Introductory Remarks by the Honorable Justice Stewart G. Pollock* at Seton Hall University School of Law†

Returning to Seton Hall University School of Law for the Health Law & Policy Program's Symposium on "Proving Product Defect After the Third Restatement of Torts: Products Liability" is like a homecoming. For years, Seton Hall has been like a second home for me.

The length of my relationship with Seton Hall came to mind when I reviewed the proposed Model Civil Jury Charge on Design Defect.[1] The proposed charge is the work of our court's Model Civil Jury Charge Committee. Included within the forty-three footnotes supporting the charge is a reference to an article published in the *Seton Hall Law Review* twenty-nine years ago. The article was written by a young trial lawyer who, in the 1960s, was trying to make sense of the emerging law of products liability.[2] That lawyer, no longer young, is still trying to make sense of products liability law. I know. I wrote the article. As an additional reminder of the length of our relationship, one of the bright young *Seton Hall Law Review* editors who checked my research was a fellow named Ronald Riccio. I wonder what ever happened to him?[3]

Over the years, the School of Law has graciously extended to me invitations to lecture and to judge moot court finals. More recently, I have been privileged to chair the Health Law & Policy Committee, the sponsor of today's symposium. Under the dynamic leadership of Professors Kathleen Boozang and John Jacobi, Seton Hall University

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[1] *See* NEW JERSEY MODEL JURY CHARGE ON DESIGN DEFECT (Proposed Official Draft 1998).

[2] *See id.* § 5.34(C)(4) n.2 (citing Stewart Pollock, *Liability of a Blood Bank or Hospital for a Hepatitis Associated Blood Transfusion in New Jersey*, 2 SETON HALL L. REV. 47, 60 (1970)).

[3] Ronald Riccio served as Dean of Seton Hall University School of Law from 1988 to 1999.

School of Law has moved to fill a void in legal education in the New Jersey-New York metropolitan area. Today's symposium is the most recent of several that the Health Law & Policy Program has sponsored.

The program for today's symposium states that I am to make introductory remarks. I've attended enough symposia to appreciate how little is expected of the speaker assigned to make such remarks. No one expects an introductory speaker to say very much, and everyone expects him to take very little time to say it.

My task is to help you make the transition from coffee and danish pastry to products liability law. It's to give you time to put down your coffee cup, pick up your pen, tune out the world, and tune-in to the speakers. Still, the temptation to say something substantive persists.

As we hear our speakers today, it might help to put their comments in perspective by recalling how typically "American" products liability law is. Products liability is a paradigm to illustrate how law is made in the United States. Theoretically, the United States is a common-law jurisdiction. Judge-made law remains the law of the land. Unlike European and Latin American jurisdictions, courts, not legislatures, are the basic sources of law. As time passes, however, common-law and code jurisdictions draw closer to each other.

In New Jersey, as throughout the United States, products liability law started with the courts. It started thirty-nine years ago with the New Jersey Supreme Court's decision in *Henningsen v. Bloomfield Motors*,[4] which eliminated privity as a defense in cases involving the sale of defective products that cause physical injury. The effect of *Henningsen*, according to Dean Prosser, was "the most rapid and all together spectacular overturn of an established rule in the entire history of the law of torts."[5] With the enactment of the Products Liability Act,[6] however, the New Jersey Legislature has supplanted the courts as the primary source of products liability law. No one questions the Legislature's power to enact such a law; even in a common-law jurisdiction, the legislature may, subject to constitutional limits, trump judicial decisions.

Making law in America depends, nevertheless, on more than the judicial and legislative branches of government. A special feature of

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[4] 32 N.J. 358, 161 A.2d 69 (1960).

[5] W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS § 97, at 690 (5th ed. 1984).

[6] *See* N.J. STAT. ANN. § 2A:58C (West 1999).

lawmaking in this country is the role of legal scholars and non-profit organizations dedicated to the improvement of the law. The most prominent of those organizations is the American Law Institute (ALI). Eight years ago, the ALI revisited the law of products liability. Its previous contribution, although extremely influential, was confined to one section in the Second Restatement of Torts.[7] After seven years of review, some of it contentious, the ALI approved the Restatement of Torts on Products Liability.[8] The controversy that still surrounds the Restatement of Torts on Products Liability typifies the controversy that surrounds products liability law in general.[9] No matter what else you might think about controversy, it produces good symposia.

The various treatments by the courts, the legislatures, and the ALI of just one issue, the state-of-the-art defense, demonstrates the genius of the American system of making law. The selection of the state-of-the-art defense in design defect cases as an illustration of lawmaking necessarily limits the depth of the discussion.

Depending on where you stand, the high or low water mark of state-of-the-art defense in New Jersey was *Beshada v. Johns-Manville Products Corp.*[10] Briefly, in *Beshada*, the New Jersey Supreme Court ruled that the manufacturers of asbestos products were strictly liable to persons who contracted asbestosis, even if the manufacturer had made the products as safely as it could. In other words, manufacturers were strictly liable even if the product comported with the state-of-the-art at the time of manufacture. Almost immediately, the court realized the need to modify the holding. To this end, the court identified the state-of-the-art defense as one element in the risk-utility analysis. The court stated that the defense would still be available except in asbestos cases and those involving products that "are so dangerous and of such little use," such as dangerous toys, "that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others."[11] This holding confined the elimination of the defense to the kind of cases that gave rise to *Beshada* — asbestosis cases. Viewed charitably, the judicial treatment of the state-of-the-art defense demonstrates the ability of the common law to adapt, modify, and self-correct.

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[7] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[8] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1997).

[9] *See generally* William A. Dreier, *The Restatement (Third) of Torts: Products Liability and New Jersey Law – Not Quite Perfect Together*, 50 RUTGERS L. REV. 2059 (1998).

[10] 90 N.J. 191, 447 A.2d 539 (1982).

[11] O'Brien v. Muskin Corp., 94 N.J. 169, 184, 463 A.2d 298, 306 (1983).

By the time the court straightened out its jurisprudence on the state-of-the-art defense, however, the wind was up. In 1987, responding to lobbying from manufacturers, primarily tobacco and pharmaceutical companies, the Legislature adopted the New Jersey Products Liability Act.[12] Among the many provisions of this new statute is one that constitutes the state-of-the-art defense as absolute. If a manufacturer can show that there was no "practical and technically feasible alternative design that would have prevented the harm without substantially impairing" the function of the product, it is not liable for failing to provide an alternative design.[13] Under the statute, state-of-the-art is no longer an element in risk-utility analysis; instead it is an absolute defense.[14] Echoing the New Jersey Supreme Court's concern about products that pose high risks and offer only low utility, the Legislature created an exception to the state-of-the-art defense for products that are "egregiously unsafe or ultra-hazardous."[15] Possible candidates for the exception include "Lawn Darts," foot-long steel darts that children can throw at targets or each other, a 150-volt "Quivering Lump Baton," advertised with the slogan "reach out and touch someone," and a hand-held crossbow that shoots bolts at forty-five miles per hour and can penetrate a telephone book from twenty-five feet away.

The Third Restatement of Torts on Products Liability abandons the term "state-of-the-art," but keeps the concept. Under the Restatement, a design is defective if the product could have been made safer "by the adoption of a reasonable alternative design."[16] Thus, a product is not defective if it could not have been made safer. In one sense, the Restatement exceeds the Products Liability Act. Under the Restatement, proof that the product could have been made safer is an element of the plaintiff's case.[17] If the defendant can show that no practical or feasible design existed, the plaintiff loses.[18] Although the substance of the Restatement is similar to New Jersey case law, the burden of proof and the effect of proving compliance with the state-of-the-art differs.

The Restatement acknowledges that some products for which no reasonable alternative design exists should still, nonetheless, be

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[12] *See* N.J. STAT. ANN. § 2A:58C-2 (1999).
[13] *Id.* § 2A:58C-3(a)(1).
[14] *See id.* § 2A:58C-3(a).
[15] *Id.* § 2A:58C-3(b)(1).
[16] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1997).
[17] *See id.*
[18] *See id.*

removed from the market because "the extremely high degree of danger posed by its use . . . so substantially outweighs its negligible social utility."[19] Consequently, on the issue of dangerous toys, New Jersey case law, the Products Liability Act, and the Restatement are all in accord.

Even those who disagree with the state-of-the-art defense as articulated in the Products Liability Act and the Restatement, may still applaud their attempts to provide a clearer and simpler explanation of the defense. For the past twenty years, I, like Judge Dreier and Judge Keefe, have reviewed jury charges in products liability cases that juries, to put it politely, must have found difficult to understand. My point is not to endorse or criticize the New Jersey Products Liability Act or the Restatement, but merely to point out how they illustrate the synergism of the judiciary, the legislature, and the academy in the process of making law.

[19] *Id.* § 2 cmt. b.