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The Products Liability Restatement Warning Obligations: History, Corrective Justice and Efficiency

M. Stuart Madden
Pace Law School

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Because a substantial amount of time is to be devoted to the design defect aspects of the new *Restatement,* I wanted to talk to you about warnings defects. I will address the subject from four perspectives. I will first speak about the dominant theories of warnings decisional law under the *Restatement (Second) of Torts,* and follow that description with my reading of the placed upon gloss on those themes by the *Third Restatement.* My goal is to evaluate whether or not the *Third Restatement* retards or advances what have been the two dominant themes in torts jurisprudence for the recent past: corrective justice and efficiency. Lastly, I wish to give a prognosis as to the acceptance of the Products Liability warnings provisions in the judicial marketplace.

Independently of a manufacturer's design or manufacturing processes, a product seller may be found liable if a product characteristic is the legal cause of injury or loss, and the product is unaccompanied by warnings adequate to make the product duly safe for its ordinarily foreseeable use, including reasonably foreseeable misuse. These two informational obligations associated with product sales, that of providing warnings and providing instructions, derive from two policy objectives: (1) risk reduction and reduction of accident costs; and (2) informed consent. Warnings as to product hazards and instructions for reasonably safe use are established mechanisms for risk reduction as they obligate manufacturers to produce products that achieve optimal levels of safety. An optimal level of safety does not mean maximum or a total safety. The informed consent, or informed judgment rationale, reflects a societal assessment that a product user or consumer is entitled to make his own choice as to whether or not a product's utility or benefits justify exposing himself to the risk of harm.

The widely followed approach for many years has been for litigants to pursue claims under both doctrinal categories (negligence, strict liability and warranty) as well as functional categories (manufacturing defect, design defect and warning defect). As you know, the new *Restatement* adopts the functional approach. But be the approach functional or doctrinal, under any theory of liability, a warning, if found to be necessary, must by its size and location and intensity of language, be calculated to impress upon the reasonably prudent user of the product the nature and extent of the hazard involved. The language must be direct and should where applicable describe methods of safe use, and it must advise of significant hazards from reasonably foreseeable misuse.

Historically, a manufacturer is not required to give warnings regarding risks that should be obvious to the ordinary user. The position taken in the decisions comprising this body of law as stated by one court is in this language: "[a] manufacturer cannot manufacture a knife that will not cut, or a hammer that will not mash a thumb, or a stove that will not burn a finger.

M. Stuart Madden is a Professor of Law at Pace University School of Law.

The law does not require him to warn of such common dangers."[1]

When products are sold in bulk to an intermediary for subsequent use by others, the seller discharges his duty to warn when it can be concluded reasonably that the intermediary is in a superior position to warn ultimate users, and when the bulk seller can rely reasonably upon the intermediary to utilize that superior position to do so.

What is the gloss to or amplification of existing warnings law that the Third *Restatement* affects? I won't describe to you what the *Restatement* provision is, as you have it in your materials. But I have selected a subset of warnings issues to illustrate the new *Restatement's* substantial fidelity to the decisional law interpreted by the *Second Restatement.*

The warning duties tied foreseeable hazards, together with the accompanying Comments and Reporters' Notes, make it clear that a seller's warning obligation is triggered only by hazards that are known or knowable at the time the product was initially introduced into commerce. This is a nearly universal rule, and it's the appropriate rule for the new *Restatement.*

The *Products Liability Restatement's* preservation of the open and obvious rule is supported by the position taken in a majority of jurisdictions that there is just no duty to warn of obvious risks. The rationale for not requiring warnings in such instances is stated in comment j to section 2 which states: "When a risk is obvious or generally known, the prospective addressee of the 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."[2] Thus, in adopting this rule, the Institute has made no significant sacrifice in the tort goals of personal autonomy and reducing preventable accidents. As importantly, the reporters have recognized the social cost of overwarning as described by Henderson and Twerski in this language: "Bombarded with nearly useless warnings about risks that rarely materialize in harm, many consumers could be expected to give up on warnings altogether."[3]

Regarding warnings to intermediaries, the *Restatement,* comment i, emphasizes the *Restatement's* interest in lowering accident costs, while recognizing that it is ordinarily the workplace supervisor who can most effectively and efficiently communicate hazard information. This position tracks, albeit more succinctly, comment n to *Restatement (Second) of Torts § 388.*

What of the efficiency goals and corrective justice objectives of tort law? I wish at this point to glimpse at the sometimes substantive but more often nominal distinctions between the two tort camps, as Gary Schwartz at one point has written, both vying for the torts flag.[4] These two schools comprise (1) those who say that tort goals are properly vindicated through a corrective justice model, and (2) those who counter that wealth maximization and efficiency are the pursuits that should be advanced with ardor.

In my view the new *Restatement's* treatment of warnings fares well under both corrective justice and efficiency principles. Viewed in terms of the personal autonomy component of corrective justice, the informed consent rationale was put forth by the Fifth Circuit in *Borel v. Fibreboard Paper Products Corp,*[5]

when the court stated that "a duty to warn attaches whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it."[6]

From an efficiency perspective, one of the efficiency approach's most noteworthy constructs has been to espouse a tort doctrine that will deter persons from engaging in activities that a reasonable person would view ahead of time to be socially wasteful. Transferred to a products liability context, what if the seller of a product without adequate warning causes personal physical injury or property damage? A seller of a product with a high risk level bargains for the right to sell it, which is to say, preserves the transaction within the market, by conveying warnings sufficient to convey to buyers or users information sufficient to make an informed choice of whether or not to expose themselves to the risk. Absent that bargain struck, absent that informed judgment, a defective product that causes injury represents an involuntary or coerced transfer of wealth from the injured party to the injurer. The wastefulness, of course, cannot be gainsaid. It leads directly to the type of litigation with which you are all familiar.

In the main, the *Products Liability Restatement's* treatment of warnings to intermediaries can be harmonized readily with both Posner's market efficiency[7] and Calabresi's least cost avoider[8] approaches. Under the latter, the least cost avoider approach, a manufacturer will ordinarily be the least cost avoider in that it, rather than the purchaser or the intermediate seller, is presumed to be an expert in all of the risk potential of the product and therefore will be in a better position than the user or consumer to know and, as appropriate, most inexpensively remediate the hazard. Illustrative of this case is one called *Beauchamp v. Russell,*[9] which involved the issue of the relation, if any, between an air valve component in a pneumatically-run palletizer and the injury of the plaintiff's spouse. The court therein suggested that the duty to warn should properly be placed upon the marketing participant with the greatest access to the information and the easiest of its dissemination; in this case, the component part manufacturer.[10]

As regards obvious risks, the general rule that there is no such duty can be validated in terms of efficiency as the new *Restatement* endorses avoidance of unnecessary transaction costs to the marketing of useful products. The *Products Liability Restatement* also retains an efficient rule that would relieve the component or ingredient supplier of liability when the component or ingredient is not itself defective. In such circumstances the component or ingredient supplier ordinarily has no meaningful control over the hazard level of the finished product.

Notes

1. *Fisher v. Johnson Milk Co.*, 174 N.W.2d 752, 753 (Mich. 1970) (quoting *Jamieson v. Woodward & Lathrop,* 247 F.2d 23, 26 (D.C. Cir. 1957)).
2. RESTATEMENT (THIRD) OF TORTS § 2 cmt. j (1997).
3. James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 296 (1990).
4. *See generally* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).
5. 493 F.2d 1076 (5th Cir. 1973).
6. *Id.* at 1089.
7. *See generally* Russell B. Korobkin & Thomas S.

Ulen, *Efficiency and Equity: What Can be Gained by Combining Coase and Rawls?*, 73 WASH. L. REV. 329 nn. 1-4 (1988).

8. *See* Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 797 (1997).

9. 547 F. Supp. 1191 (N.D. Ga. 1982).

10. *Id.* at 1197.