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Introduction to the Northern Kentucky Law Review Products Liability Symposium 1999

David Franklyn

Golden Gate University School of Law, dfranklyn@ggu.edu

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NORTHERN KENTUCKY LAW REVIEW
PRODUCTS LIABILITY SYMPOSIUM, 1999

by David J. Franklyn¹

On February 6, 1999, the *Northern Kentucky Law Review*² sponsored a symposium on the *Restatement (Third) of Torts: Products Liability* (hereinafter *Third Restatement*), which was recently released by the American Law Institute ("ALI"). The ALI "is a private body of judges, practicing attorneys, and legal scholars that drafts and publishes the Restatements of various fields of law."³ Many of our symposium speakers and article contributors participated in drafting the *Third Restatement*.

It has been said that the ALI's mission "is not to reform the law, but rather to rationalize it . . . to reconcil[e] conflicting state standards . . . and [to] creat[e] a unified presentation of products liability law"⁴ The goal is to articulate a uniform rule of law that "might, as the hypothesis goes, prompt a state high court in a jurisdiction that had not ruled on the matter to adopt the Restatement position as the optimum rule of law."⁵

In 1965, the ALI promulgated the *Restatement (Second) of Torts* § 402A (hereinafter *Second Restatement*), which proposed a set of rules and comments pertaining to the liability of commercial sellers for injuries caused by their products.⁶ Section 402A was adopted in numerous jurisdictions and today dominates the field of products liability law.⁷ It has received both praise and criticism from scholars, judges and practicing attorneys.

In the early 1990s, the ALI appointed professors James Henderson, of Cornell Law School, and Aaron Twerski, of Brooklyn

1. Assistant Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University.

2. The Law Review would like to express its gratitude to Professor David Elder for his help and assistance in planning and executing the symposium.

3. Stuart Madden, *Component Parts and Raw Materials Sellers: From the Titanic to the New Restatement*, 26 N. KY. L. REV. 535, 544 n.25 (1999).

4. *Id.*

5. *Id.*

6. See *Courts Cautious Toward New Products Liability Restatement*, 4 CIVIL JUSTICE DIGEST 3, Summer 1997, at 1.

7. See *id.*

Law School, as Reporters for the project of drafting a *Third Restatement* for products liability.⁸ The Revision project was finished in 1998 when the ALI published the final version of the new Restatement on products liability. The final draft was almost four hundred pages long and consisted of twenty-one numbered sections.⁹

Like the *Second Restatement*, the *Third Restatement* has sparked considerable interest (and, again, criticism and praise) by the academy, the bench and the bar. While some commentators have expressed approval of the *Third Restatement* and its proposed changes in products liability law, others have severely criticized it as being too influenced by the so-called "tort-reform" movement.¹⁰ It has also been noted that there was a great deal of partisan lobbying of the ALI by both plaintiff and defense attorneys.¹¹ Our symposium speakers and writers were chosen because of their expertise in the products liability field, their participation in the ALI project, and their divergent views.

Specifically, the symposium contributors debated the impact of the *Third Restatement* on four important areas of tort law: (1) the post-sale duty to warn; (2) liability of component parts manufacturers and raw materials sellers; (3) the relationship between warnings and design defects; and (4) the interplay between the *Third Restatement* and regulatory agencies' controls on product defectiveness.

The symposium participants contributed a series of articles that form this special edition of the *Northern Kentucky Law Review*. Professor Stuart Madden's¹² article discusses important changes in the *Third Restatement* regarding the duties of component parts and raw material sellers.¹³ Professor Madden asserts that the *Third Restatement's* position in this area is well founded under either a corrective justice or economic efficiency analysis.¹⁴

8. *See id.*

9. *See id.* at 2.

10. *See id.* at 3-6.

11. *See id.* at 5.

12. Professor Madden is the Charles A. Freauff Research Professor and Distinguished Professor of Law at Pace University School of Law in New York.

13. *See Madden, supra* note 3.

14. *Id.* at 555.

Professors Jerry Phillips¹⁵ and Richard Ausness¹⁶ provide divergent viewpoints regarding the question whether manufacturers should ever be permitted to warn their way out of design defects. Following the approach taken by the *Third Restatement*, Professor Phillips contends that the adequacy of a product's design should be resolved by use of a risk-utility test and that a factor in this assessment should be whether the product had an adequate warning.¹⁷ By contrast, Professor Ausness argues that the *Third Restatement's* position is too sweeping and that giving large damages awards to consumers who fail to heed clear warning is not socially or economically desirable.¹⁸

Professor Kenneth Ross¹⁹ writes on the post-sale duty to warn and its treatment by the *Third Restatement*.²⁰ Professor Ross notes that while the possibility of burdening manufacturers with a post-sale duty to warn generated a good deal of debate, the drafters ultimately decided that there was sufficient common law precedent for such a duty and thus included it in the final draft.²¹ Professor Ross' article provides an overview of the *Third Restatement's* post-sale duty sections and suggests ways in which manufacturers might comply with the new provisions.²²

Finally, Professor James O'Reilly²³ writes regarding the interplay of regulatory product safety agencies and the *Third Restatement*.²⁴ Professor O'Reilly argues that there needs to be greater coordination between the common law tort system and the governmental safety

15. Professor Phillips is the W. P. Thomas Professor of Law at the University of Tennessee School of Law in Knoxville.

16. Professor Ausness is the Ashland Oil Professor of Law at the University of Kentucky School of Law in Lexington.

17. See Richard C. Ausness, *When Warnings Alone Won't Do: A Reply to Professor Phillips*, 26 N. KY. L. REV. 627 (1999).

18. See *id.* at 628.

19. Professor Ross is the Distinguished Practitioner in Residence at William Mitchell College of Law in St. Paul, Minnesota.

20. See Kenneth Ross, *Post-Sale Duty to Warn: A Critical New Cause of Action*, 26 N. KY. L. REV. 573 (1999).

21. See *id.* at 573.

22. See *id.* at 587.

23. Visiting Professor of Law, University of Cincinnati College of Law.

24. See James T. O'Reilly, *Dialogue with the Designers: Comparative Influences on Product Design Norms Imposed by Regulators and by the Third Restatement of Products Liability*, 26 N. KY. L. REV. 655 (1999).

regulation systems.²⁵ He contends that such coordination will result in greater protective deterrents and hopefully safer product designs.²⁶

We are hopeful that this edition of the *Northern Kentucky Law Review* will make a meaningful and lasting contribution to the field of products liability law generally, and to the emerging debate over the *Third Restatement* in particular.

25. *See id.* at 567-58.

26. *See id.* at 655.