Gray has expressed concern that there is no case law supporting the proposal that under negligence law a plaintiff show a reasonable alternative design when a product is alleged to be unreasonably dangerous. He also questioned whether this is a requirement for a determination of unmerchantability under Article 2 of the UCC.

He then explained that toxic chemicals provide an example of this diminished incentive for manufacturers to learn of the dangers of their products. A manufacturer that faces strict liability without a plaintiff having to prove that the manufacturer should have known of a danger has considerable incentive to conduct a thorough investigation and testing of its product. According to Gray, the requirement that the victim establish what a manufacturer should have known can be overly burdensome.

In certain industries, such as industrial chemical production, this problem is exacerbated by the fact that governmental regulation actually provides a disincentive for manufacturers to discover the potential hazards of the chemicals they produce. Unlike pharmaceutical manufacturers, for example, industrial chemical producers do not need to receive the government’s permission before placing a product on the market. Under the Toxic

The Restatement (Second) imposes strict liability when a product is defective and unreasonably dangerous, regardless of why the product was defective. The new proposals for the Restatement (Third) impose strict liability only in cases of manufacturing defects. Warning defects are treated largely on a negligence standard. Liability for design defects, by contrast, is limited to foreseeable harm at the time of design, and the plaintiff bears the burden of demonstrating that a reasonable alternative design was available at the time the design was developed.

According to Gray, there are two principal problems with these proposals. First, the retreat from strict liability for design and warning defects may make products more dangerous for consumers because this will reduce the incentive for manufacturers proactively to discover hazards associated with their products. Second, the new ALI proposals suggest that liability for defectively designed products and product warnings would be limited not only under a strict liability theory, but also under long-standing negligence and Uniform Commercial Code (UCC) causes of action.
Substances Control Act (TSCA), a manufacturer marketing a new chemical merely needs to notify the Environmental Protection Agency (EPA); there is no need for governmental authorization unless the EPA makes a finding of need. Although a manufacturer must disclose to the EPA any testing that has been performed, there is no requirement for disclosure of test data.

As a result, insists Gray, a producer of industrial chemicals has considerable incentive not to undertake any testing. Without any testing data, the only safety standard for a product is what is known about similar chemicals. Gray maintains that this lack of incentive on the part of producers may have a severe impact on the safety of products on the market.

Moreover, Gray says that the proposals for the new Restatement would suggest obsolete priorities about planning for product quality. That is, modern management often stresses quality as an important business objective, suggesting an unrelenting pursuit of quality, which begins with the initial design of a product. He expresses concern that the new proposals will underemphasize these quality assurance pledges regarding design safety, by placing greater emphasis on the avoidance of manufacturing errors than on safe design.

According to Gray, the new proposals may well encourage manufacturers toward past business practices that were far more concerned with inspecting the assembly line for defects than with ensuring that products are safe from their inception. Strict liability provides more powerful incentives for a manufacturer to ensure that its products are as safe as possible than a negligence standard. Thus, he contends, the new proposals for the Restatement (Third) reduce a producer’s inducement to prevent product defects at the earliest possible stage, design rather than production.

Gray’s criticisms were initially presented at a Symposium at the University of Tennessee last year. Following the publication of these remarks, the ALI tentatively adopted this year an amendment that may ameliorate the impact of the new restatement on negligence cases brought for the distribution of unreasonably dangerous products where the restatement’s requirements for a design defect action are not met.

School Welcomes New Faculty

Three new faculty members have joined the School of Law on a visiting basis for the 1995-96 academic year.

Janell Byrd has accepted a one-year, visiting assistant professor appointment to teach the Education and Affirmative Action course in the fall of 1995 and a Legal Theory and Practice course in the spring of 1996. Byrd is an outstanding civil rights attorney. While attending Boalt Hall School of Law at the University of California at Berkeley, she served as associate editor on the California Law Review and won best oral argument award for the school’s Moot Court team. She served as law clerk to the Honorable A. Leon Higginbotham, United States Court of Appeals for the Third Circuit in Philadelphia, PA. She has been an associate at Wilmer, Cutler & Pickering for four years.

The Environmental Law Program welcomes Susan Schneider as a visiting professor this fall. Schneider is a senior attorney with the Environmental Enforcement Section of the U.S. Department of Justice’s Environmental and Natural Resources Division. An honors graduate at Brown University and Georgetown’s National Law Center, Schneider will bring to the clinic broad litigation experience acquired during 11 years handling environmental cases for the Justice Department and six years as an attorney with the federal Public Defender Service in the District of Columbia.

Residents of Baltimore’s neighborhoods will be glad to know that Audrey McFarlane has accepted a visiting assignment to head the Clinical Law Program’s economic, housing and community development specialty. She and her students will provide legal services to community-based groups that wish to improve neighborhoods, including a number of groups in Baltimore’s Empowerment Zone. McFarlane is a graduate of Stanford Law School, where she received the Earl Warren legal training scholarship by the NAACP Legal Defense Fund. She served as law clerk to the Honorable A. Leon Higginbotham, United States Court of Appeals for the Third Circuit in Philadelphia, PA. She has been an associate at Wilmer, Cutler & Pickering for four years.

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