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Proximity-Driven Liability

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Proximity-Driven Liability

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This Article argues that commercial sellers' growing information about, access to, and control over their products, product users, and product uses could significantly expand their point-of-sale and post-sale obligations toward people endangered by these products. This Article first describes how companies are embracing new technologies that expand their information, access, and control, with primary reference to the increasingly automated and connected motor vehicle. It next analyzes how this proximity to product, user, and use could impact product-related claims for breach of implied warranty, defect in design or information, post-sale failure to warn or update, and negligent enabling of a third-party's tortious behavior. It finally flips the analysis to consider how the uncertainty caused in part by changing liability could actually drive companies to further embrace this proximity.

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INTRODUCTION

Visa, Google, Amazon, Facebook, and FedEx know more about my purchases over the last five years than I do. AT&T can find me—or at least my phone—whenever it wants.¹ Microsoft updates my computer’s software several times a month. But what about a manufacturer that discovers a new risk in something that it made and I bought? The Restatement (Third) of Torts: Products Liability stresses that warning me could be “difficult”² and “daunting,”³ would be “invariably costly,”⁴ and, if required for every risk, would impose “costly and potentially crushing burdens” on sellers.⁵ This view, which is based in part on products, practices, and precedents that predate the modern web, may no longer accurately describe today’s burdens of communication. It is just one example of the potential anachronisms created by the increasing (and increasingly dynamic) information, access, and control that commercial sellers⁶ enjoy with respect to their products, product users, and product uses—relationships encompassed by what I call proximity.

1. For recent confirmation of this, see Scott Shane & Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.’s*, N.Y. TIMES, Sept. 1, 2013, <http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html> (describing an AT&T database of every call passing through an AT&T switch since 1987).

2. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. e (1998).

3. *Id.* cmt. a.

4. *Id.* cmt. d.

5. *Id.* If only marketing departments felt the same way.

6. Throughout this Article, “seller” refers to any of the commercial actors upstream of the consumer, including retailers, distributors, manufacturers, and suppliers, whether they sell, lease, or potentially even operate.

This Article argues that growing proximity could significantly expand sellers' point-of-sale and post-sale obligations toward people endangered by their products. I first describe how companies are embracing new technologies for information, access, and control, with primary reference to the increasingly automated and connected motor vehicle.⁷ I next analyze how this proximity could impact product-related claims for breach of implied warranty, defect in design or information, post-sale failure to warn or even update, and negligent enabling of a third-party's tortious behavior.⁸ I finally flip my analysis to consider how the uncertainty caused in part by changing liability could actually drive companies to further embrace proximity.⁹

This spiral of liability and proximity could mean that sellers are—perhaps unwittingly and probably unwillingly—ushering in a new age of product stewardship. More than before, companies may have to live with the products that they have made and marketed.

I. INCREASING PROXIMITY

More than at any point since the advent of industrialization, commercial sellers today have greater knowledge about, access to, and control over their products, the people who use them, and the ways in which they are used, even after those products have left the factory, warehouse, or showroom. In contrast to a twentieth century that was, from the perspective of a large manufacturer or merchant, highly impersonal,¹⁰ the coming decades are likely to feature sellers wading deep into the vast deltas of well-charted streams of commerce. This Part briefly describes three overlapping, multidisciplinary aspects of this expanded pre- and post-sale presence: greater proximity to the product, to the product user, and to the product use. It then considers all three aspects as they relate to the modern automotive industry. Finally, it looks ahead to automated motor vehicles as well as other emerging consumer and industrial products.

A. PROXIMITY TO THE PRODUCT

The proximity between a commercial seller and its product at the point of sale is manifest: Implicit in the law of warranty is the expectation that a seller knows what it is selling, and companies have long been liable for defects

7. See *infra* Part I. I use motor vehicles because of the huge legal and social impact they have had over the last century, see *infra* section I.D, and because of the technical and commercial changes they reflect and portend, see *infra* section I.E.

8. See *infra* Part II.

9. See *infra* Part III.

10. See, e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 467 (Cal. 1944) (Traynor, J., concurring) (“As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered.”); David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 962 (2007) (“As courts began imposing implied warranties of quality on manufacturers in the latter part of the nineteenth century, manufacturers increasingly were handing over the retail function to third-party dealers.”).

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