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## Dean John Wade and the Law of Torts

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# DEAN JOHN WADE AND THE LAW OF TORTS

*Gary Myers\**

Dean John Wade's death last year ends the career of a great scholar, teacher, and administrator. His many accomplishments and his impressive personal traits have been duly praised and chronicled. His legacy includes an impressive body of scholarly work, many former students trained in the ways of the law, and institutions that are better for his walking their hallways. This article focuses on one particular aspect of Dean Wade's contribution—his impact on the law of torts.

Dean Wade's influence on tort law is extensive and enduring. His importance can be measured in a variety of ways, both quantitative and qualitative. For example, Dean Wade had a hand in writing three casebooks, one of which is the leading text in the field of torts, *Cases and Materials on Torts*.<sup>1</sup> This book has aided hundreds of torts teachers and almost one million law students<sup>2</sup> in understanding this fundamental field of law. Dean Wade was involved in preparing the fifth edition some twenty-five years ago, and his involvement continued until the ninth edition, which was published in 1994. For more than a decade, he worked as Reporter for the Restatement (Second) of Torts. He wrote approximately thirty-

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<sup>1</sup> WILLIAM L. PROSSER & JOHN W. WADE, *CASES AND MATERIALS ON TORTS* (9th ed. 1994).

<sup>2</sup> Michael D. Green, *The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation*, 48 VAND. L. REV. 609, 610 (1995).

five full-length articles and some forty-five shorter pieces—many, though not all of them, on the subject of tort law. He delivered numerous addresses, many of which were published. He also assumed the role of an advocate, presenting his views on torts and attempting to move the law in directions he perceived as more desirable.

Of course, many law professors ably compile substantial publication lists during their careers, but Dean Wade and his work stand out in this crowd of academics and their writings because of his powerful influence in shaping tort law. His work was of interest not only to scholars but also to courts, legislatures, and practicing attorneys. His work dramatically affected the direction that tort law has taken in the last several decades.

In reviewing Dean Wade's work, a distinct pattern emerges: Dean Wade was a great compromiser<sup>3</sup> who believed in balancing an array of societal interests in order to arrive at a just rule of law. He avoided strict categorical rules in tort law regardless of whether they imposed greater liability on defendants or left plaintiffs with no recovery. He effectively advocated legal rules that took into account the interests of plaintiffs, defendants, consumers, and society as a whole. He criticized technical rules and distinctions, particularly those which confused juries. The tort rules Dean Wade advocated influenced many jurisdictions. This is reflected by the affirmation of many courts and policy-makers of Wade's tort theories.

One of Dean Wade's greatest contributions to the field of tort law is the risk-utility test for analyzing design defects in product liability cases. His path-breaking work on this topic, entitled *On the Nature of Strict Tort Liability for Products* and published in this journal, was a major step in the reformation of this area of the law.<sup>4</sup> This ambitious article, incidentally,

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<sup>3</sup> Robert E. Keeton, *Restating Strict Liability and Nuisance*, 48 VAND. L. REV. 595, 607 (1995) ("John Wade, distinctively, was the most persistent among the group in searching for common ground that would enable us to reach recommendations acceptable not only to Bill Prosser as reporter but also, in due course, to the council and the [American Law] Institute.").

<sup>4</sup> John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS.

may be the most widely-cited article ever published in the *Mississippi Law Journal*.<sup>5</sup> Professor Michael Green recently stated that, "While most of the courts and commentators were attempting to understand and unravel the vagaries of this new world of liability, Dean Wade published an article about strict liability that was a tour de force."<sup>6</sup> This article identified what have become known as the three familiar categories of products liability claims: manufacturing defects, design defects and failure to warn.<sup>7</sup>

In addition to providing an analytical framework for strict liability, Dean Wade offered a seven-factor test for determining whether a product is unreasonably dangerous for purposes of strict tort liability. Dean Wade introduced the now familiar factors as follows:

If there is agreement that the determination of whether a product is unreasonably dangerous, or is not duly safe, involves the necessary application of a standard, it will, like the determination of negligence or of strict liability for an abnormally dangerous activity, require the consideration and weighing of a number of factors. I offer here a revised list of factors which seem to me to be of significance in applying the standard:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or

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L.J. 825 (1973).

<sup>5</sup> Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 662-63 & n.158 (1995) (discussing "much cited article" and noting extensive number of references to article in *Shepard's Law Review Citations*).

<sup>6</sup> Green, *supra* note 2, at 611.

<sup>7</sup> Wade, *supra* note 4, at 841-42.

making it too expensive to maintain utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.<sup>8</sup>

Dean Wade's risk-utility test now is the majority rule in design defect cases.<sup>9</sup> Even a cursory sampling of the cases that cite, discuss, and adopt the analysis include numerous decisions.<sup>10</sup> As Professor Marshall Shapo posited, the test "has been quoted over and over by the courts."<sup>11</sup> The drafters of the Restatement (Third) of Torts also have adopted it.<sup>12</sup> The Supreme Court of Mississippi joined this growing trend by explicitly

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<sup>8</sup> *Id.* at 837-38.

<sup>9</sup> See Shapo, *supra* note 5, at 666 (stating, "The reporters [for the Restatement] argue forthrightly that 'an overwhelming majority of American jurisdictions rely on risk-utility balancing in design cases.'" (quoting RESTATEMENT (THIRD) OF TORTS § 2 cmt. c (Tentative Draft No. 1, 1994))). Shapo disputes the contention that the risk-utility test has been adopted unequivocally, noting that some of the decisions "leave considerable room for interpretation." *Id.* Nonetheless, the risk-utility test's wide endorsement and discussion, as well as its status as the majority rule in products liability cases, cannot be doubted.

<sup>10</sup> See, e.g., *Nowak v. Faberge USA, Inc.*, 32 F.3d 755, 759 (3d Cir. 1994) (applying Pennsylvania law); *Whitehead v. St. Joe Lead Co.*, 729 F.2d 238, 244-45 (3d Cir. 1984) (applying New Jersey law); *Williams v. Brasea, Inc.*, 497 F.2d 67, 79 (5th Cir. 1974) (applying maritime law), *modified per curiam*, 513 F.2d 301 (5th Cir. 1975), *and cert. denied*, 423 U.S. 906 (1975), *and cert. denied sub nom. Brasea, Inc. v. Bendes Welding & Mach. Co.*, 423 U.S. 906 (1975); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 883 (Alaska 1979); *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 878-80 (Ariz. 1985) (en banc); *Duran v. General Motors Corp.*, 688 P.2d 779, 785 (N.M. Ct. App. 1983), *cert. quashed*, 685 P.2d 963 (N.M. 1984), *and overruled by Brooks v. Beech Aircraft Corp.* 1995 WL 504785 (N.M. June 28, 1995); *Cremeans v. International Harvester Co.*, 452 N.E.2d 1281, 1284 (Ohio 1983).

<sup>11</sup> Shapo, *supra* note 5, at 663.

<sup>12</sup> RESTATEMENT (THIRD) OF TORTS, § 2 cmt. c (Tentative Draft No. 2, 1995). See generally Shapo, *supra* note 5, at 661 (discussing drafters' adoption of risk-utility test).

adopting Dean Wade's risk-utility test in *Sperry-New Holland v. Prestage*.<sup>13</sup>

Dean Wade's risk-utility test is not only popular, but wise. It avoids the rigidity of the consumer expectations test, an alternative standard which can either inappropriately impose or bar liability in certain cases. For example, the consumer expectations test would point toward liability for a highly useful product that presented a low but unavoidable risk of which consumers were not aware. Under the risk-utility test, however, the defendant would have a much stronger argument against liability for such products. Similarly, the consumer expectations test can preclude liability in cases in which liability arguably should be imposed. This often seems to occur as a result of the "open and obvious hazard" defense, a frequently applied aspect of the consumer expectations test. This defense would seem to bar recovery regardless of the ease of avoiding the danger through redesign or the difficulty of the plaintiff reducing his or her risk when the product possessed an open and obvious hazard. For example, a worker who could avoid injury from an "open and obvious" workplace hazard by seeking employment elsewhere could be denied damages if the employer asserted this defense and the court accepted it.<sup>14</sup>

Thus, the wisdom of the risk-utility test is that it avoids arbitrary or undesirable results by taking into account a sufficient number of factors. The test recognizes that all products present some risks and that some of those risks cannot be avoided. It recognizes that some products are so useful that no one could contend that the product should be redesigned or pulled from the market to avoid the risks involved. On the other hand, the test imposes liability when the product presents too great a risk given its utility or the availability of feasible alternative designs. Thus, the risk-utility test is a prime

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<sup>13</sup> 617 So. 2d 248, 256 (Miss. 1993); see also *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1313-15 (5th Cir. 1995) (discussing Mississippi's adoption of the risk-utility test).

<sup>14</sup> See *Shapo*, *supra* note 5, at 681 (citing *Micallef v. Mirhle Co.*, 348 N.E.2d 571, 577 (N.Y. 1976) (rejecting open and obvious hazard defense in case of workplace injury)).

example of Dean Wade's balancing approach in the law of torts.<sup>15</sup> As Professor Green also observed, Wade's ideas in this area of law now seem familiar but they were paradigm-shaking when Dean Wade first discussed them more than twenty years ago.<sup>16</sup> In one article Dean Wade explains the rationales for the imposition of strict liability and neatly sums up the principal arguments:

It is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, *res ipsa loquitur* often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This often is not present, and strict liability eliminates the need of the proof. A second reason is suggested by the phrase "spread the risk." The idea is that the loss should not be allowed to remain with the injured party on whom it fortuitously fell, but should be transferred to the manufacturer who, by pricing his product, can spread it among all the consumers. The extent to which a manufacturer, may be free to "spread the risk" created by his product can be the subject of some debate. A different way of expressing essentially the same idea is to say that the activity of making the particular product should pay its own way, that the enterprise should bear the liability. Also similar is the argument regarding availability of insurance. That type of first-party insurance for automobile accidents, which is sometimes called no-fault insurance, is less available here, since the injured party would need to take out accident insurance in general; on the other hand, the manufacturer can more easily obtain appropriate liability insurance coverage. Another argument involves the deterrent effect. Experience seems to demonstrate that if a manufacturer knows he will be held liable for injuries inflicted by his product, that the product will be safer than if he understands that he can avoid liability by demonstrating the exercise of due

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<sup>15</sup> See Wade, *supra* note 4, at 835 n.36, 837 n.41 (recognizing that balancing test was similar in spirit to other multi-factor tests used in tort law, such as tests for ultrahazardous activity and negligence).

<sup>16</sup> Green, *supra* note 2, at 613.

care. There is also no good analogy to automobile accidents here, since a driver who is not deterred by thought of injury to himself is hardly likely to be deterred by the thought of financial loss, especially if it would be covered by insurance.<sup>17</sup>

Dean Wade persuasively illustrated that strict liability does not make the seller an insurer of its product:

Strict liability for products is clearly not that of the insurer. Thus, the manufacturer of a match would be liable for anything burned by a fire started by a match produced by him, an automobile manufacturer would be liable for all damages produced by the car, a gun maker would be liable to anyone shot by the gun, anyone cut by a knife could sue the maker, and a purchaser of food with high calories would have an action for his overweight condition and for an ensuing heart attack.<sup>18</sup>

He noted the need for limits on both the existence of strict liability and its scope, as constrained by the concepts of proximate cause and plaintiff's fault.<sup>19</sup> He attacked the formalisms and complications of warranty-based notions of strict liability.<sup>20</sup> He explained why the jury should not be given an instruction containing the risk-utility factors he proposed, an argument worth reading although it may not be entirely persuasive.<sup>21</sup>

Another area of tort law in which Dean Wade advocated balancing tests is the subject of comparative negligence. He authored the Uniform Comparative Fault Act,<sup>22</sup> wrote a number of articles on comparative negligence, and successfully

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<sup>17</sup> Wade, *supra* note 4, at 826.

<sup>18</sup> *Id.* at 828 (footnote omitted).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 834.; *see also infra* notes 27-30, 32 and accompanying text.

<sup>21</sup> Wade, *supra* note 4, at 838-41.

<sup>22</sup> Unif. Comparative Fault Act §§ 1-11, 12 U.L.A. 43 (West Supp. 1995). Although this uniform act has not been widely adopted, it has been praised. *See Green, supra* note 2, at 610 (noting that "model statute . . . contains so much wisdom that it borders on criminal that more states have not adopted it as their own" and observing that two states have adopted it).

persuaded the Supreme Court of Tennessee to adopt the doctrine of comparative negligence, a rejection of many years of precedent in Dean Wade's adopted home state.<sup>23</sup>

Dean Wade often criticized the traditional common law approach in this area: "The common law was long beset by the all-or-nothing approach that differentiated it from equity. It would be a step backward, I think, to return to it."<sup>24</sup> Under the common law, if a plaintiff was found to be even partly at fault, his or her contributory negligence was a complete and total bar to recovery. Wade preferred the malleable rule of comparative negligence, which weighs the relative fault of the plaintiff and the defendant. More particularly, he advocated the doctrine of pure comparative negligence, which allocates damages based on the fact-finder's determination of relative fault. He disliked what he saw as the arbitrariness of modified comparative negligence rules, under which plaintiffs recover only if their percentage of relative fault is less than fifty-one or fifty percent.<sup>25</sup>

In addition to dealing with comparative negligence rules, Dean Wade proposed in the Uniform Comparative Fault Act a system for joint and several liability and contribution among tortfeasors. In this Act, Dean Wade grappled with the problem of the insolvent tortfeasor. Suppose there are two negligent

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<sup>23</sup> Dean Wade often advocated adoption of the pure comparative negligence rule, which he sought to persuade Tennessee to adopt. See John W. Wade et. al., *Comparative Fault in Tennessee Tort Actions: Past, Present and Future*, 41 TENN. L. REV. 423, 459-60 (1974) (advocating adoption of pure comparative negligence in Tennessee). The Supreme Court of Tennessee eventually adopted this position in 1992. See *McIntyre v. Balentine*, 833 S.W.2d 52, 56 (Tenn. 1992) (abandoning outdated common law doctrine of contributory negligence).

<sup>24</sup> John W. Wade, *Essays on Torts*, 47 LA. L. REV. 691, 695 n.17 (1987); see also John W. Wade, *Comparative Negligence—Its Development in the United States and its Present Status in Louisiana*, 40 LA. L. REV. 299, 299-307 (1980) (discussing development of comparative negligence).

<sup>25</sup> See John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors be Abolished?*, 10 AM. J. TRIAL ADVOC. 193, 205 (1986) [hereinafter *Joint and Several Liability*] (analyzing problems with joint and several liability); see also Wade, *supra* note 23, at 459-60 (advocating adoption of pure comparative negligence in Tennessee); Wade, *supra* note 4, at 250 (espousing pure comparative negligence).

tortfeasors, Ann and Bob. The jury finds that Ann's comparative fault was forty percent, Bob's was also forty percent, and the plaintiff was twenty percent at fault. Normally, under the pure comparative negligence rule, the plaintiff would thus receive eighty percent of the total harm caused, forty percent from each defendant. But what if Bob is insolvent? Who bears the loss? Under Dean Wade's proposal, the insolvent defendant's share is reallocated among the remaining parties who are at fault, including the plaintiff if the plaintiff was found partly at fault.<sup>26</sup> Thus, Ann would pay two-thirds of Bob's share of the damages, while the plaintiff would bear one-third of it. In the end, Ann would pay 66.7 percent (forty percent plus twenty-six and two-thirds) of the total damages suffered by the plaintiff. This solution avoids the harsh results that would occur by either making the other joint tortfeasor fully liable (which would mean Ann would bear eighty percent of the loss though she was only forty percent at fault) or making the plaintiff bear that loss. Once again, Dean Wade takes the middle ground, which seems to ameliorate the effects that absolute rules would have in real-life situations.

Dean Wade's balancing approach is also evident in his contributions to nuisance law. This point was articulated by Judge Robert Keeton:

The principal section on nuisance, as it emerged from all the consultation and debate of the 1970s, reflects a judgment of the Institute consistent with John Wade's recommendation for a multi-factor evaluative standard. Perhaps it is a correct observation also that judicial decisions of the latter half of the twentieth century have moved farther than had decisions of earlier vintage toward reliance on evaluative standards in

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<sup>26</sup> *Joint and Several Liability*, *supra* note 25, at 206; see also David R. Smith & John W. Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 *IND. L. REV.* 969, 973-96 (1984) (discussing balancing approach of Uniform Act); John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 *VAND. L. REV.* 551, 577-80 (1980) (discussing proportional allocation of loss); John W. Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 *MERCER L. REV.* 373, 374-91 (1978) (discussing Uniform Act).

areas where policy arguments founded on highly-valued interests can be invoked by each set of opposing advocates.<sup>27</sup>

Other Wade articles apply his balancing approach to tort rules governing frivolous litigation,<sup>28</sup> to the subjects of defamation and privacy law,<sup>29</sup> and to a proposed tort for insulting or abusive language.<sup>30</sup> One of his most important articles, again on the subject of products liability, dealt with the question of determining when a manufacturer's knowledge should be measured—at the time of distribution of the allegedly defective product or at the time of trial.<sup>31</sup> His suggestions for addressing this difficult issue reflected his balancing approach which required, for example, that a manufacturer that asserts its lack of knowledge of information known at the time of trial had the burden of proving that this fact was not known at the time it sold the product.<sup>32</sup>

Dean Wade's writings on tort law display a remarkable understanding of the field, one drawn from many years of reflection. He recognized, for example, that negligence law could have evolved to deal with many of the situations currently addressed by strict liability.<sup>33</sup>

In addition to advocating tort rules and doctrines that balanced many conflicting interests, Dean Wade criticized tort rules that were unduly technical and distinctions that were

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<sup>27</sup> Keeton, *supra* note 3, at 605 (discussing RESTATEMENT (SECOND) OF TORTS).

<sup>28</sup> John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 434 (1986) (suggesting balancing approach).

<sup>29</sup> John W. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1122 (1962) (suggesting balancing approach to defamation law).

<sup>30</sup> John W. Wade, *Tort Liability For Abusive and Insulting Language*, 4 VAND. L. REV. 63, 115 (1950).

<sup>31</sup> John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 735 (1983).

<sup>32</sup> *Id.* at 760-61. Dean Wade's version of the risk-utility test generally focuses on the state of knowledge at the time of distribution, as distinguished from Dean Keeton's emphasis on the information available at the time of trial. See Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 569-71 (1969).

<sup>33</sup> Wade, *supra* note 4, at 850.

without a difference. He disliked rules that juries could not understand. Hence his simplified statement of the strict liability rule which reads in pertinent part:

"A [product] is not duly safe if it is so likely to be harmful to persons [or property] that a reasonable prudent manufacturer [supplier], who had actual knowledge of its harmful characters would not place it on the market. It is not necessary to find that this defendant had knowledge of the harmful character of the [product] in order to determine that it was not duly safe."<sup>34</sup>

Hence his proposal that the overlapping claims of negligence, warranty, and strict liability be melded into one.<sup>35</sup> Hence his dislike for some of the arcane distinctions between libel and slander, including the "special damages" rule.<sup>36</sup>

One of the few areas in which Dean Wade seemed to abdicate his centrist role was in the area of tort reform. He had few positive words on the topic, referring to the proposals as "special-interest legislation" resulting from "an intensive, lavishly financed campaign to persuade the legislatures and the general public."<sup>37</sup> He believed that tort reform measures were "primarily for the benefit of insurance companies."<sup>38</sup> Interestingly, although he sometimes favored the concept of uniformity of state laws in the area of products liability,<sup>39</sup> he disavowed it when tort reform became a possibility on the federal level.<sup>40</sup> Al-

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<sup>34</sup> See *id.* at 839-40.

<sup>35</sup> *Id.* at 849-50; see also John W. Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 MO. L. REV. 1, 27 (1983) [hereinafter *Tort Liability*].

<sup>36</sup> John W. Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L.J. 671, 711 (1977).

<sup>37</sup> *Joint and Several Liability*, *supra* note 25, at 207; see John W. Wade, *Strict Product Liability: A Look at Its Evolution*, 19 THE BRIEF 8, 56 (1989) (asserting that reform provisions sought to change both statutory and common law).

<sup>38</sup> Wade, *supra* note 26, at 209.

<sup>39</sup> John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 576 (1980); see also *Tort Liability*, *supra* note 35, at 27-28 (suggesting that greater simplicity of law could be beneficial).

<sup>40</sup> See generally John W. Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 HOUS. L. REV. 81 (1987) (suggesting that substantive provi-

though his arguments in this area may not be as convincing as his position on other issues, his expertise in this field has provided valuable insight. For example, Dean Wade produced compelling evidence rebutting the mythical "litigation explosion" believed to be taking place in American courts today.<sup>41</sup>

As this survey of Dean Wade's contributions to tort law indicates, his influence in the field has been powerful. Dean Wade's pragmatic approach has held the day on many hotly-contested tort issues. Roger Traynor made a noteworthy comment to Wade shortly after the 1963 decision in *Greenman v. Yuba Products Co.*,<sup>42</sup> a case in which California adopted strict liability. "Judge Traynor confided in me that he expected strict liability for products to simplify trials so much that there would be no reason to write further in the field of torts. He advised me to write on the subject of restitution instead."<sup>43</sup>

Fortunately, although Dean Wade heeded the call to write on restitution, he also ignored Traynor's guidance on the subject of torts.

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sions of proposed federal tort laws have become far too detailed and have favored defendants).

<sup>41</sup> Wade, *supra* note 40, at 95-96.

<sup>42</sup> 377 P.2d 897 (Cal. 1963).

<sup>43</sup> Wade, *supra* note 40, at 83.