionals:

We have reexamined our case law on the subject of professional services and are not persuaded that the time has yet arrived for the abrogation of the traditional rule. Adoption of the city's implied warranty theory would in effect impose strict liability on architects for latent defects

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671. See *Valley Farmers'*, 398 N.W.2d at 557.

672. See *id.* at 556.

673. See *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 728 (Minn. 1983) (holding that it is inappropriate to impose a strict liability standard on the defendant because it would result in using a consumer protection statute to second-guess the professional judgment of accounting practitioners).

674. 263 N.W.2d 420 (Minn. 1978).

675. See *id.* at 421.

676. See *id.* at 422.

677. See *id.* at 424.

in the structures they design. That is, once a court or jury has made the threshold finding that a structure was somehow unfit for its intended purpose, liability would be imposed on the responsible architect in spite of his diligent application of state-of-the-art design techniques. If every facet of structural design consisted of little more than the mechanical application of immutable physical principles, we could accept the rule of strict liability which the city proposes. But even in the present state of relative technological enlightenment, the keenest engineering minds can err in their most searching assessment of the natural factors which determine whether structural components will adequately serve their intended purpose. Until the random element is eliminated in the application of architectural sciences, we think it fairer that the purchaser of the architect's services bear the risk of such unforeseeable difficulties.<sup>678</sup>

The *Restatement (Third)*'s policy judgment with respect to human blood and tissue appears to be supported by Minnesota law.<sup>679</sup> In *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*,<sup>680</sup> a serum hepatitis case arising from a blood transfusion, the supreme court held that "the furnishing of blood is more in the nature of a service than in the sale of goods," and that warranty principles were inapplicable as a matter of public policy:

We find it difficult to give literal application of principles of law designed to impose strict accountability in commercial transactions to a voluntary and charitable activity which serves a humane and public health purpose. The activities involved in the transfusion of whole blood, a component of the living body, from one human being to another may be characterized as *sui generis* in that the sequence of events involve acts common to legal concepts of both a sale and a service. Moreover, it seems to us that under the facts in the case before us it would be unrealistic to hold that there is an implied warranty as to qualities of fitness of human blood on which no medical or scientific information can be acquired and in respect to which plaintiffs' physician has the same information, knowledge, and experience as the supplier.<sup>681</sup>

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678. *Id.*

679. See Proposed Final Draft, *supra* note 6, § 19 cmt. c.

680. 270 Minn. 151, 132 N.W.2d 805 (1965).

681. *Id.* at 159, 132 N.W.2d at 811.

The second case involving the issue is *Doe v. Travenol Laboratories, Inc.*,<sup>682</sup> a federal district court case applying Minnesota law.<sup>683</sup> The plaintiff, a hemophiliac, contracted the AIDS virus through a blood transfusion.<sup>684</sup> The court noted the supreme court's conclusion that provision of blood is a service and not a sale, but resolved the case on the basis of the blood shield statute in the Uniform Anatomical Gift Act,<sup>685</sup> adopted some four years after *Balkowitsch* was decided.<sup>686</sup> The court read the statute, which stated that the use of any part of a body "shall be construed, for all purposes whatsoever, as a rendition of a service by each and every person participating therein . . ." as a legislative effort in light of *Balkowitsch* to protect entities such as the defendant in the case from being subjected to liability without fault.<sup>687</sup>

The blood shield statute was repealed in 1992,<sup>688</sup> leaving *Balkowitsch* as the prevailing law in Minnesota. It is consistent with the limitations most states have imposed on the liability of blood and tissue suppliers.<sup>689</sup>

## § 20. DEFINITION OF "ONE WHO SELLS OR OTHERWISE DISTRIBUTES"

For purposes of this Restatement:

(a) One sells a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.

(b) One otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product

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682. 698 F. Supp. 780 (D. Minn. 1988).

683. *See id.*

684. *See id.* at 781.

685. MINN. STAT. § 525.928 (1986) (repealed 1992). The statute read as follows:

The use of any part of a body for the purpose of transplantation in the human body shall be construed, for all purposes whatsoever, as a rendition of a service by each and every person participating therein and shall not be construed as a sale of such part for any purpose whatsoever.

"Part" was defined in section 525.921, subd. 6, as "organs, tissues, eyes, bones, arteries, blood, other fluids and any other portions of a human body." *Id.*

686. *See Doe*, 698 F. Supp. at 784.

687. *See id.* at 783.

688. *See* Act of May 27, 1991, ch. 202, § 42, 1991 Minn. Laws 562.

689. *See* Proposed Final Draft, *supra* note 6, § 19 cmt. c.

to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.

(c) One also sells or otherwise distributes a product when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b).<sup>690</sup>

### Commentary

Section 20 of the *Restatement (Third)* applies the current understanding concerning the kinds of product sellers and distributors subject to its products liability provisions.<sup>691</sup> It specifically includes commercial product sellers, such as: manufacturers, wholesalers, and retailers, although the *Restatement* does not limit section 20 exclusively to those sellers.<sup>692</sup> Section 20 defines sale to include a transfer of ownership "either for use or consumption or for resale leading to ultimate use or consumption."<sup>693</sup>

Sales may occur at all levels in the chain of distribution.<sup>694</sup> The definition is broad enough to include product give-aways as part of a commercial sales promotion.<sup>695</sup> The commercial sale need not be the last transaction in order for the seller to be subject to a products liability claim. One person could, for example, buy a product at a store and give it to a friend, who is subsequently injured.<sup>696</sup>

Section 20 subjects commercial lessors of new or almost-new used products to the rules governing sellers of new products.<sup>697</sup> Rental of a new or almost-new product on a short term basis, where the lessee does not have a chance to inspect the product, and where the lessor draws the product from a pool of new and almost-new units, with no attempt made by the leasing agent to distinguish

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690. *See id.* § 20.

691. *See id.* cmt. a.

692. *See id.* cmt. b.

693. *Id.* § 20(a).

694. *See id.* cmt. b.

695. *See id.*

696. *See id.*

697. *See id.* cmt. c.



the units on the basis of age or condition, makes the lessor subject to strict liability.<sup>698</sup>

The *Restatement (Third)* also includes other nonsale product distributors, including certain forms of bailments, where there is a charge for use of a product.<sup>699</sup> Bailors furnishing products that are an integral part of their sales or marketing operations, however, are strictly liable for the harm caused by defective products that are bailed even if there is no separate charge for their use.<sup>700</sup> Commercial bailors who provide products for use as a convenience but do not charge for the products' use, such as a grocer who provides shopping carts, are not subject to the strict liability rules.<sup>701</sup>

Cases involving combinations of sales and services may be problematic.<sup>702</sup> If the sales component is clearly kept separate from a service provided along with the product, the person who provides the services and products may be deemed to be a product seller.<sup>703</sup> The *Restatement (Third)* comments use the example of a lawn-care firm that bills separately for a fertilizer that is applied to the lawn of a customer, or a company that replaces a component part and bills separately.<sup>704</sup>

However, courts differ in their treatment of transactions if the parties do not clearly separate the sales from the services aspects.<sup>705</sup> The judicial treatment depends on which of two categories the transaction fits.<sup>706</sup> In cases where a product is consumed during the course of providing a service, such as a case where hair dye is used by a hair stylist, the product will usually be treated as a sale of dye.<sup>707</sup> But when the product is not consumed or permanently transferred to the customer, such as defective scissors that cut the customer, the transaction will be treated as solely furnishing a service.<sup>708</sup>

In contrast, Minnesota products liability law has been applied to a variety of product sellers and distributors, although it has not been worked out as completely. It is clear that products liability

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698. *See id.*

699. *See id.* cmt. f.

700. *See id.*

701. *See id.* Reporters' Note, at 365.

702. *See id.* cmt. d.

703. *See id.*

704. *See id.*

705. *See id.*

706. *See id.*

707. *See id.*

708. *See id.*

law will be applied to parties in the chain of manufacture and distribution, although parties lower in the chain may move for dismissal if the product manufacturer is solvent and subject to Minnesota jurisdiction.<sup>709</sup> It has been applied to leases of defective products,<sup>710</sup> and bailments,<sup>711</sup> although the issue of whether strict liability applies to either a lease or a bailment for compensation has not yet been decided by the supreme court.<sup>712</sup>

In dealing with the sales-service hybrid transactions, the supreme court adopted the "predominant factor" test in *Valley Farmers*.<sup>713</sup> The application of the test depends largely on whether there is an identifiable product that is sold in the transaction.<sup>714</sup> In *McCarthy Well Co. v. St. Peter Creamery, Inc.*<sup>715</sup> the supreme court, applying *Valley Farmers*, held that a well company hired to restore a creamery's artesian well to its original capacity performed a service rather than entered into a sale of goods:

We conclude that the predominant purpose of the McCarthy Well-St. Peter Creamery contract was the provision of services. The creamery hired McCarthy Well to restore the creamery's artesian well to its original capacity.

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709. See MINN. STAT. § 544.41 (1996).

710. See, e.g., *Clark v. Rental Equip. Co.*, 300 Minn. 420, 220 N.W.2d 507 (1974) (concerning scaffolding without a safety railing); *Rediske v. Minnesota Valley Breeder's Ass'n*, 374 N.W.2d 745, 747 (Minn. Ct. App. 1985) (involving a defective solid animal waste recycling system).

711. See *Butler v. Northwestern Hosp.*, 202 Minn. 282, 285, 278 N.W. 37, 38 (1938) (involving a plaintiff-patient who sustained hot water burns due to defect in clamp in proctolysis delivery system). The *Butler* court took the position that:

It is well established that one who furnishes an instrumentality for a special use or service impliedly warrants the article furnished to be reasonably fit and suitable for the purpose for which it is expressly let out, or for which, from its character, he must be aware it is intended to be used and is liable for injuries to the bailee or third persons for injuries proximately resulting from any defect due to his want of due care.

*Id.* (citations omitted).

712. See *Wegscheider v. Plastics, Inc.*, 289 N.W.2d 167, 170 (Minn. 1980). The plaintiff, a truck driver, was injured when he fell off a tanker trailer while unloading it. See *id.* at 169. The plaintiff's employer owned the tractor used to pull the tanker trailer. See *id.* The tanker trailer was supplied by Plastics, Inc. See *id.* The plaintiff had requested a jury instruction based on section 402A, but because the plaintiff had assumed the risk of injury, the court concluded that it was unnecessary to "address the issue of whether strict liability as stated in § 402A should be applied to cases such as this, where the defective product was not sold but merely supplied by defendant to plaintiff." *Id.* at 170.

713. See *Valley Farmer's Elevator v. Lindsay Bros. Corp.*, 398 N.W.2d 553, 556 (Minn. 1987).

714. See *id.*

715. 410 N.W.2d 312 (Minn. 1987).

Toward this end, McCarthy Well pulled a liner out of the well casing, airlifted sand out of the well, televised the well, attempted to remove a donut from the well casing, exploded dynamite at the bottom of the well, and installed a new pump. After installing the pump, McCarthy Well billed the creamery \$34,573.27; of this amount, only \$8,329.45 is identified as the cost of the new pump.<sup>716</sup>

Because the court held that the transaction was not a “commercial transaction,” the creamery was entitled to recover under a negligence theory for the economic loss it sustained.<sup>717</sup>

In *Butler v. Northwestern Hospital*,<sup>718</sup> the plaintiff-patient, in the hospital for an appendectomy, sustained serious burns due to defect in a clamp that was used in a proctolysis delivery system.<sup>719</sup> The clamp that was used to prevent the hot water drip was ordinarily used in the administration of enemas, but the clamp was being used for the usual purpose of preventing the flow of water.<sup>720</sup> The court took the position that:

It is well established that one who furnishes an instrumentality for a special use or service impliedly warrants the article furnished to be reasonably fit and suitable for the purpose for which it is expressly let out, or for which, from its character, he must be aware it is intended to be used and is liable for injuries to the bailee or third persons for injuries proximately resulting from any defect due to his want of due care.<sup>721</sup>

However, the court did not impose liability on the basis of strict liability in tort, but concluded that the evidence was sufficient to establish that the defect in the clamp was “discoverably defective.”<sup>722</sup>

## § 21. DEFINITION OF “HARM TO PERSONS OR PROPERTY”: RECOVERY FOR ECONOMIC LOSS

For purposes of this Restatement, harm to persons or property

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716. *Id.* at 315. The court also noted in a footnote that “the purchase and installation of the pump was not a separate transaction. This was a single agreement executed over an extended period of time, of which the pump was but one part.” *Id.* at n.1.

717. *See id.* at 312.

718. 202 Minn. 282, 278 N.W. 37 (1938).

719. *See id.* at 284-85, 278 N.W. at 37.

720. *See id.*

721. *Id.* at 285, 278 N.W. at 38.

722. *Id.* at 287, 278 N.W. at 39.

includes economic loss if caused by harm to:

- (a) the plaintiff's person;
- (b) the person of another when harm to the other interferes with a legally protected interest of the plaintiff; or
- (c) the plaintiff's property other than the defective product itself.<sup>723</sup>

### Commentary

The comments to section 21 note the two constraints that prompted the limitations on the right to recover for economic loss.<sup>724</sup> The first is that "products liability lies at the boundary between tort and contract."<sup>725</sup> Some losses seem to straddle the two theories, but are more appropriately assigned to contract law and the remedies of the U.C.C., with its attendant limitations on recovery, including notice, privity, and disclaimer limitations.<sup>726</sup> The second constraint is that there are some forms of economic loss that "have traditionally been excluded from the realm of tort law even when the plaintiff has no contractual remedy for a claim."<sup>727</sup>

Economic loss that arises from personal injury is included in the *Restatement (Third)*'s definition of harm to the person.<sup>728</sup> Subpart (b) includes actions for loss of consortium or wrongful death,<sup>729</sup> and both are clearly covered under Minnesota products liability law.<sup>730</sup> It also includes losses such as injury to reputation, subject to rules of legal causation, even where the plaintiff has not suffered personal injury.<sup>731</sup> Minnesota does not appear to have a

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723. Proposed Final Draft, *supra* note 6, § 21.

724. *See id.* cmt. a.

725. *Id.*

726. *See id.*

727. *Id.*

728. *See id.* § 21(b).

729. *See id.* cmt. c.

730. *See, e.g.,* Busch v. Busch Constr., Inc., 262 N.W.2d 377, 400 (Minn. 1977) (affirming a jury award for loss of consortium); Horvath v. Liquid Controls Corp., 455 N.W.2d 60, 64 (Minn. Ct. App. 1990) (holding that if death of employee was causally related to the negligence of designer and installer of work facility, the cause of action is governed by the wrongful death statute, MINN. STAT. § 573.02 (1996)).

731. *See* Proposed Final Draft, *supra* note 6, § 21 illus. 1. It provides the following example:

A machine that is used to anesthetize dental patients is delivered to Dr. Smith with the labels for nitrous oxide and oxygen reversed. Dr. Smith,

analogue.

Part (c) includes as harm to property, damage to “the plaintiff’s property other than the defective product itself.”<sup>732</sup> Harm to the defective product itself is not included as a recoverable element of damage under products liability principles.<sup>733</sup> Damage to the product itself is excluded from the *Restatement (Third)* because “the law covering commercial transactions sets forth a comprehensive scheme governing the rights of the buyer and seller.”<sup>734</sup> Harm to the product itself is not covered even where the product is in a defective condition that makes it unreasonably dangerous.<sup>735</sup> The comments note that a plausible argument exists that such cases should be covered by products liability law, but that a majority of jurisdictions to consider the issue have taken the position that those losses should be covered by the U.C.C.<sup>736</sup> Minnesota law agrees.<sup>737</sup> Even a catastrophic loss that results in death will not justify recovery for damage to the product by the owner under a products liability theory.<sup>738</sup> If there is harm to other property, section 21 permits recovery not only for the harm to the product but also for incidental economic loss.<sup>739</sup>

The comments set aside the asbestos cases:

In the case of asbestos contamination in buildings, most courts have taken the position that the contamination constitutes harm to the building as other property. The serious health threat caused by asbestos contamination has led the courts to this conclusion. Thus, actions seek-

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believing she was administering oxygen to a patient, mistakenly administered nitrous oxide which caused the patient to die. Due to the adverse publicity arising from accurate media reporting of the case, Dr. Smith suffered a sharp drop in her practice and substantial economic loss. Dr. Smith’s damages for economic loss are recoverable in tort from the seller of the machine under Subsection (b).

*Id.*

732. *See id.* § 21 (c).

733. *See id.* cmt. d.

734. *Id.*

735. *See id.*

736. *See id.* Reporters’ Note, at 371.

737. *See* S.J. Groves & Sons v. Aerospatiale Helicopter, 374 N.W.2d 431, 434 (Minn. 1985) (holding the U.C.C. is designed to provide remedies for unsatisfactory results of products and that plaintiff should not be allowed to seek remedies under tort theories).

738. *See id.*

739. *See* Proposed Final Draft, *supra* note 6, § 21 cmt. e. The determination of when incidental economic loss will be compensable is controlled by the RESTATEMENT (SECOND) OF TORTS §§ 430-461 (1965).

ing recovery for the costs of asbestos removal have been held to be within the purview of products liability law rather than commercial law.<sup>740</sup>

From *Superwood Corp. v. Siempelkamp Corp.*,<sup>741</sup> to *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*,<sup>742</sup> and *80 South Eighth Street Limited Partnership v. Carey-Canada, Inc.*,<sup>743</sup> the Minnesota Supreme Court has been in the process of developing a set of rules to govern claims for economic loss and property damage.<sup>744</sup>

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740. Proposed Final Draft, *supra* note 6, § 21 cmt. e.

741. 311 N.W.2d 159 (Minn. 1981).

742. 491 N.W.2d 11 (Minn. 1992).

743. 486 N.W.2d 393 (Minn. 1992).

744. In *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 565 N.W.2d 16 (Minn. 1997), a suit was brought in Texas state court by four independent companies that were involved in the three-dimensional photography business. *See id.* at 18. Two individuals who together owned the four companies, developed a plan for managing a three-dimensional photography company through their four businesses. *See id.* One of the individuals met with 3M officials to obtain assistance with the film development process. *See id.* Because of problems in the development of the process, the company ultimately failed. *See id.* at 19.

The jury concluded that 3M breached an express warranty for the emulsion used in the development process and implied warranties for the emulsion and backcoat sauce used in the process, and that the breaches directly caused harm to each of the plaintiffs. *See id.* The jury fixed damages at \$50,000,000 for the group. *See id.* Damages were reduced by the 49% fault attributable to the plaintiffs. *See id.*

Nishika and American 3D, two of the plaintiffs, did not deal directly with 3M. *See id.* They did not use, purchase, or otherwise secure the 3M products at issue in the case. *See id.* Nishika was not even in existence at the time the goods were sold by 3M. *See id.*

The Texas Supreme Court certified two questions to the Minnesota Supreme Court:

1. For breach of warranty under [Minn. Stat. § 336.2-318], is a seller liable to a person who never acquired any goods from the seller, directly or indirectly, for pure economic damages (e.g. lost profits), unaccompanied by any injury to the person or the person's property?
2. If the answer to Question 1 is "yes," may several such persons, who may or may not be related, and who may or may not include the buyer of the goods, recover damages jointly as a single economic unit?

*Id.* The Minnesota Supreme Court answered the first question in the negative.

Minnesota Statutes section 336.2-318, the privity provision in the U.C.C., states that a seller's warranty, express or implied, "extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty." MINN. STAT. § 336.2-318 (1996). The term "person" includes corporations and other business organizations. *See Nishika*, 565 N.W.2d at 19 (citing MINN. STAT. § 336.2-318). The court held that although in the past it had permitted recovery of lost profits from a remote seller's breach of warranty, and had permitted plaintiffs who had not purchased, used, or otherwise acquired a product to recover as third-party beneficiaries for property damage, it had never permitted recovery by a plaintiff "seeking lost profits unaccompanied

The set of rules the supreme court has developed<sup>745</sup> coincide with the rules in the *Restatement*. In *80 South Eighth Street*, the supreme court, on certified questions from the United States District Court for the District of Minnesota, held that the owner of a building with fireproofing containing asbestos was not barred from recovering for “damages relating to the maintenance, removal and replacement” of the fireproofing.<sup>746</sup> Rather than slotting the claim into the economic loss decisions that would have barred recovery by the plaintiff, the court concluded that the policies of tort law should apply due to the dangers presented by asbestos.<sup>747</sup> While that decision can be disputed, the court’s policy analysis makes it clear, as does the *Restatement*, that the asbestos cases are unique.<sup>748</sup> The court viewed one objective of tort law as being deterrence of unreasonable risks of harm.<sup>749</sup> Building owners should be encouraged to abate asbestos hazards rather than waiting for personal injury to occur.<sup>750</sup> The court intended for its decision to accomplish that objective.<sup>751</sup>

A few months after *80 South Eighth Street*, the supreme court decided *Den-Tal-Ez*, further refining the economic loss doctrine in a case involving property damage caused by an electrical defect in a dental chair that caused a fire,<sup>752</sup> but no personal injuries.<sup>753</sup> Suit was brought by the dentist who owned the chair, the owner of the building where the dentist practiced, and other tenants in the building against the manufacturer of the chair and the chair’s motor.<sup>754</sup> The court held that the property damage they sustained was compensable:

[W]e hold that the U.C.C. provides the exclusive remedy

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by physical injury or property damage and who never used, purchased, or otherwise acquired the goods in question.” *Id.* at 20. The court concluded that construing the statute to reach such claims would constitute an expansion of warranty beyond the intent of the legislature. *See id.*

745. For a more detailed analysis, see Jacquelyn K. Brunmeier, Note, *Death by Footnote: The Life and Times of Minnesota’s Economic Loss Doctrine*, 19 WM. MITCHELL L. REV. 871 (1993).

746. *See 80 S. Eighth Street*, 486 N.W.2d at 398.

747. *See id.* at 397.

748. *See id.*

749. *See id.* at 398.

750. *See id.*

751. *See id.*

752. *See Lloyd F. Smith v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 12-13 (Minn. 1992).

753. *See id.* at 12-13.

754. *See id.* at 13.

for other property damages arising out of a sale of goods only when that sale fits Hapka's narrow definition of a "commercial transaction," i.e., where the parties to the sale are dealers in the same goods or, to use a more precise term, "merchants in goods of the kind." In actions for damages to other property which arise from a sale of goods between parties who are not "merchants in goods of the kind," such as in the case here, the tort remedies of negligence and strict liability are always available, even if the parties can sue under the U.C.C. as well. And, of course, an action for damage to the defective product itself is always limited to a U.C.C. based recovery.<sup>755</sup>

The *Den-Tal-Ez* court narrowly interpreted its earlier decision in *Hapka v. Paquin Farms*,<sup>756</sup> a claim by potato farmers for the economic loss they sustained because of diseased seed potatoes grown from defective seed purchased from the defendants.<sup>757</sup> The *Hapka* court held that the plaintiffs were not entitled to recover for the economic loss they sustained because they entered into a commercial transaction for the purchase of the seed,<sup>758</sup> and that the U.C.C. controls "exclusively with respect to damages in a commercial transaction which involves property damage only."<sup>759</sup> *Den-Tal-Ez* limits *Hapka* to transactions between "merchants in goods of the kind."<sup>760</sup>

In response to the court's decision in *Hapka*, the legislature enacted a specific statute to deal with the issue of economic loss arising from the sale of goods:

(a) Economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold may be recovered in tort as well as in contract, but economic loss that arises from a sale of goods between parties who are each merchants in goods of the kind is not recoverable in tort.

(b) Economic loss that arises from the sale of goods, between merchants, that is not due to damage to tangible property other than the goods sold may not be recovered in tort.

(c) The economic loss recoverable in tort under this

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755. *Id.* at 17.

756. 458 N.W.2d 683 (Minn. 1990).

757. *See id.* at 684.

758. *See id.* at 688.

759. *Id.*

760. *See Den-Tal-Ez*, 491 N.W.2d at 15.



section does not include economic loss due to damage to the goods themselves.

(d) The economic loss recoverable in tort under this section does not include economic loss incurred by a manufacturer of goods arising from damage to the manufactured goods and caused by a component of the goods.<sup>761</sup>

Subpart (a) of the statute permits recovery for economic loss arising from a sale of goods due to “damage to tangible property other than the goods sold” in tort as well as contract.<sup>762</sup> However, there is an exemption from tort liability for the economic loss arising from “a sale of goods between parties who are each merchants in goods of the kind.”<sup>763</sup> Consequently, damage to other property is not recoverable in tort where the transaction is between merchants in goods of the kind.<sup>764</sup>

Subpart (b) precludes recovery in tort for economic loss arising from the sale of goods between merchants, where the loss is “not due to damage to tangible property other than the goods sold.”<sup>765</sup> The converse seems to be that where the sale of goods is not between merchants, economic loss other than loss due to damage to tangible property other than the goods sold may be compensable in tort.

Subpart (c) states that the economic loss that is recoverable in tort under the section “does not include economic loss due to damage to the goods themselves.”<sup>766</sup> Finally, subpart (d) defines the recoverable economic loss under the section to exclude “economic loss incurred by a manufacturer of goods arising from damage to the manufactured goods and caused by a component of the goods.”<sup>767</sup>

In *Regents of the University of Minnesota v. Chief Industries, Inc.*,<sup>768</sup> the Eighth Circuit Court of Appeals considered the impact of section 604.10 on a case involving a products liability claim by the University of Minnesota for property damage allegedly caused by a

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761. Act of May 5, 1993, ch. 91, § 2, 1993 Minn. Laws 274 (amending MINN. STAT. § 604.10).

762. MINN. STAT. § 604.10 (1996).

763. *Id.*

764. *See id.*

765. *Id.*

766. *Id.*

767. *Id.*

768. 106 F.3d 1409 (8th Cir. 1997).

grain dryer that caught fire because of a defective solenoid.<sup>769</sup> A subsidiary of Chief Industries manufactured the grain dryer.<sup>770</sup> The solenoid was manufactured by Parker-Hannafin.<sup>771</sup> The University brought suit against both companies, alleging strict liability, failure to warn, and negligent design and manufacture.<sup>772</sup> The sole issue the Eighth Circuit considered was whether the University was “a merchant in goods of the kind” under the statute.<sup>773</sup> The court concluded that a person need not be an actual dealer of a product in order to be a “merchant in goods of the kind.”<sup>774</sup> The court focused instead on the University’s specialized knowledge with respect to the grain dryer in concluding that the University fit the definition:

In the present case, the University’s knowledge and experience with respect to grain dryers constituted “knowledge or skill peculiar to the practices or goods involved in the transaction.” Minn. Stat. § 336.2-104(1). The University had purchased a number of such units over the prior thirty years, and had the advantage of a centralized purchasing department that solicited bids for the purchase. Before purchasing the unit, the Southwest station’s superintendent (who had been responsible for other such purchases) consulted a prominent expert in grain drying, who provided advice on such specifications for the unit as fan size and BTU requirements.

To be sure, not all large, sophisticated purchasers are necessarily merchants in goods of the kind they buy, just as an informed and careful individual consumer does not become a “merchant.” But based on the particular and undisputed facts of this case, we agree with the district court that the University possessed specialized knowledge with respect to the grain drying unit, and that “[t]his knowledge informed the University of the risks posed by the product and the potential damage to both the product and other property that could result from product failure.” The district court properly concluded that, as a matter of law, the University was a merchant of goods of

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769. *See id.* at 1410-11.

770. *See id.* at 1410.

771. *See id.*

772. *See id.*

773. *See id.* at 1411.

774. *See id.* at 1412.

the kind and that section 604.10 bars any action in tort.<sup>775</sup>

Judge Lay dissented in the case.<sup>776</sup> Based on the legislative history and relevant supreme court authority, he argued that the University was not a merchant in goods of the kind for purposes of the statute.<sup>777</sup> He interpreted *Den-Tal-Ez* as providing a “narrow definition” of “commercial transaction.”<sup>778</sup> *Den-Tal-Ez* held that the U.C.C. provides the exclusive remedy only in cases where the parties to the sale are dealers in the same goods or merchants in goods of the kind.<sup>779</sup> Because the University and Parker-Hannafin were not both dealers in goods of the kind, Judge Lay would not have applied U.C.C. limiting principles. He explained:

Section 604.10 (a) governs this claim. When it enacted § 604.10 in 1991, had it so desired, the Minnesota legislature could have chosen the broad term “merchant” as generally defined by § 336.2-104(1) instead of “merchants in goods of the kind.” The legislature’s choice instead to incorporate the limiting language manifests its intent to narrow application of the economic loss doctrine. There is no inconsistency in this obvious, clarifying provision, with § 336.2-104(1). The intended purpose of § 604.10 was to overcome *Hapka*’s broad language, based on § 336.2-104(1), so that ordinary consumers will not be denied their “economic loss arising from the sale of goods.”<sup>780</sup>

The case is not binding on the Minnesota courts, of course, which leaves the final interpretation of the statute to the Minnesota Supreme Court.

### CONCLUSION

The *Restatement (Third) of Torts: Products Liability* provides a yardstick for measuring products liability law in each individual state. Minnesota’s law is largely similar to the rules set out in the *Restatement*. While Minnesota has not yet adopted all of the positions in all of the rules, the Minnesota Supreme Court has taken positions on the rules governing liability, which are substantially

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775. *Id.* at 1412 (citation omitted).

776. *See id.*

777. *See id.* at 1412-13, 1415.

778. *See id.* at 1413.

779. *See Lloyd F. Smith Co v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 17 (Minn. 1992).

780. *Chief Industries*, 106 F.3d at 1413 (footnotes omitted).

the same. It no longer seems possible to argue that negligence principles do not control in cases involving design defect and failure to warn. The strict liability vernacular may still be used in design defect cases, but the important question is whether the supreme court's statement in *Kallio v. Ford Motor Co.*,<sup>781</sup> that proof of a feasible alternative is not part of the plaintiff's prima facie case in a design case,<sup>782</sup> establishes a meaningful wall between the theories. Any realistic appraisal of the supreme court and court of appeals decisions in design defect cases, including *Kallio*, will have to bow to the reality and practical necessity of establishing the feasible alternative in most cases. In failure to warn cases the supreme court has acknowledged that negligence principles control strict liability failure to warn cases. In other words, they really are negligence cases. The only detail that has to be developed in the Minnesota failure to warn cases is the appropriate division of responsibility between judge and jury.

A section-by-section comparison requires an understanding of Minnesota products liability law and an appraisal of any gaps in the law. The *Restatement (Third)* is more likely to be a gap filler than an impetus for any significant change in the law. In areas where the law is not fully roughed out, such as cases involving post-sale duty to warn, the *Restatement* may provide useful guidelines for resolving those cases. In others, such as economic loss cases, it provides reaffirmation of economic loss rules that have been worked out in this state over the course of some twenty years.

The *Restatement (Third)* should be an excellent resource for evaluating the evolution of Minnesota products liability law and a roadmap, although not the only one, for the development of the law in the future.

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781. 407 N.W.2d 92 (Minn. 1987).

782. See *id.* at 97.