

# The Least Stroke of a Pen: The Restatement (Third) of Torts, Products Liability, and Circumstantial Means of Proving Defect in Vermont Law

## Introduction

A disturbing trend has emerged in Vermont products liability case law. Vermont courts and federal courts applying Vermont law have displayed a tendency to focus more on the doctrinal labels governing liability for product related injuries, the illusory distinctions between them,<sup>1</sup> and their compatibility with other principles of tort law,<sup>2</sup> rather than the functional formulas underlying those labels. Such a practice needlessly confuses things for practitioners and muddles the law. A recent decision of the Second Circuit Court of Appeals<sup>3</sup> exemplifies this trend and presents the Vermont Supreme Court with an opportunity to clarify an important aspect of product liability law: the manner in which a plaintiff establishes defect through circumstantial evidence. This article examines the various doctrines that allow the trier of fact to draw an inference of product defect from the circumstances surrounding the accident. It is clear that a single formula underlies all of these doctrines. The undesirable results of a failure to recognize this fact are chronicled as well. From this it is abundantly clear that the Vermont Supreme Court should apply this functional formula to prove an unspecified defect regardless of the theory under which plaintiff seeks recovery.

### **Allstate Insurance Company v. Hamilton Beach/Proctor Silex, Inc.**

Gary Malboeuf purchased one of Hamilton Beach's coffee makers from an Ames department store in mid- to late-May of 2002.<sup>4</sup> Upon returning home he set the package that housed the coffee maker on his kitchen floor.<sup>5</sup> There it sat until the night of June 13, 2002, when Malboeuf took it out of the packaging, rinsed the glass carafe and filled it with ground coffee in preparation for use the next morning.<sup>6</sup> After he rose the next day he plugged it in to brew

a cup of coffee with the machine for the first time.<sup>7</sup> He filled his travel mug, turned off the machine and left for work with it still plugged in.<sup>8</sup> Less than three hours after Malboeuf's departure, a neighbor observed flames coming from Malboeuf's home. After the St. Albans fire department quelled the blaze, Chief Gary Palmer investigated the scene to determine its cause. The coffee maker itself was almost completely destroyed but Palmer concluded that the fire started in the spot where it was located.<sup>9</sup> Malboeuf's insurer, Allstate, sent an investigator to the scene and he noted that physical evidence was consistent with this proposition.<sup>10</sup> A second investigation ruled out all of the other possible sources of ignition.<sup>11</sup> Based upon his examination of stranded wires from the coffee maker's power cord, Allstate's electrical engineer concluded that arcing in the wires was the most probable cause of the fire.<sup>12</sup> Defendant's expert disputed whether any electrical arcing in the power cord would have been strong enough to cause a fire.<sup>13</sup>

In a subrogation action against Hamilton Beach, Allstate asserted warranty and strict liability claims. Allstate argued that they had produced sufficient evidence to allow an inference of defect pursuant to section 3 of the *Restatement (Third) of Torts: Products Liability*.<sup>14</sup> In his recommendation Magistrate Judge Niedermeier held that there was no need to consider whether the Vermont Supreme Court would adopt section 3 because plaintiff's failure to eliminate the possibility that the coffee maker had been damaged at some point post-sale but pre-accident prevented them from prevailing under it.<sup>15</sup> Judge Murtha adopted this recommendation and awarded defendants summary judgment. An appeal ensued.

The Second Circuit reversed the trial court's decision to grant defendant's summary judgment motion. Although they believed that the Vermont Supreme Court would adopt section 3's

"malfunction theory," the Court thought that it was unnecessary to formally enter such a prediction because, under established rules of causation in Vermont law, the plaintiff produced sufficient evidence on its warranty and strict liability claims.<sup>16</sup> The court also found support for its holding in the policies underlying "strict liability."<sup>17</sup> Ultimately, the court laid down the following rule,

In sum, under Vermont law Plaintiffs prevail in their opposition to Defendant's summary judgment motion if they can establish that: (1) their evidence would allow a jury to reasonably conclude that a defect in the coffee maker was the most probable cause of the fire; and (2) a jury could reasonably infer that the product was defective while still in the possession and control of Hamilton Beach and the defect was not due to any post-purchase mishandling or misuse.<sup>18</sup>

The *Allstate* court's failure to indicate whether this rule applies exclusively to the breach of warranty or strict liability leads one to conclude that, when it comes to circumstantial cases, the two theories have been conflated.

## **Restatement (Third), Section 3**

The Restatement (Third) allows plaintiffs to establish a product defect through circumstantial evidence. Section 3 provides,

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff: (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than defect existing at the time of sale or distribution.<sup>19</sup>

The standard for product safety in this section can be described as one that is implicit and internal.<sup>20</sup> It is implicit in the sense that it typically applies

when products fail to safely perform the functions that the manufacturer manifestly, yet implicitly, intends for the product to perform.<sup>21</sup> For example, the manufacturer of a blender manifestly intends for his product to be able to safely and effectively blend ice and liquid mixtures together. Most courts, and section 3, will hold the manufacturer liable for harm where the blades of a blender become unmoored and shatter the glass casing after a relatively short period of use for that purpose.<sup>22</sup> Certainly, when this is the case, the accident was “of a kind that ordinarily occurs as a result of product defect.” Indeed, most courts would base such a determination on the theory that such behavior violates consumer expectations.<sup>23</sup> It is internal in the sense that this standard of product safety stems from the manufacturer himself.<sup>24</sup> This stands in stark contrast to a general definition of defective product design based upon risk-utility balancing, which is an independent judicial decision as to what constitutes a reasonably safe product.

Section 3(b) is meant to ensure that product manufacturers are held liable only in cases where it is more probable than not that a defect existing at the time of sale caused the harm.<sup>25</sup> As the “not solely the result of causes other than defect” language implies, the fact that there may be other causes of the accident unrelated to a product defect will not prevent the plaintiff from recovering under this section. As the accompanying illustrations point out, so long as the plaintiff’s theory of causation and supporting evidence points to the existence of a defect as the most probable source of the failure, the fact that there may be concurrent causes other than defect simply highlights the existence of a factual question on this issue.<sup>26</sup> Whether an inference of defect may be drawn pursuant to this section depends on the age of the product and whether it had been subjected to repairs or misuse by the plaintiff or others.<sup>27</sup> Section 3 does not require the plaintiff to establish what kind of defect—manufacturing or design—the product suffered from,<sup>28</sup> nor must the plaintiff pinpoint the precise component of the product that failed.<sup>29</sup> Finally, as the reporters point out, this section stems from *res ipsa loquitor*: the common law doctrine that allows an inference of negligence to be drawn under certain circumstances.<sup>30</sup>

### *Res Ipsa Loquitor* in Vermont

The elements of *res ipsa* consist of:

(1) a legal duty owing from the defendant to exercise a certain degree of care in connection with a particular instrumentality to prevent the very occurrence that has happened, (2) the subject instrumentality at the time of the occurrence must have been under the defendant’s control and management in such a way that there can be no serious question concerning the defendant’s responsibility for the misadventure of the instrument, (3) the instrument for which the defendant was responsible must be the producing cause of the plaintiff’s injury, (4) the event which brought on the plaintiff’s harm is such that would not ordinarily occur except for the want of requisite care on the part of the defendant as the person responsible for the injuring agency.<sup>31</sup>

The control element has been liberally construed such that the defendant need not have control over the instrumentality at the time of the accident. Instead, “it is sufficient if it appears that such agency was in their control at the time of the negligent act which caused the injury.”<sup>32</sup>

### Doctrinal Convergence

As discussed above, the *Allstate* court held that it was not necessary to decide whether the Vermont Supreme Court would adopt section 3’s “malfunction theory” because plaintiff produced sufficient evidence under existing Vermont warranty and strict liability law to create a question of fact on the issues of defect and causation. What the *Allstate* court failed to recognize was that Vermont has already adopted section 3, as it lies beneath the surface of the warranty and strict liability case law they relied upon as well as *res ipsa*. The coffee maker at issue in *Allstate* certainly violated section 3’s implicit internal standard as it failed to safely perform its intended function—to brew coffee. *Allstate* also relied on the very same factors listed in the comments to section 3: the age of the product, the fact that it had never been subjected to repairs, and the fact that it was being used for the first time. *Allstate* expressly adopted section 3(b)’s position that a defect need only be the most probable cause of the harm as opposed to the only cause. To this end the court cited the fact that plaintiff’s evidence ruled out causes other than defect. Furthermore,

the *Allstate* court, like section 3, did not insist on being apprised of the specific type of defect—manufacturing or design—that plagued the product. Although plaintiff pinpointed the specific part of the product that failed, there is no indication that a failure to do so would have barred recovery.<sup>33</sup> Thus, *Allstate* essentially adopted and applied section 3. As the court expressly recognized, their holding was crafted from settled principles of Vermont warranty law and the policies underlying strict liability as they have been espoused by Vermont courts.<sup>34</sup> Therefore, the Vermont courts have already adopted and applied section 3 to a certain extent in warranty and strict liability cases<sup>35</sup> and subsequent approval of the *Allstate* holding by the Vermont Supreme Court would offer further support for this proposition.<sup>36</sup>

Furthermore, it is clear that any distinctions between the *Allstate* rule—and hence strict liability and breach of implied warranty—and *res ipsa* cannot withstand scrutiny. In a product liability context, if a product fails to safely perform its intended function, common experience teaches that the event is one that would not ordinarily occur except for the want of requisite care on the part of the manufacturer. Similarly, a product’s failure to safely perform its intended function would surely render it “[un]fit for the ordinary purposes for which such goods are used” and hence subject the manufacturer to liability for breach of an implied warranty.<sup>37</sup> The two doctrines are further similar in the sense that neither requires the plaintiff to demonstrate the precise way in which the defendant was at fault. The similarities between *res ipsa* and section 3(b) have been acknowledged as well.

In order for the fourth element to be applicable, the possibility that the injury was caused by something other than defendant’s negligence need not be completely eliminated; the evidence need only permit a reasonable factfinder to conclude that the event probably would not have occurred if defendant used requisite care.<sup>38</sup>

In addition, the *Allstate* court expressly recognized that, under the causation standards already adopted by the Vermont Supreme Court ... [p]laintiffs have submitted evidence in opposition to [d]efendant’s motion for summary judgment sufficient to defeat that motion with respect to [p]laintiffs’ breach of warranty and products liability claims.<sup>39</sup>

Therefore, there is no difference between the three main theories of recovery that allow plaintiffs to prove an unspecified defect through circumstantial evidence.

### The Implications of Convergence

Given the essential equivalence of these doctrines, to submit all three to a jury would be unnecessary, potentially confusing, and invite inconsistent verdicts. As the *Allstate* court noted, Vermont warranty and strict liability law requires that plaintiff prove that a defect existing at the time of sale caused the harm.<sup>40</sup> If a jury were to be instructed on the *Allstate* rule for both strict liability and breach of warranty, a negative finding on one theory necessitates a negative finding on the other.<sup>41</sup> To inject a *res ipsa* instruction into the picture would be to further complicate the deliberative task of the jury, add nothing but excess verbiage to the charge, and would not eliminate the possibility of inconsistent verdicts. If the product is found to be reasonably safe—that is, not defective under *Allstate*'s warranty and strict liability rule—how could it be said that the incident is such that it would not occur except for the want of requisite care on the part of the manufacturer?<sup>42</sup> Even a resort to the famed yet feeble product-conduct distinction<sup>43</sup> would not save a verdict that defendant was not negligent yet the defendant is strictly liable. Vermont's law of *res ipsa* makes it clear that both the conduct of the manufacturer and the condition of the product may be considered in the analysis under the first element.<sup>44</sup> Thus, if the Vermont Supreme Court were to approve of *Allstate* and fail to recognize the essential similarities running through facially distinct theories of recovery, they would implicitly sanction the submission of all three theories to juries. This would needlessly confuse the deliberation process and invite inconsistent verdicts. The most repugnant feature of inconsistent verdicts lies not in their capacity to waste judicial resources or in their tendency to strain the emotions of the parties, but in the fact that the jurisdiction embraces a system of law that is so muddled and confused it cannot produce logically stable results.

### Conclusion

The title for this article derives in part from a verse in the Gospel according to Luke.<sup>45</sup> It is designed to demonstrate how it is easier for profound changes in the

natural world to occur than for a concept to drop out of the legal landscape. This idea plays out in the doctrine of "strict liability" for defective product distribution and the judicial insistence that differences remain between various theories of recovery. Courts continue to insist that strict liability offers plaintiffs some competitive advantage and search for illogical distinctions between negligence and strict liability. This despite the fact that, as we have seen, in Vermont circumstantial cases, the formulas relied upon to determine the issue of defect in strict liability and warranty cases and to determine breach of duty under *res ipsa* are analytically equivalent. But at the same time the least stroke of a pen by the Vermont Supreme Court can set things right. The Vermont Supreme Court should candidly recognize that, when it comes to establishing an unspecified defect through circumstantial evidence, *res ipsa*, breach of implied warranty and strict liability all revolve around section 3's functional formula, that an inference of defect can be drawn where a product fails to safely perform its intended function. By making this formula the exclusive test to be applied regardless of the theory the plaintiff formally relies upon the possibility of inconsistent verdicts would be eliminated and the deliberation process would be freed from superfluity. As we have seen, to do so would not be a break from the prior case law but to uphold it and free it from the shackles placed upon it by labels. The least stroke of a pen is all it takes.

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<sup>1</sup> See, *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 54 (2nd Cir. 1992)(applying Vermont law); *Smith v. Goodyear Tire & Rubber Co.*, 600 F. Supp. 1561, 1568 (D. Vt. 1985)(applying Vermont law); *Webb v. Navistar Int'l.*, 692 A.2d 343 (Vt. 1996); *Kinney v. Goodyear Tire & Rubber Co.*, 367 A.2d 677, 679 (Vt. 1976).

<sup>2</sup> *Mumley v. Lenco Indus., Inc.*, No. 97-9575, 1999 U.S. App. LEXIS, at \*1, \*4 (2nd Cir. March 15, 1999)(applying Vermont law to

the question of whether the intervening cause defense is applicable in cases sounding in strict liability); *Smith*, 600 F. Supp. at 1568; *Webb*, 692 A.2d 343 (Vt. 1996)(applicability of comparative fault principles to strict liability design defect case); *Brennen v. The Mogul Corp.*, 557 A.2d 870, 872 (Vt. 1988)(whether a spouse can recover for loss of consortium under strict liability).

<sup>3</sup> *Allstate Ins. Co. v. Hamilton/Beach/Proctor Silex, Inc.*, 473 F.3d 450 (2nd Cir. 2007)(applying Vermont law).

<sup>4</sup> 473 F.3d at 452.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> The heaviest point of charring was in the area where the coffee maker was located. *Id.* at 453.

<sup>11</sup> The three other possible sources were the electrical range, the range hood, and the electrical receptacle behind the coffee maker. *Id.* Plaintiff's expert ruled out two of these sources—the electrical range and the range hood—and defendant's expert conceded that neither of these items caused the fire. *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

<sup>15</sup> *Allstate*, 473 F.3d at 454.

<sup>16</sup> *Id.* at 456.

<sup>17</sup> *Id.* at 459.

<sup>18</sup> *Id.* at 457. See also, *id.* at 455. ("... we find there is circumstantial evidence sufficient to allow a jury to reasonably find: (1) that a defect in the coffee maker was the more probable cause of the fire; and (2) that the coffee maker was in substantially the same condition as it was when last in Defendant's control.")

<sup>19</sup> See, RESTATEMENT (THIRD), *supra* note 14, at § 3.

<sup>20</sup> See, James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 872-73 (1998).

<sup>21</sup> See, *id.* at 873. See also, RESTATEMENT (THIRD), *supra* note 14 § 3, cmt. b. ("Section 3 claims are limited to situations in which a product fails to safely perform its manifestly intended function, thus supporting the conclusion that a defect of some kind is the most probable explanation.")

<sup>22</sup> See, RESTATEMENT (THIRD), *supra* note 15 § 3, ill. 1.

<sup>23</sup> See, *Soule v. General Motors Corp.*, 882 P.2d 298, 308 n.3 (Cal. 1994)("For example, the ordinary consumers of modern automobiles may and do expect that such vehicles will be designed so as not to explode while idling at stoplights, experience sudden steering or brake failure as they leave the dealership, or roll over and catch fire in two-mile-per-hour collisions. If the plaintiff in a product liability action proved that a vehicle's design produced such a result, the jury could find forthwith that the car failed to perform as safely as its ordinary consumers expect, and was therefore defective."); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1146 (Fla. Dist. Ct. App. 1981). Several Vermont cases are similar to the scenarios

envisioned by the *Soule* court. See, *Cote v. Butler*, 518 F.2d 157 (2d Cir. 1975)(new car “lurched” at certain speeds); *Wasik v. Ford Motor Co.*, 423 F.2d 44 (2d Cir. 1970)(applying Vermont law to sudden acceleration of automobile); *Chrysler v. Mokovec*, 596 A.2d 1284 (Vt. 1991)(brake malfunction); *Sampson v. Karpinski*, 525 A.2d 1066 (Vt. 1986)(lye in plaintiff’s beer).

<sup>24</sup> See, *Henderson & Twerski*, *supra* note 20, at 873.

<sup>25</sup> RESTATEMENT (THIRD), *supra* note 14, at § 3, cmt. d. & Reporters’ Note cmt. d. (citing RESTATEMENT (SECOND) OF TORTS (1965) § 328 cmt. f).

<sup>26</sup> RESTATEMENT (THIRD), *supra* note 14, § 3, illus. 6 & 7.

<sup>27</sup> *Id.* cmt. d.

<sup>28</sup> *Id.* § 3, cmts. b. & c.

<sup>29</sup> *Id.* § 3, cmt. c.

<sup>30</sup> *Id.* § 3, cmt.

<sup>31</sup> *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124, 129 (2d Cir. 1963)(applying Vermont law); *McDonnell v. Montgomery Ward & Co.*, 154 A.2d 469, 473 (Vt. 1959).

<sup>32</sup> *Deveny*, 319 F.2d at 129.

<sup>33</sup> *Allstate*, 473 F.3d at 457. (“In sum, under Vermont law Plaintiffs prevail in their opposition to Defendant’s summary judgment motion if they can establish that: (1) their evidence would allow a jury to reasonably to conclude that a defect in the coffee maker was the most probable cause of the fire; and (2) a jury could reasonably infer that the product was defective while still in the possession and control of Hamilton Beach and the defect was not due to any post-purchase mishandling or misuse.”) In fact it would seem quite odd for a court to allow the plaintiff to prove an unspecified defect in one breath and insist upon an evidentiary showing pinpointing the specific constituent part that failed in another.

<sup>34</sup> 473 F.3d at 456 & 459.

<sup>35</sup> *Travelers Ins. Co. v. Demarle, Inc.*, 574 A.2d 267 (Vt. 2005); *Hershenson v. Lake Champlain Motors, Inc.*, 424 A.2d 1075 (Vt. 1981).

<sup>36</sup> Historically the Vermont courts have followed the lead of federal courts in products cases. See, e.g., *Zaleskie v. Joyce*, 333 A.2d 110, 113 (Vt. 1975).

<sup>37</sup> 9A V.S.A. §2-314 (2)(c) (2007).

<sup>38</sup> *Gentles v. Lanctot*, 491 A.2d 336, 337 (Vt. 1985). See also, *McDonnell v. Montgomery Ward & Co., Inc.*, 154 A.2d 469, 474 (Vt. 1959)(“The requirement of exclusive control is related to proximate cause. It calls for proof tending to eliminate other possible causes of the occurrence, so as to indicate that the negligence of which the event speaks is probably that of the defendant.”)

<sup>39</sup> *Allstate*, 473 F.3d at 456.

<sup>40</sup> *Id.*

<sup>41</sup> The only way to reconcile a finding that the defendant did not breach the implied warranty of merchantability yet is strictly liable under the *Allstate* rule is to say that the breach of warranty focuses only on the functions that the manufacturer intended for the product to perform whereas strict liability will allow for liability to fall where the product is not reasonably safe to perform a broader set of functions based on the concept of reasonable

foreseeability. While this distinction will hold up in classic design cases where the product escapes destruction and plaintiffs are able to formulate a specific theory of defect, it is not likely to be invoked in circumstantial cases where products fail to perform their intended functions.

<sup>42</sup> Again, the only possible basis for reconciling the verdicts would have to come from the discussion above. But when a product was being used to perform a function that the manufacturer did not intend for the product to perform, any recovery by the plaintiff would have to come after a showing that it was reasonably foreseeable to the manufacturer that the product would be used in such a way thus compelling him to take reasonable design precautions to reduce the risks of harm associated with that use. This principle is at the core of the “crashworthiness” doctrine. However, when reasonable foreseeability is brought into the inquiry the court is not really applying a specific design standard like section 3. Rather, they are applying a more general definition of defect that resembles RESTATEMENT (THIRD) §2(b). See, *Henderson & Twerski*, *supra* note 20, at 873.

<sup>43</sup> See, *Blue v. Env’tl. Eng’g. Inc.*, 828 N.E.2d 1128 (Ill. 2005).

<sup>44</sup> See, *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124, 129 (2d Cir. 1963)(applying Vermont law)(“ ... to exercise a certain degree of care in connection with a particular instrumentality ... ”). This language is broad enough to consider conduct such as the nature and amount of quality control employed at the defendant’s plant, unreasonable manufacturing processes as well as unreasonable design decisions, and the products themselves that owe their very existence to those decisions and processes. The only way Vermont could distinguish the two theories would involve a resort to the curious approach taken by the Arizona Supreme Court in *Dart v. Wiebe Mfg. Inc.*, 709 P.2d 876, 881 (Ariz. 1985) and hold manufacturers strictly liable for failing to design against risks that were unknowable at the time of manufacturing and yet refuse to do so under a negligence theory.

<sup>45</sup> *Luke 16:17* (New International Version, 1973) (“It is easier for heaven and earth to disappear than for the least stroke of a pen to drop out of the Law.”)

