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Introduction

Honorable George C. Pratt

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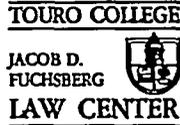
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INTRODUCTION

*Hon. George C. Pratt**:

Good morning, I am George Pratt. I have been chosen to be the moderator of the discussion this morning. The various speakers that have been scheduled to speak today are the country's most acknowledged experts in the area of products liability, many of whom have written various influential textbooks on this subject.

The program description in the brochure states that section 402A of the Restatement (Second) of Torts¹ is one of the most

* The Honorable George C. Pratt is a full-time Professor of Law at Touro College Jacob D. Fuchsberg Law Center. Judge Pratt was appointed to the United States District Court for the Eastern District of New York in 1976 and served there until 1982 when he was appointed to his current seat as Circuit Judge for the United States Court of Appeals for the Second Circuit.

1. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides in pertinent part:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and

cited provisions of the United States law ever drafted. I used to think that what the term “restatement” implied, was the restatement of the law as it has made it through the court system. However, section 402A has clearly taken on a different characteristic. In fact, not only the section itself, but its comments as well, have been relied upon by many courts as “black letter law.”² I am not quite sure how a group of professors can get together and “restate” what the courts have done, and at the same time draft a new provision of law. Although it does not follow the usual legislative process, it is a rather accurate description of many cases that will be decided on the basis that it does not conform to comment k.³ I am confident that the Restatement (Third) of Torts will be most influential on the judicial application of comment k.

I professed ignorance as to why I should be here when Professor Zablotzky asked if I would be the moderator. Then I began thinking about what products liability experience I have had in the eleven years that have passed since I left the district court and went onto the circuit court. I could remember only one case.

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

2. See Myron J. Bromberg, *The Mischief of the Strict Liability Label in the Law of Warnings*, 17 SETON HALL L. REV. 526, 527 (1987) (“The comments are accepted as so integral to the black letter rule of § 402A that they are commonly treated as part of that rule.”); James A. Henderson, Jr. & Aaron D. Twerski, *Essay, Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257, 1263 (1993) (“[A] Restatement can by its formulation of black letter law and explanatory comments, provide the courts with crisp and unclouded formulations of legal problems.”).

3. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965). Comment k reads in pertinent part:

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 Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous.

Id. For the preliminary draft of comment k of the Restatement (Third) of Torts see James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1522-23 (1992) (giving two alternatives).

Even though I could not remember specifically what it was about, I did remember that it involved section 402A. So I sent my law clerk to Westlaw and said, "Find out how many times section 402A has been cited in Second Circuit opinions in the last ten years." The answer was four. Out of the 3,000 cases a year, or a total of 30,000 cases in the circuit, only four have relied on section 402A. Yet we are told in the brochure that section 402A has been cited 80,000 times by various courts.

Pursuing this issue a little bit further, I talked to our district judges over in Uniondale and asked, "Do you have products liability cases?" They replied, "Oh, we have lots of them." Then I talked to the magistrates. They are the ones that handle civil litigation these days in the district courts, because the district courts are too busy handling drug cases. According to the magistrates, what seems to be happening, at least in the Eastern District, and probably the Second Circuit, is that these cases are litigated furiously before the district judges. At some time, even before appeals get filed, they get disposed of, I suppose by settlement. So, because of the early disposition of these cases, anything that I know about products liability is over ten years old.

I am looking forward to hearing what our panelists have to say today. It is clear that section 402A, which is in the process of undergoing drastic revision, is of enormous significance to the economy of the country because it guides industry as to what it must do in terms of standards of safety, warning, and design problems. Thus, it affects the conduct of every manufacturer in the country.

Fortunately, two of our speakers this morning are the co-reporters for the American Law Institute Committee that is engaged in the revision. The purpose of today's symposium is to highlight some of the intricacies of the proposed Restatement (Third), to illustrate the areas of conflict, and to encourage scholarly debate. After hearing from all the prominent speakers, I am confident that we will all have a better understanding of the problems behind products liability and how they affect the country.

The first speaker will be Professor Twerski, one of the two reporters for the committee. I look forward to hearing what he has to say. So let us get started.

