

University of Michigan Journal of Law Reform

Volume 18

1985

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Aaron D. Twerski
Hofstra University

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Recommended Citation

Aaron D. Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J. L. REFORM 575 (1985).

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A MODERATE AND RESTRAINED FEDERAL PRODUCT LIABILITY BILL: TARGETING THE CRISIS AREAS FOR RESOLUTION

Aaron D. Twerski*

The drive for the enactment of a federal product liability bill continues unabated.¹ For the sixth time in as many years, the proponents of legislative reform will lock horns with those who seek to protect the common law system from encroachment by the business lobby.² The committee hearings over the years have

* Sidney & Walter Siben Distinguished Professor of Law, Hofstra University. A.B., 1960, Beth Medrash Elyon Research Institute; J.D., 1965, Marquette University; B.S., 1970, University of Wisconsin-Milwaukee.

The author gratefully acknowledges the research assistance of Jack Panitch and Nora Hirschberger.

1. See S. 100, 99th Cong., 1st Sess., 131 CONG. REC. S218 (daily ed. Jan. 3, 1985) [hereinafter cited as S. 100].

2. Federal legislative activity began with the promulgation of the Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979) [hereinafter cited as MUPLA], by the United States Department of Commerce. The following bills have been introduced in Congress: H.R. 5626, 96th Cong., 1st Sess., 125 CONG. REC. 28,678 (1979) [hereinafter cited as H.R. 5626]; H.R. 7000, 96th Cong., 2d Sess., 126 CONG. REC. 7428 (1980) [hereinafter cited as H.R. 7000] (virtually identical to MUPLA); H.R. 5214, 97th Cong., 1st Sess., 127 CONG. REC. H9529 (daily ed. Dec. 14, 1981) [hereinafter cited as H.R. 5214]; H.R. 5261, 97th Cong., 1st Sess., 127 CONG. REC. H9928 (daily ed. Dec. 16, 1981); S. 2631, 97th Cong., 2d Sess., 128 CONG. REC. S6878 (daily ed. June 8, 1982) [hereinafter cited as S. 2631] (reported with amendments by a unanimous Senate Committee on Commerce, Science, and Transportation on December 1 (legislative day Nov. 30), 1982. S. REP. NO. 670, 97th Cong., 2d Sess. (1982)); H.R. 2729, 98th Cong., 1st Sess., 129 CONG. REC. H2328 (daily ed. Apr. 25, 1983) [hereinafter cited as H.R. 2729]; S. 44, 98th Cong., 1st Sess., 129 CONG. REC. S90 (daily ed. Jan. 26, 1983) [hereinafter cited as S. 44] (S. 44 is virtually identical to S. 2631, and was reported with amendments by a vote of 13-2 to the Senate Committee on Commerce, Science, and Transportation on May 23 (legislative day May 21), 1984. S. REP. NO. 476, 98th Cong., 2d Sess. (1984)).

Legislative hearings have generated intense interest from both consumer and industry groups. See *To Establish Standards and Procedures for Determining Legal and Financial Responsibilities in Product Liability Actions: Hearing on H.R. 5626 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. (1979); *To Regulate Interstate Commerce by Providing for a Uniform Product Liability Law, and for Other Purposes: Hearing on S. 2631 Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. (1982) [hereinafter cited as *S. 2631 Hearings*]; *To Regulate Interstate Commerce by Providing for a Uniform Product Liability Law, and for Other Purposes: Hearing on S. 44 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess., Part 1 (1983) and 2d Sess., Part 2 (1984) [hereinafter cited as *S. 44 Hearings*].

taken on the aura of an old-time Western. The guys in the "white hats" (consumer groups) speak of the glories of the common law system.³ The guys in the "black hats" (the business associations) relate horror stories of righteous corporations driven out of business because of the ludicrous decisions of common law courts.⁴ Off-stage some have begun to question the necessity

3. *S. 44 Hearings* (Part 1), *supra* note 2, at 294 (statement of Sybil Shainwald, National Women's Health Network): "S. 44 will not only wipe out present rights but will also stagnate innovation and development in the field of product liability law. It is the state courts that have sought to accommodate social needs and to do justice in the face of an ever-increasing technological society." See also *id.* (Part 2) at 389. (statement of Charles B. O'Reilly, Counsel, on behalf of Asbestos Victims of America):

In the proper exercise of the states' Constitutional right to enact laws for the protection of their citizens and property, almost all states have adopted product liability laws. These laws invariably included principles of strict liability.

The legitimate state interest protected by these strict liability principles was and is the health and welfare of its citizens. The public policy underlying strict liability principles recognized that strict liability provided the only fair and equitable means to (i) compensate the victims, and (ii) provide financial motivation for industry to consider safety.

Id. at 402 (letter of Hon. Robert Abrams, Att'y Gen. of New York):

Given the preemptive nature of this bill, the broad brush with which it paints, and its endorsement by an administration supposedly dedicated to a "new federalism", one would be led to believe that it addresses severe problems that are currently being ignored at the state level. But the truth of the matter is that while there are indeed some large awards and some variations in results among jurisdictions, no crisis exists. To the contrary, the present law is necessary to provide the minimal protection to consumers and should, if anything, be strengthened.

4. See *S. 44 Hearings* (Part 2), *supra* note 2, at 426 (testimony and statement of Robert D. Rogers, Senior Vice President, Lubbock Mfg. Co.):

In 1975 our company was subject to a rude awakening. We had been in the business of making and developing systems for the safe handling of hazardous material for some 45 years. We have had an exemplary record, but we had a tank trailer that had been 10 years on the road, probably 1 million miles, and it was involved in a horrible accident. There was evidence the driver had been speeding.

At that time, the investigation by the State and Federal Government, the National Transportation Department, had proved there was nothing wrong with our product. However, as a result of that accident, we had a \$50 million judgment against us and other defendants. About half of that ended up being awarded against us, not because the jury intended it that way, but because of the concept of strict liability and other problems in Texas law at that time.

This accident resulted in our insurance premiums being raised from some \$22,000 to \$650,000. It eventually resulted in our going out of business.

Id. (Part 1) at 356-57 (letter of Durant A. Hunter, Vice President, James Hunter Mach. Co., Inc.):

After witnessing the legal gymnastics which our manufacturing company has had to perform, I am not surprised at the dearth of aspiring leaders in American manufacturing. The problems of a manufacturer mirror [sic] those of society in the staggering number of lawsuits springing up everywhere. My family has been involved in the manufacturing business for 136 years. One month ago, James Hunter Machine Company, Inc. filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code, not so much because business conditions are poor, but

for any legislation.⁵ The crisis atmosphere, which reached fever

because of a little understood, yet all too familiar concern of American manufacturers—product liability.

. . . We filed Chapter 11 because the current status of product liability laws made it impossible to continue. After two recent court battles and a quarter of a million dollars in payments, we had the choice of fighting with lawyers the rest of our lives or filing for reorganization. At the present time we have been named in 20 suits. A review of only those claims where a specific demand had been made (only one-half the claims) discloses product liability demands in excess of \$17 million. We know of 11 additional accidents which may result in suits, and live with the uncertainty of future accidents on which we have no control.

S. 2631 Hearings, supra note 2, at 31-32 (testimony of Arthur Rosen on behalf of Special Comm. for Workplace Product Liability Reform):

Product liability is a noose over my head. My company presently has four liability suits pending. The largest is for \$21 million. I am presently insured, but what does that do? Our limit is \$500,000. The \$21 million claim is for the death of a person caused by his breaking his company rules. He was running a small lathe which we sold in 1972 for \$2,750. This machine was built in 1944 and had run adequately for almost 40 years. The person was wearing loose clothing which caught in the machine while he apparently was climbing over the machine and kicked or pushed in the clutch.

This lathe is a current state-of-the-art machine. This accident could happen on a brand new machine. As I also understand the accident, he was operating the machine during a break in time against company rules. If we lose and the judgment is rendered over \$1 million or even less, that is the end of my company, 26 years of work, the jobs of 25 people.

Id. at 114 (statement of Peter Voss, President, Voss Equip., Inc.):

I do not mind telling the subcommittee I am scared. The specter of a devastating product liability case haunts my business on an almost daily basis. A pending case involving a fellow Pennsylvania material handling equipment distributor is a prime example. The distributor did not sell the truck to the user, nor control its use. Yet an \$18.8 million judgment was just rendered against him and the manufacturer. If this decision holds, it will more than likely wipe the distributor out of business.

While I am here today to talk about my own product liability problems, my statement reflects the serious concerns of thousands of other wholesale-distributors throughout the country. For our industry, today's maze of product liability laws represents an utter lack of control over circumstances which give rise to liability, the lack of uniformity, and lack of equity and common sense.

Id. at 237 (testimony of William D. Ford, Coalition for Uniform Product Liability Law, and General Counsel, Colt Indus., Inc.):

In the case of asbestos-related diseases, over 16,000 suits have been filed, and unknown numbers of future product liability claims may be made. One Yale University economist has estimated that the cost of these claims may range from \$38 billion to as much as \$90 billion.

Not only is the continued existence of some manufacturers of asbestos products threatened, but a number have received qualified opinions from their auditors because of their potential exposure. Some experts have questioned whether the American property casualty insurance industry can withstand the magnitude of the claims expected to result.

5. See *S. 44 Hearings* (Part 1), *supra* note 2, at 174-75 (testimony of Hon. Dennis DeConcini, Senator from Arizona); *S. 2631 Hearings, supra* note 2, at 17-19 (statement of Jerry J. Phillips, W.P. Toms Professor of Law, University of Tennessee); Kircher, *Federal Product Legislation and Toxic Torts: The Defense Perspective*, 28 VILL. L. REV. 1116 (1982-83); Page & Stephens, *The Product Liability Insurance "Crisis": Causes,*

pitch several years ago when small manufacturers could not obtain insurance, has abated.⁶ It appears unseemly, almost un-American, for the federal government to legislate in an area so long delegated to the states unless there exists a "crisis" of seismic proportions threatening widespread destruction of business interests.⁷ Behind the set in small jam-packed rooms, businessmen load their respective revolvers with live ammunition to be directed not against consumers but against their brethren should any of them suggest the deletion of some pet word, phrase, or section that would otherwise give succor to a particular industry.⁸

In this circus-like atmosphere, relatively few have reflected on the overall performance of the courts in these years of change.⁹ Have there been excesses and if so, are they subject to legislative correction? If legislation is called for, what should be its gestalt? How will any proposed legislation mesh with the existing body of precedent firmly in place in both products and general tort law? What transaction costs are involved in putting a new product liability code in place? With fifty independent and sovereign states interpreting a statute, can there be much hope for the kind of uniformity that will give clear direction to designers and engineers charged with the responsibility of bringing the product to the marketplace?

Nostrums, and Cures, 13 CAP. U.L. REV. 387 (1984).

6. S. 44 *Hearings* (Part 1), *supra* note 2, at 176-78 (statement of Hon. Bruce Babbitt, Governor of Arizona); Page & Stephens, *supra* note 5. *But see* NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION, PRODUCT LIABILITY DIGEST (Mar. 12, 1985) (reporting that product liability insurance premiums, which peaked in 1979, are on the rise again).

7. S. REP. NO. 476, 98th Cong., 2d Sess. 71 (1984) (minority views of Ernest F. Hollings, Senator from South Carolina).

8. It is difficult to support this proposition with authority. It is, however, a matter of common knowledge that the infighting between industry groups has been substantial. One can only explain the continued insistence to include politically unpalatable provisions dealing with such subjects as product misuse and alterations, unavoidably unsafe products, and government contract defenses as a reflection of the dogged insistence of particular industries to build statutory protection for their product line. The proliferation of these and similar "pet" provisions has engendered substantial opposition and endangered the legislative effort.

9. *But see* Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973) [hereinafter cited as Henderson, *Conscious Design Choices*]; Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773 (1979) [hereinafter cited as Henderson, *Defective Product Design*]; Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980); Reed & Watkins, *Product Liability Tort Reform: The Case for Federal Action*, 63 NEB. L. REV. 389 (1984); Wade, *On Product 'Design Defects' and Their Actionability*, 33 VAND. L. REV. 551 (1980).

Legislative standards in an area that is so heavily litigated must be comprehensible not only to the parties who must live by them but also to the courts that must utilize them for judging.¹⁰ One must thus ask whether courts can administer the standards and how they will translate them into jury instructions. Finally, in an area so heavily politicized by outrageous rhetoric over the years,¹¹ the legislation, if it is to succeed, must survive the legislative process. Although two bills have been reported out of committee in successive years, neither has reached the Senate floor for a vote.¹² There is every reason to expect that the House of Representatives will be more hostile than the Senate to legislation that constricts consumer rights.¹³ If this year's efforts are to be more than jousting with windmills, reflections on the kind of bill likely to draw broad-based support become important.

In this article I have tried to offer a rational, feasible, and politically acceptable solution to the present product liability crisis. To do this, I have first set out the problem. I explain in Part

10. See Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 911-14 (1982).

11. See S. 44 Hearings (Part 1), *supra* note 2, at 202 (testimony of Karl Asch, Counsel):

Strict liability is a concept now which has been adopted after years of evolution in the several States, and it would appear to me from my own unsophisticated point of view that perhaps this bill would more appropriately be called the manufacturers and distributors and insurance companies' defective products escape from responsibility and whatever you do, get rid of strict liability act.

S. 2631 Hearings, *supra* note 2, at 62 (testimony of Dr. Sidney Wolfe, Director, Public Citizens Health Research Group): "The past year has seen an unprecedented assault by business acting as the ventriloquist for Ronald Reagan and his colleagues, designed to . . . weaken not only Government regulation of health and safety but also to cripple the flow of information to consumers . . ."; *Id.* at 101 (testimony of James H. Mack, Public Affairs Director, Nat'l Mach. Tool Builders Ass'n): "Our view is, that in the area of product liability, the experimentation by courts and legislatures in 50 states has created an end result affecting interstate commerce that looks like it was evolved by Dr. Strangelove."; *Id.* at 106 (statement of Emmet W. McCarthy, Vice President, Product Reliability, Dreis and Krump Mfg. Co.): "Our dilemma, then, is *not* that we lose a lot of cases in the courtroom, but that we get sued a lot. The current roulette wheel system with no stable rules encourages 'sue and hope' syndrome." (emphasis in original); *Id.* at 281 (testimony of Delby Humphrey, Chairman, Schutt Mfg. Co.): "The time for deciding the fate of football in America is at hand. The sport will not survive the tremendous financial pressures imposed upon it by today's litigation."

12. S. 2631, *supra* note 2, was reported with amendments by a unanimous Senate Committee on Commerce, Science, and Transportation on December 1 (legislative day November 30), 1982. S. REP. NO. 670, 97th Cong., 2nd Sess. (1982). S. 44, *supra* note 2, which is virtually identical to S. 2631, was reported with amendments 13-2 by the Senate Committee on Commerce, Science, and Transportation on May 23 (legislative day May 21), 1984. S. REP. NO. 476, 98th Cong., 1st Sess. (1983).

13. The current Congress (the 99th) has 54 Republicans and 46 Democrats in the Senate and 180 Republicans and 225 Democrats in the House. The Democratic majority in the House will probably be less receptive to legislation constricting consumer rights.

I how courts have created the crisis by formulating incomprehensible legal standards. In Part II, I examine the difficulties with assessing punitive damages against a defendant. In Part III, I discuss the conflict between the torts and workers' compensation systems. In Part IV, I reflect on the need to protect wholesalers and retailers from needless litigation. Part V suggests that a federal study on the role of damages in product liability litigation be undertaken. I then explain in Part VI why Congress need only address these five problem areas to resolve the crisis, and in Part VII, I present my proposed statute.

I. THE CRISIS OF INCOMPREHENSIBLE STANDARDS

The naysayers notwithstanding, there exists a product liability crisis that deserves the immediate attention of Congress. The crisis does not arise from the unavailability of insurance, nor does it stem from the high cost of that insurance. The source of the unrest lies in the lack of comprehensibility of the law to those whose behavior the law seeks to control or modify. This incomprehensibility either rests in or is exacerbated by the unmanageable open-endedness of the law which makes it unfathomable to courts. Three recent cases will illustrate the point.

A. Barker-Campbell—*Open-Ended Liability*

By now everyone probably knows of California's major contribution to the product liability crisis, *Barker v. Lull Engineering Co.*¹⁴ One will recall that in *Barker* the plaintiff was injured at a construction site while operating a high-lift loader manufactured by the defendant, Lull Engineering Co. The plaintiff had used the loader to lift a load of lumber on terrain that sloped sharply in several directions. The injury occurred when the load was lifted approximately twenty feet above ground. Due to the sharp slope, the load of lumber shifted and forced the plaintiff to jump from the loader. A piece of falling lumber struck him and caused serious injuries.

The plaintiff contended that the loader had a number of design defects. First, it did not have outriggers to lend stability to the loader and thus prevent its tipping on difficult terrain. Second, it had no roll bars or seat belts to protect the operator in

14. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

the event the machine rolled over. Finally, it lacked an automatic locking device on the leveling lever to prevent inadvertent bumping by the operator.

The *Barker* court held that a product may be found defective in design under *either* of two alternative tests:

First, a product may be found defective in design if . . . the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if . . . the benefits of the challenged design [do not] outweigh the risk of danger inherent in such design.¹⁵

The mere fact that the California court adopted a "consumer expectation test" for defect did not pre-ordain that industry would find it incomprehensible and courts would find it unmanageable. Courts could have narrowed the test's scope to give it meaning.¹⁶

Nevertheless, in *Campbell v. General Motors, Inc.*¹⁷ the California Supreme Court fulfilled the expectations of those who predicted that the adoption of a "consumer expectation" test would invite jury lawlessness and foster open-ended liability

15. *Id.* at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38.

16. A precisely defined and appropriately limited consumer expectation test that focuses exclusively on normal or "core uses" could govern cases not addressed by either risk-utility analysis or the express warranty provision of U.C.C. § 2-313 (1985). Advertisements, the product's self image, uses to which consumers have put the product in the past, and other similar intangible factors significantly influence consumer behavior. Product image, which is a function of these sensory impressions and subsequent expectations, creates an objective expectation that the express warranty does not cover. Furthermore, although the manufacturer's risk-utility balancing takes into account the consumer's perception of product image, the risk-utility formula does not adequately protect these "soft" product expectations.

As set forth in Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Rule of Judicial Screening in Product Liability Litigation*, 11 HOFSTRA L. REV. 861 (1983), strict liability theory provides no place for an independent standard that measures abstract expectations of product performance in terms of a jury's subjective experience. On the other hand, if liability turns on whether the use of the allegedly defective product fell within the core of uses indigenous to the product and whether the product failed in that normal use, then the consumer expectation prong could serve an important role. The court, however, must decide the threshold question whether the consumer was using the product according to this normal expected use. If the court determines that the use falls within the "core uses," then the jury can safely decide whether the product was defective for that expected use. In those cases where the court finds that the consumer used this product outside of the norm (but still very possibly foreseeably) then risk-utility analysis provides the only appropriate standard. For an application of this thesis to *Barker* and other cases, see *id.* at 895-930.

17. 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).

against manufacturers.¹⁸ In that case, the plaintiff, a sixty-two-year old woman, boarded a bus manufactured by General Motors. When she first boarded the bus, she sat in a double seat, but she later decided to sit down on the first forward-facing single seat on the right side of the bus. The bus had a horizontal metal "grab bar" attached at shoulder level above the back of each forward-facing seat. Because the plaintiff's seat faced the side of a lateral-facing double seat she did not have access to a metal "grab bar." The only handrail directly in front of plaintiff was the metal armrest attached, at about waist level, to the side of her seat. Although the bus had a number of vertical poles, which extended to the ceiling, there were none by the plaintiff's seat.

As the bus entered the intersection, the plaintiff knew that it was about to make a right-hand turn. The bus driver turned sharply, and the bus gained speed. The force propelled the plaintiff from her seat, and she sought to break her fall by grabbing onto something. Because no guardrails or handrails were available, the plaintiff suffered serious injuries in the fall. In her subsequent lawsuit, the plaintiff cited the failure to install a pole or handrail in the vicinity of the first forward-facing seat as a design defect.

In reversing the trial court's grant of a nonsuit to General Motors, the California court set forth the requirements for establishing a *prima facie* case of design defect. Under the *Barker* test, the plaintiff could establish a *prima facie* case if she suggested a design alternative that would have avoided the injury to her.¹⁹ At that point the burden of proof switched to the defen-

18. The consumer expectation test essentially maintains that courts should hold liable a manufacturer who leads consumers to believe that a product will perform at a certain level and then disappoints those expectations. See *supra* note 16. MUPLA, *supra* note 2, provides the rebuttal to this argument. The drafters of MUPLA were among those who forewarned of the insurmountable problem associated with a consumer expectation test. In explaining the omission of the test from the statute they wrote:

Neither the formula nor the detailed list of the more important evidentiary items includes what has been called the "consumer expectation test." The reasons for not including it are rooted in both economics and practicality The consumer expectation test takes subjectivity in its most extreme end. Each trier of fact is likely to have a different understanding of abstract consumer expectations. Moreover, most consumers are not familiar with the details of manufacturing process and cannot abstractly evaluate conscious design alternatives.

Id. § 104 analysis; see also Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 829 (1973).

19. Read literally, the *Barker* rule requires only that the plaintiff demonstrate that the product design "proximately caused" the injury. 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. Nevertheless, as Professor Gary Schwartz explains, it would be very poor strategy for a plaintiff to pass up the opportunity of getting the jury to con-

dant to establish that the product it manufactured met risk-utility standards and did not present "excessive preventable danger."²⁰ The court correctly noted that under the second leg of the *Barker* test the plaintiff had established a prima facie case, and therefore the lower court should not have granted the nonsuit.²¹

Of greater interest is the California court's treatment of the first prong of *Barker* which permits the plaintiff to establish her case if the product failed to satisfy ordinary consumer expectations as to safety. The court found that the plaintiff had established a prima facie case of defect on this ground as well. In delineating the proof necessary to establish a prima facie case, the court did not require expert testimony.²² Instead, it said that

sider his version of the design issue before the manufacturer presents his pro-product evidence. Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF. L. REV. 435 (1979). In fact, unless plaintiff's evidence suggesting any design defect is exceptionally weak, the plaintiff will not use the literal *Barker* rule because in practice it gives the defendant first crack at the jury and relegates the plaintiff to the defensive counterattack. See also Birnbaum, *supra* note 9, at 607-09. Like the plaintiff in *Barker*, most plaintiffs will offer several design alternatives in order to establish a tactically effective prima facie case.

20. 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

21. Many commentators have criticized the relative ease with which the *Barker* plaintiff can make out a prima facie case. See Henderson, *Defective Product Design*, *supra* note 9, at 784-85. See generally Schwartz, *supra* note 19, at 464-71. Although the well-advised plaintiff will go beyond the literal *Barker* rule, see *supra* note 19, in essence, the plaintiff can reach the jury merely by alleging some evidence of design alternatives that might have avoided the injury. Some argue that this presents a problem because the court cannot direct a verdict for the defendant in cases that are simply too fragile to go to a jury. See *infra* note 25 and accompanying text.

22. The court said:

Here, plaintiff presented sufficient evidence to have the case submitted to the jury on this theory as well. Not only did she testify about the accident (her use of the product), but she also introduced photographic evidence of the design features of the bus. This evidence was sufficient to establish the objective conditions of the product. The other essential aspect of this test involves the jurors' own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence. Since public transportation is a matter of common experience, no expert testimony was required to enable the jury to reach a decision on this part of the *Barker* inquiry.

Indeed, it is difficult to conceive what testimony an "expert" could provide. The thrust of the first *Barker* test is that the product must meet the safety expectations of the general public as represented by the ordinary consumer, not the industry or a government agency. "[O]ne can hardly imagine what credentials a witness must possess before he can be certified as an expert on the issue of ordinary consumer expectations." (Schwartz, *Understanding Products Liability*, 67 CAL. L. REV. 435, 480 (1979).)

The quantum of proof necessary to establish a prima facie case of design defect under the first prong of *Barker* cannot be reduced to an easy formula. However, if the product is one within the common experience of ordinary consumers, it is generally sufficient if the plaintiff provides evidence concerning (1) his or her use of the product; (2) the circumstances surrounding the injury; and (3) the

"it is generally sufficient if the plaintiff provides evidence concerning (1) his or her use of the product; (2) the circumstances surrounding the injury; and (3) the objective features of the product which are relevant to an evaluation of its safety."²³

To understand the broad sweep of this decision, one must reflect on the fact that the "consumer expectation" test operates independently from the risk-utility test.²⁴ Thus, even if the defendant had carried its burden of proof by establishing that to have placed a pole adjacent to the plaintiff's seat would have created greater dangers than it would have prevented, the plaintiff would still have won if the jury found that the product failed to meet the consumer's expectations. One searches in vain for any standard that gives content to the consumer expectation test in this case. The plaintiff's testimony that she rides buses regularly and did not expect that this bus would cause her injury appears sufficient to make out a *prima facie* case of design defect.

The *Barker* and *Campbell* decisions have created a crisis of comprehensibility for responsible manufacturers. To be told that

objective features of the product which are relevant to an evaluation of its safety. That evidence was provided in this case. Therefore, appellant was entitled to a jury determination concerning whether the bus satisfied ordinary consumer expectations.

32 Cal. 3d at 126-27, 649 P.2d at 232-33, 184 Cal. Rptr. at 899-900.

One can question the court's reliance on Professor Gary Schwartz's analysis of the role of the expert witness in this context. Professor Schwartz rejects the use of the consumer expectation test as an independent liability standard (except under narrowly circumscribed conditions) because it raises prospects of "haphazard impressionistic jury decision-making." Schwartz, *supra* note 19, at 480. While Schwartz takes issue with an "expert" testifying on matters of the victim's pre-injury expectations, he also questions the reliability and admissibility of the consumer-victim's after-the-fact testimony that the product failed to meet his expectations. *Id.* Moreover, Schwartz disagrees with the theory that the jurors themselves represent ordinary consumers who can identify consumer expectations, *id.*, which appears to be the premise underlying the *Campbell* result.

23. 32 Cal. 3d at 127, 649 P.2d at 233, 184 Cal. Rptr. at 900.

24. See *Barker*, 20 Cal. 3d at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38. The court's language is unmistakably clear:

A product may be found defective in design so as to subject a manufacturer to strict liability for resulting injuries, under *either of two alternative tests*. First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.

Id. (emphasis added); see also *Campbell*, 32 Cal. 3d at 118, 649 P.2d at 227, 184 Cal. Rptr. at 894, where the California court reiterates: "In *Barker*, two alternative tests were established for determining whether a product is defectively designed."

the defendant must bear the burden of proof on risk-utility presents a serious problem; it virtually wipes out the possibility of winning a design defect case on directed verdict because the party with the burden of proof rarely wins on directed verdict.²⁵ In all but the utterly frivolous design case, the defendant will have to face the vagaries of a jury. It then adds insult to injury to tell the defendant that, even if it carries that onerous burden, the plaintiff will have a second bite at the apple by submitting the case to the jury with nothing more than the testimony of the plaintiff that as an ordinary consumer she did not expect to be injured. Manufacturers have considerable justification for the belief that, in California, they cannot successfully defend design defect cases.²⁶

25. See Schwartz, *supra* note 19. Professor Schwartz, in criticizing the *Barker* burden-of-proof rule, states:

[O]ne simply cannot talk meaningfully about a risk-benefit defect in a product design until and unless one has identified some design alternative (including any design omission) that can serve as the basis for a risk-benefit analysis. If the *Barker* rule is read literally, however, it fails to require the plaintiff even to point to an alternative of this sort. Within the burden-of-proof jurisprudence, one respected canon is that the burden shall be placed on the party who has control of or access to the relevant information; that is the canon upon which *Barker* properly relies. But another respectable canon is that the burden-of-proof should not be placed so as to require a party to prove a negative. This canon the *Barker* rule violates.

Id. at 468; see also Henderson, *Defective Product Design*, *supra* note 9, at 784-85: "Directed verdicts for defendants, traditionally an important protection against arbitrary jury decisions in cases of doubtful merit, will occur even less frequently under the *Barker* [burden-of-proof] rule literally applied than they occur under the existing majority rule."

The need to control product design litigation by directed verdict practice is discussed in Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982).

26. See Schwartz, *supra* note 19. Professor Schwartz, in discussing cases where the victim has suffered severe injuries but the facts supporting design defects are weak, states:

Given the frailty of the liability claim, without *Barker* the plaintiff might well succumb to summary judgment or a directed verdict. Under *Barker*, however, once the burden of proof has been shifted by the plaintiff's limited showing, only in a few cases will the manufacturer be able to offer the kind of unmistakable evidence that overcomes the defect presumption as a matter of law.

Id. at 470; see Twerski, *National Product Liability Legislation: In Search of the Best of All Possible Worlds*, 18 IDAHO L. REV. 411, 412 (1982).

*B. O'Brien v. Muskin Corp.—The Assault on Market
Decision Making*

The New Jersey Supreme Court has led the nation in pushing back the frontiers of product liability law.²⁷ Commentators have questioned the wisdom of these changes, particularly the holding in *Beshada v. Johns-Manville Products Corp.*²⁸ which imposed strict liability on the defendant for failing to warn of dangers that were technologically and scientifically unknowable at the time the product was sold.²⁹ Similarly, manufacturers point to *Beshada* as irrefutable evidence that common law courts have lost touch with reality.³⁰ Prior to *Beshada* several decisions contained language indicating that a manufacturer would be

27. See *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984) (finding manufacturers of prescription drugs not immune to strict liability; deeming reasonably prudent manufacturer to know of information generally available or reasonably obtainable at time of distribution; and holding that defendant bears burden in strict liability failure-to-warn cases of proving that information was not reasonably obtainable at time of distribution); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983) (holding state-of-the-art evidence relevant to risk-utility analysis and therefore admissible in strict liability cases involving design defects, but plaintiff is not required to prove an alternative design to make out prima facie case); *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) (disallowing state-of-the-art defense in failure-to-warn cases); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979) (rejecting assumption of risk industrial design cases); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972) (rejecting contributory negligence in industrial design cases); *Newmark v. Gimbel's Inc.*, 54 N.J. 585, 258 A.2d 697 (1969) (finding liability in sales-service hybrid transactions); *Cintrone v. Hertz Truck Leasing & Rental*, 45 N.J. 434, 212 A.2d 769 (1965) (holding lessor strictly liable); *Santor v. A & R Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) (granting recovery in strict liability for economic loss); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (invalidating disclaimer of warranty where contract of adhesion present).

28. 90 N.J. 191, 447 A.2d 539 (1982).

29. See Page, *Generic Product Risks: The Case Against Comment K and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 877-82 (1983); Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 824-25 (1983); Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 901-05 (1983); Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734 (1983); Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 GEO. L.J. 1635 (1983); Birnbaum & Wrubel, *N.J. High Court Blazes New Path in Holding a Manufacturer Liable*, Nat'l L.J., Jan. 24, 1983, at 24, col. 1; see also *Feldman v. Lederle Laboratories*, 189 N.J. Super. 424, 460 A.2d 203 (1983) (limiting *Beshada* rule to "ordinary" products cases; New Jersey law does not require the imputation of time-of-trial knowledge in failure-to-warn cases attending the use of pharmaceutical drugs). But see Placitella & Darnell, *Beshada v. Johns-Manville Prods. Corp.: Evolution or Revolution in Strict Products Liability?*, 51 FORDHAM L. REV. 801 (1983).

30. See, e.g., S. 44 Hearings (Part 1), *supra* note 2, at 91 (statement of James Sales) ("Under *Beshada* of New Jersey and *Azarello* of Pennsylvania, it matters not that a 1940 automobile, if it is the subject of a lawsuit today, will be judged by the standards of engineering knowledge available in 1983. To me that is absurd.").

charged with knowledge of risk whether or not reasonable conduct on its part would have revealed the information.³¹ Nevertheless, not even these pre-*Beshada* cases maintained that liability would attach for failing to provide warnings based on scientific or technological information that was unavailable at the time the defendant marketed the product.

In *O'Brien v. Muskin Corp.*³² the New Jersey Supreme Court strengthened the position of the proponents of legislative reform by permitting the jury to decide that a rather ordinary product could be declared defective even though the plaintiff presented no evidence of the feasibility of an alternative design that would have minimized the risk. *O'Brien* involved an outdoor, above-ground swimming pool made out of an embossed vinyl liner which fit within an outer structure and was filled with water to a depth of approximately three and one-half feet. On the outer wall of the pool, the manufacturer placed a decal that warned "DO NOT DIVE" in letters roughly one-half inch high. Despite the warning, the plaintiff, a twenty-three year old, dove into the pool. As his outstretched hands hit the vinyl-lined bottom, they slid apart, and he struck his head on the bottom of the pool, sustaining serious injuries. The complaint alleged that the manufacturer was strictly liable for failing to warn adequately about the dangers of diving and for using the highly slippery vinyl liner.

The trial judge permitted the jury to determine the adequacy of the warning. Yet, the judge took the design defect issue from the jury because the plaintiff's expert admitted that he knew of no above-ground pool that made use of any material other than vinyl as a liner, even though the expert criticized the use of vinyl. Thus, the court found the absence of testimony as to a viable alternative sufficient grounds to remove the design issue from the case.

The New Jersey Supreme Court disagreed. In sending the case back for retrial on the design defect allegation, the court noted that:

The evaluation of the utility of a product also involves

31. See *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978); *Freund v. Cellofilm Properties*, 87 N.J. 229, 239, 432 A.2d 925, 930 (1981); *Cepeda v. Cumberland Eng'g Co.*, 76 N.J. 152, 163, 386 A.2d 816, 821 (1978), *overruled on other grounds*, *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 177, 406 A.2d 140, 153 (1979); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 494-95, 525 P.2d 1033, 1037-38 (1974).

32. 94 N.J. 169, 463 A.2d 298 (1983).

the relative need for that product; some products are essentials, while others are luxuries. A product that fills a critical need and can be designed in only one way should be viewed differently from a luxury item. Still other products, including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others. That cost might dissuade a manufacturer from placing the product on the market, even if the product has been made as safely as possible. Indeed, plaintiff contends that above-ground pools with vinyl liners are such products and that manufacturers who market those pools should bear the cost of injuries they cause to foreseeable users.³³

Thus, the court concluded that a case for design defect could go to the jury even where the plaintiff failed to prove the existence of alternative safer designs. It maintained that "[e]ven if there are no alternative methods of making bottoms for above-ground pools, the jury might have found that the risk posed by the pool outweighed its utility."³⁴

O'Brien reaches an astounding result. I do not quarrel with the court's contention that some products may present dangers so extreme that manufacturers should remove them from the market even if there exist no alternative designs that would reduce their dangerousness.³⁵ Instead, the application of that principle to the facts of *O'Brien* troubles me. *O'Brien* involved an above-ground swimming pool, a product that enjoys immense popularity throughout the country. Although the plaintiff contended that the manufacturer failed adequately to warn about the risks of diving into the pool, the court submitted the design defect question to the jury as well. Because the design and warning claims can stand independent of each other, one must conclude that, even if the manufacturer had provided adequate warnings, the design defect allegation would stand. In short, courts may rely on *O'Brien* to declare defective in design a product used in millions of American homes even though the manufacturer provides adequate warning of the risks involved in its misuse and the plaintiff fails to present any evidence of an alternative design that would render the product safer.

33. *Id.* at 184, 463 A.2d at 306.

34. *Id.* at 185, 463 A.2d at 306.

35. *See id.* at 184, 463 A.2d at 306.

Although the court admitted that imposing upon the manufacturer the cost of compensation for injuries might well lead it to remove the product from the market,³⁶ the court still saw no reason to remove decision-making power from the jury. If courts abandon responsibility for rule making and permit cases as far-fetched as *O'Brien* to go to juries, then one can only expect the business community to reject the common law as an acceptable decision-making process in product liability cases. Ultimately, *O'Brien* rejects the notion that the market, as an indicator of consumer values, provides an appropriate basis for concluding that widespread acceptance of a product indicates the social importance of a product or society's willingness to accept the risk the product presents, or both.³⁷

Moreover, in a design defect case, the plaintiff challenges an entire product line. Consequently, the defendant could face countless lawsuits without any realistic defense. This presents a frightening liability picture for even the most conscientious manufacturer. Because *O'Brien* permits a jury to condemn at whim a common product that a manufacturer has honestly marketed and whose design it cannot improve, the New Jersey Supreme Court has added to the crisis of comprehensibility that stems from a lack of standards. Manufacturers cannot intelligently respond to the dictates of *O'Brien*, and courts cannot guide juries to fair results utilizing its teaching.

C. Carter v. Johns-Manville Sales Corp.—*Confusion Compounded*

The application of strict liability principles to design defect and failure-to-warn cases has caused great confusion almost from the outset.³⁸ Unlike production defect cases, for which the manufacturer's "good" product provides the standard against

36. See *id.*

37. For an economic analysis of *O'Brien*, see Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 COLUM. L. REV. 2045 (1984). In it the author points out that the *O'Brien* court has rejected the assumption of fully informed and rational consumers. Rejecting this assumption allows the court to reach the conclusion that consumers are buying more of the product than they would if they fully understood the product's risks. On a theoretical level the Note's author agrees with the *O'Brien* court's theory of court-enforced safety despite market demand. On a practical level, however, the Note's author predicts that few products on the market have negative net utility and that the *O'Brien* holding will give to juries many cases that they will probably decide incorrectly due to the emotional appeal of plaintiff's severe injuries.

38. See Wade, *supra* note 29, at 741-45.

which to measure defect,³⁹ the design and failure-to-warn cases require courts to create their own standard.⁴⁰ By common acknowledgement, risk-utility balancing became the test utilized to determine the availability of an alternative design that would not render the product "unreasonably dangerous."⁴¹

39. Henderson, *Conscious Design Choices*, *supra* note 9, at 1544; Phillips, *A Synopsis of the Developing Law of Products Liability*, 28 DRAKE L. REV. 317, 345 (1979) [hereinafter cited as Phillips, *Synopsis of the Developing Law*]. See Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101, 105 & n.22 (1977) [hereinafter cited as Phillips, *Determining Defectiveness*]. Section 104(A) of MUPLA, *supra* note 2, has incorporated the standard that measures a production defect against the manufacturer's internal design specifications. This standard is replete in the case law. See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 655-56, 641 P.2d 353, 362 (1982); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 491, 525 P.2d 1033, 1035-36 (1974).

40. Henderson, *Conscious Design Choices*, *supra* note 9, at 1547.

41. Most of the recent literature in products liability has focused on the reasonable test and the appropriateness of risk-utility balancing as a method for establishing defects. See Birnbaum, *supra* note 9; Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978); Henderson, *Conscious Design Choices*, *supra* note 9; Henderson, *Defective Product Design*, *supra* note 9; Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976) [hereinafter cited as Henderson, *Expanding the Negligence Concept*]; Henderson, *Manufacturer's Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625 (1978) [hereinafter cited as Henderson, *Proposed Statutory Reform*]; Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 SW. U.L. REV. 109 (1976); Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUM. L. REV. 293 (1979); Phillips, *Determining Defectiveness*, *supra* note 39; Schwartz, *supra* note 19; Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1979) [hereinafter cited as Twerski, Weinstein, Donaher & Piehler, *Use and Abuse of Warnings*]; Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347 (1980) [hereinafter cited as Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives*]; Wade, *supra* note 9.

Most courts have adopted risk-utility analysis as either an exclusive or an alternative ground of liability. See, e.g., *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071-73 (4th Cir. 1974) (exclusive ground); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885 (Alaska 1979) (alternative ground); *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-39 (1978) (alternative ground); *Lewis v. Bucyrus-Erie, Inc.*, 622 S.W.2d 920 (Mo. Ct. App. 1981) (exclusive ground); *Michalko v. Cooke Color & Chem. Corp.*, 91 N.J. 386, 394, 451 A.2d 179, 183 (1982) (exclusive ground); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 170-71, 406 A.2d 140, 150-51 (1979) (alternative ground); *Cover v. Cohen*, 61 N.Y.2d 261, 266-67, 461 N.E.2d 864, 866, 473 N.Y.S.2d 378, 380 (1984) (exclusive ground); *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 108-09, 450 N.E.2d 204, 208-09, 463 N.Y.S.2d 398, 402-03 (1983) (exclusive grounds); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 386, 348 N.E.2d 571, 577-78, 384 N.Y.S.2d 115, 121 (1976) (exclusive ground); *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 67-68, 577 P.2d 1322, 1326 (1978) (exclusive ground); *Turner v. General Motors Corp.*, 584 S.W.2d 844, 850 (Tex. 1979) (exclusive ground); *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 887-90, 253 S.E.2d 666, 682-83 (1979) (exclusive ground). Federal statutes also use the reasonableness concept in setting design standards. See, e.g., National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392(f) (1982); Consumer Prod-

Once courts focused on a risk-utility assessment, the question arose whether strict liability perceptibly differed from negligence. The difference between the two is the time when information became available to the manufacturer or seller. Negligence, with its focus on the conduct of the manufacturer, would impose liability where a reasonable manufacturer knew or should have known of certain information.⁴² Strict liability, however, would impose liability even though a reasonable manufacturer would not have had access to information that later became available.⁴³ Thus, courts applying a strict liability standard would deem a product "unreasonably dangerous" even though the manufacturer had acted reasonably in designing and marketing the product.

This attribution to the manufacturer of knowledge that it could not have acquired using reasonable care has created enormous apprehension in the business community.⁴⁴ Courts and legislatures have responded to this concern by creating "state of the art" defenses to the strict liability rule.⁴⁵ Although the for-

uct Safety Act, 15 U.S.C. §§ 2056(a), 2058(c) (1982).

42. A number of courts have predicated liability in design defect and failure-to-warn cases on basic negligence principles. *See, e.g., Borel v. Fiberboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973); *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176 (5th Cir. 1971); *Schwartz v. General Motors Corp.*, 375 Mass. 628, 378 N.E.2d 61 (1978); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 246 S.E.2d 176 (1978); *Crocker v. Winthrop Laboratories*, 514 S.W.2d 429 (Tex. 1974).

43. Although many courts have indicated that the strict liability standard governs design defect and failure-to-warn cases, a majority of them view strict liability in foreseeability terms. Using a "strict liability" standard, the following courts have predicated liability on the failure to utilize risk information or technology only if this knowledge was available at the time of sale. *See, e.g., Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192 (4th Cir. 1982); *Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059, 1063-64 (Alaska 1979); *Woodhill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980); *Hunt v. City Stores, Inc.*, 387 So. 2d 585, 589 (La. 1980); *Cover v. Cohen*, 61 N.Y.2d 261, 270-71, 461 N.E.2d 864, 868-69, 473 N.Y.S.2d 378, 382 (1984); *Little v. PPG Indus., Inc.*, 92 Wash. 2d 118, 594 P.2d 911 (1979). Other courts reject the knowledge at the time-of-sale standard as being indistinguishable from negligence; they adopt a more absolute view of strict liability. At this end of the spectrum, the defendant is held liable for after-acquired knowledge, even though he may have acted reasonably when he designed the product without regard to the availability of critical information or technology. *See, e.g., Barker v. Lull Eng'g Co., Inc.*, 20 Cal. 3d 413, 435, 573 P.2d 443, 457-58, 143 Cal. Rptr. 225, 239-40 (1978); *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 204-09, 447 A.2d 539, 546-49 (1982); *Michalko v. Cooke Color & Chem. Corp.*, 91 N.J. 386, 395, 451 A.2d 179, 183 (1982); *Newman v. Utility Trailer & Equip. Co.*, 278 Or. 395, 398-400, 564 P.2d 674, 676 (1977); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 497-98, 525 P.2d 1033, 1039 (1974); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 (Tex. 1977).

44. 4 REPORT OF THE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY—LEGAL STUDY 101 (1977).

45. *See, e.g., Sturm Ruger & Co., Inc. v. Day*, 594 P.2d 38, 45 (Alaska 1979) ("While not, strictly speaking, a defense in a products liability action, state of the art may be

mulation of these "state of the art" rules differs from jurisdiction to jurisdiction,⁴⁶ in the end and for all practical purposes, the defense reinstates the negligence standard as the operative rule in all cases where it applies.

The term "state of the art" came to mean all things to all people.⁴⁷ Some courts used it to describe various kinds of knowledge⁴⁸ while others applied it to the different standards for im-

considered in determining whether a product is defective."); *Bell Bonfil Memorial Blood Bank v. Hansen*, 665 P.2d 118, 126 n.14 (Colo. 1983) ("When the [RESTATEMENT (SECOND) OF TORTS (1965) § 402 A] comment k exception is asserted, establishing that the product's manufacture, design, and warning conformed to the state of the art is merely a part of the defendant's burden."); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 183, 463 A.2d 298, 305 (1983) ("Although state-of-the-art evidence may be dispositive on the facts of a particular case, it does not constitute an absolute defense apart from risk-utility analysis."). The following statutes have been enacted: ARIZ. REV. STAT. ANN. § 12-683(1) (Supp. 1980); COLO. REV. STAT. § 13-21-403(a) (Supp. 1984); IND. CODE § 33-1-1.5-4(b)(4)(1983); KY. REV. STAT. § 411.310(2) (Supp. 1984); NEB. REV. STAT. § 25-21, 182 (1979); TENN. CODE ANN. § 29-28-105(b) (1980); WASH. REV. CODE ANN. § 7.72.050(1) (Supp. 1985).

46. Compare WASH. REV. CODE ANN. § 7.72.050(1) (Supp. 1985) (allowing consideration of evidence of industry custom, technological feasibility, or compliance with non-governmental or legislative regulatory standards by trier of fact) with KY. REV. STAT. § 411.310(2) (Supp. 1984) (authorizing presumption of no defect upon proof of manufacturer's adherence to state of the art in design, manufacturing methods, and testing) and ARIZ. REV. STAT. ANN. § 12-683(1) (1982) (authorizing affirmative defense upon proof that product plans, manufacturing methods, inspection, testing, and labelling conformed with state of the art).

47. Dean Wade urges that the "chameleon-like" term should be dropped from use because "its meanings are so diverse and so often confused." Wade, *supra* note 29, at 751. Although most jurisdictions have misapplied "state of the art," if properly defined it has great utility. In response to the need for increased judicial control of design defect litigation, I proposed a multifactor duty analysis to replace single factor no-duty rules. See Twerski, *supra* note 25. While the single-issue test served to insulate the defendant manufacturer, an overall duty consideration that focuses on tangible policy factors aids the court in directing verdicts in cases that should not go to a jury. As one factor in this overall duty analysis, "state of the art" represents a useful screening device. Thus, in cases where substantial time has passed from manufacture to injury, courts should be sensitive to: (a) change in societal values, (b) the quality of expert testimony, and (c) the advanced state of knowledge and technology. These considerations should weigh on the decision to direct a verdict for the manufacturer. *Id.* at 556-61.

48. Courts and commentators have used "state of the art" to describe at least three different kinds of problems. In the controversy over the fairness and wisdom of applying strict liability in design defect and failure-to-warn cases, "state of the art" refers to the limited knowledge of risk and technology available at the time the manufacturer first made the product or placed it into the stream of commerce. By asserting this defense, a manufacturer may limit the imputation of after-acquired knowledge and time-of-trial technological advances. Those who applaud this limitation claim that it is unjust to apply a risk-utility analysis with the benefit of hindsight. See *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-157 (4th Cir. 1978); *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1184-86 n.24 (5th Cir. 1971). On the other hand, plaintiffs argue that it is virtually impossible to ascertain the exact state of a defendant's knowledge of risk and technology and that the "state of the art" as described forces them to pinpoint knowledge and foreseeability with unfair exactitude. See *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 811-12 (9th Cir. 1974); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406

plementing knowledge⁴⁹ in order to improve a product. In a masterful treatment of the subject, Dean Wade identified three separate kinds of knowledge that could be relevant to risk-utility balancing: (1) knowledge of danger, hazards, or risks that arise from normal use of a product that a manufacturer could have learned of after marketing the product; (2) scientific and technological developments that have occurred since marketing that could make the product safer; and (3) product use and misuse that a manufacturer could not have reasonably foreseen at the time of marketing but that the actual experience of consumer use has made available.⁵⁰

Dean Wade notes that courts differ sharply about whether they should impute knowledge of dangers arising from normal use to the defendant.⁵¹ As to the issue of technological and economic feasibility, the issue most often dubbed "state of the art," most courts appear unwilling to impute post-marketing knowledge. Dean Wade notes that "while product hazards exist independently of whether anyone knows about them, feasibility is, almost by definition, a function of contemporary perceptions

A.2d 140 (1979). See generally Henderson, *Coping with the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919 (1981); O'Donnell, *Design Litigation and the State of the Art: Terminology, Practice and Reform*, 11 AKRON L. REV. 627 (1978); Twerski, *supra* note 25, at 556-61. For additional constructions of "state of the art" see *infra* note 49.

49. Courts use "state of the art" terminology to describe the complex interplay between design alternatives and the burden of proof in design litigation. How practically feasible must the plaintiff show his design alternative to be? The plaintiff's expert will ordinarily support the plaintiff's theory that the manufacturer could have designed the product in a way that minimized risk without destroying utility. The courts, however, divide on how much attention the plaintiff needs to give state-of-the-art issues. Manufacturers urge that the plaintiff must address in the *prima facie* case the practicality, cost, and marketability of the alternative he offers. See O'Donnell, *supra* note 48, at 646-53. For an in-depth analysis of the role of experts in products liability litigation, see Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303 (1974).

Manufacturers also claim "state of the art" when issues of changing societal standards and increased consumer expectations are evident. Applied in this context, the "state of the art" bears a strong resemblance to a custom defense. In both cases, defendants point to socially accepted industry practices in an effort to justify its design. Defendants argue, with varied success, that courts cannot require industry to set standards that do not correspond with society's needs and attitudes. Thus, even when plaintiffs present an economically and technologically feasible alternative design that is demonstrably safer, defendants argue that liability should not attach because at the relevant time of manufacture or distribution, society did not demand the proposed level of safety. See Wade, *supra* note 29, at 750 & n.59. Once again, courts should determine issues of changing societal norms, as well as the aforementioned knowledge of risk and technology and shifting burdens of proof. See Twerski, *supra* note 25, at 556-61 for discussion and additional sources.

50. Wade, *supra* note 29, at 751-53.

51. *Id.* at 757.

and priorities.”⁵² Nonetheless, he finds no justification for distinguishing between the various kinds of knowledge.⁵³ An examination of *Carter v. Johns-Manville Corp.*⁵⁴ serves to illustrate the logical inconsistencies these meaningless distinctions create.

In *Carter*, plaintiff's decedent (Elbert Blackwell) brought suit against Johns-Manville, the manufacturer of the asbestos used as insulation material in a shipyard where he worked from 1942 to 1946. The use of defendant's product exposed Blackwell to fiber dust from which he contracted a fatal case of mesothelioma. The plaintiff brought suit on both failure-to-warn and design defect grounds and, for the purpose of perfecting an appeal, the parties stipulated “that the defendant did not know of the dangers involved in using its products, nor could it have reasonably known of them or foreseen them, even held to the knowledge and skill of an expert.”⁵⁵

The Texas District Court found that, under state law, it could impute after-acquired knowledge in a defective design case but not in a failure-to-warn case.⁵⁶ The court found that Texas adopted strict liability in design defect litigation.⁵⁷ It reasoned that if strict liability did not require the imputation of after-acquired knowledge, there would be no difference between negligence and strict liability.⁵⁸

The court then examined Texas law on the issue of failure to warn. Here, the court found that Texas had retained a basic negligence rule.⁵⁹ One might attribute this result to the Texas court's uneasiness about imposing a duty on the manufacturer to warn about information that it could not reasonably obtain. The matter did not, however, end at this point. Having concluded that the plaintiff could not pursue the failure-to-warn claim

52. *Id.* at 757-58.

53. *Id.* at 757-59.

54. 557 F. Supp. 1317 (E.D. Tex. 1983).

55. *Id.* at 1318.

56. *Id.* at 1319.

57. *Id.* at 1318-19.

58. The court noted that:

[T]he “prudent manufacturer” test used in strict liability cases already incorporates the “reasonable man” test used in negligence cases. *The difference is that in a strict liability case, the defendant's awareness of the danger is hypothesized, and therefore the plaintiff need not prove that the danger was foreseeable.* To permit the defendant to defeat a strict liability claim by proving that it could not have foreseen the danger, in effect by proving that it was not negligent, would fly in the face of the entire history of the evolution of strict liability in tort.

Id. at 1319 (emphasis added).

59. *Id.*

under strict liability, the court returned to consider the design defect claim. It observed that in order to perform a risk-utility analysis, a court must investigate not only engineering changes that could have rendered the product safer but also whether a warning could have helped to reduce the product's dangerousness.

In essence, the court viewed a warning as "one of a product's many design attributes that weigh in the balance of dangers against utility to determine whether the product is unreasonably dangerous."⁶⁰ Consequently, it found that "[a] manufacturer . . . [could] defend a strict liability claim based on defective design by showing that a warning accompanied the product that reduced its dangers."⁶¹ The court, however, explicitly rejected the notion that a manufacturer could introduce hypothetical warnings that might have made the product safer and then excuse the failure to provide these warnings on its justifiable ignorance of the risk information. To permit this, the court maintained, would "reinject the element of foreseeability into the theory of strict liability for defective design, and revert that theory into one of negligence."⁶²

Finally, the court turned its attention to the "state of the art" question. A leading Texas case, *Bailey v. Boatland of Houston*,⁶³ had firmly established "state of the art" as a legitimate defense to a strict liability design defect claim. The *Carter* court explained that this state-of-the-art defense would permit the defendant to argue that the unavailability of technology or the economic infeasibility of implementing an alternate design precluded it from making its original design safer.⁶⁴ Nevertheless, under the state-of-the-art defense, a manufacturer defending in a failure-to-warn case could not argue that it provided no warning because it had not known of the danger against which the consumer should have taken precaution. Instead, the court maintained that:

[t]he manufacturer would have to claim that, even if the danger was in fact foreseeable, it was not feasible to have included a warning on the product, in that there did not exist the technological capability to have done so, at least not without making the product less useful

60. *Id.* at 1320.

61. *Id.*

62. *Id.*

63. 609 S.W.2d 743 (Tex. 1980).

64. 557 F. Supp. at 1320.

to society. Foreseeability is know-of; true state of the art is know-how. Know-of has no place in a strict liability case based on defective design.⁶⁵

We have now come full circle. To succeed under a state-of-the-art defense a defendant need only establish that it incorporated into its product all technologically and economically feasible safety measures. Consequently, a manufacturer must supply a warning only when feasible.⁶⁶ The feasibility of a warning, however, depends on knowledge of the risk against which the warning seeks to advise the user, and in a design defect case the court cannot inquire into knowledge of the risk or foreseeability of the harm. Thus, the court is caught in a classic Catch-22 from which it cannot extricate itself.

One can argue that the court's dilemma stemmed from the Texas courts' failure to apply strict liability in both design and failure-to-warn cases. With very few exceptions,⁶⁷ however, courts have strongly resisted applying strict liability in the pure failure-to-warn case.⁶⁸ If Texas erred here, then so have all the other courts that have refused to follow *Beshada*.

Some commentators have taken the position that *Carter* erred in treating the warning issue as negligence when the claim was failure to warn and as strict liability when the claim was based

65. *Id.* at 1320-21 (emphasis added).

66. *Id.* at 1320.

67. The following courts have applied strict liability in a failure-to-warn case or have approved of its application in dicta: *Whitehead v. St. Joe Lead Co.*, 729 F.2d 238, 246-47 (3d Cir. 1984) (applying New Jersey law); *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 812 (9th Cir. 1974) (applying Montana law); *Hamilton & Hardy*, 37 Colo. App. 375, 384-85, 549 P.2d 1099, 1107 (1976); *Beshada v. Johns-Manville*, 90 N.J. 191, 204-05, 447 A.2d 539, 546-47 (1982); *Michalko v. Cooke Color & Chem. Corp.*, 91 N.J. 386, 402, 451 A.2d 179, 187 (1982); *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 240, 432 A.2d 925, 931 (1981); *Pegg v. General Motors Corp.*, 258 Pa. Super. 59, 78, 391 A.2d 1074, 1083 (1978); *Little v. PPG Indus.*, 19 Wash. App. 812, 820-22, 579 P.2d 940, 945-97 (1978), *modified*, 92 Wash. 2d 118, 594 P.2d 911 (1979).

68. The following decisions reflect the majority view. See, e.g., *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 344 (5th Cir. 1982) (asbestos insulation); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 158-59 (8th Cir. 1975) (applying Minnesota law) (asbestos insulation); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1090 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (asbestos insulation); *Cover v. Cohen*, 61 N.Y.2d 261, 274-75, 461 N.E.2d 864, 871, 473 N.Y.S.2d 378, 385 (1984) (throttle return spring in automobile); *Seley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 198, 423 N.E.2d 831, 836-37 (1981) (oral contraceptives); *Bristol-Meyers v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978) (ototoxic pharmaceutical drugs). It is worth noting that the duty to warn is an ongoing process that does not terminate upon manufacture and delivery. Many courts apply a negligence standard to defective warning in the first instance and continue to impose a duty on manufacturers to update their warnings and notify retailers and consumers of dangers that become known after distribution.

on design defect.⁶⁹ They argue that courts should treat a failure-to-warn claim as based in negligence and ought not to impute after-acquired knowledge merely because the warning issue is made part of the design defect claim.⁷⁰ Although this contention has merit, the authors fail to recognize the soundness of the court's analysis. One cannot evaluate a product's design by simply inquiring into the proposed design changes that a manufacturer could have made.

Warnings play a legitimate role in risk-utility analysis.⁷¹ Sometimes a warning alone will reduce the probability of the harm sufficiently to render an otherwise dangerous product reasonably safe. In other instances, a manufacturer will have to combine design changes and warnings to achieve reasonable safety. There is just no way to artificially distinguish between

69. See Wheeler & Kress, *A Comment on Recent Developments in Judicial Imputation of Post-Manufacture Knowledge in Strict Liability Cases*, 6 J. PROD. LIAB. 127, 128-36 (1983); cf. Wade, *supra* note 29, at nn.50-52 and accompanying text.

70. Wheeler and Kress argue that *Carter* introduces imputed knowledge into the failure-to-warn claim without sound justification. Wheeler & Kress, *supra* note 69, at 145. The authors contend that there are good reasons for refusing to impute time-of-trial knowledge when the "defect" is a failure to warn and criticize *Carter* for its superficial analysis. *Id.* at 144-45.

Carter creates an initial problem by affording the plaintiff a unique advantage when the court imputes knowledge to the defendant in the failure-to-warn case. Unlike design modifications in which the prohibitive costs may offset the benefit of a safer alternative, warnings cost little and generally do not impede the product's function. Almost any risk reduction attributable to a warning will therefore make the warning cost effective on risk-utility balancing. Once the court removes the foreseeability question, liability will be greatly extended. The effect of strict liability on the food and chemical industries is especially troubling. While it is very difficult to change the chemical structure without seriously impairing the function of food, pharmaceuticals and other chemicals, courts can apply post-manufacture knowledge of risk to a written warning with relative ease. *Id.* at 137-39.

Moreover, strict liability in failure-to-warn will have a disproportionate impact because generally there exists a greater likelihood of discovery of post-manufacture risks for chemical and food products than for machines. *Id.* at 141-42. The authors attribute this to naturally longer discovery periods between exposure to the product and manifestation of injury, the accelerating growth of knowledge in the field of biochemistry as compared to well-understood engineering principles; and the relative difficulty of post-sale warning and recall in the food and chemical industries. *Id.* at 142-43.

71. See Twerski, Weinstein, Donaher & Piehler, *Use and Abuse of Warnings*, *supra* note 41, at 517:

In short, when calculating the burden of precaution which is part of the risk-utility calculus, it will be necessary to focus on costs other than the cost of label printing. The efficacy of warning is a societal cost of substantial importance. Thus, it will not be possible for the courts to rely on warnings alone to ensure product safety. The range of risks is so broad, and the type of consumer response so varied, that the courts cannot avoid asking "what is a reasonably safe product" or "how much safety is enough." The answers will sometimes lie with an adequate warning, sometimes with redesign of the product, but most often with warning and design blended together to give an adequate level of safety.

warning and design parameters. A design change in and of itself may accomplish greater safety by making it more difficult for the dangerous event to take place and by simultaneously highlighting the dangerous nature of the product, thus calling the user's attention to whatever product danger remains. Thus a single design change may serve both engineering safety and communicating danger functions. A tamper-proof cap on a bottle containing poisonous ingredients serves both to deter easy access by children (engineering safety) and to alert the user that the contents are dangerous (communicating danger).

In short, warning and design claims overlap. To utilize a strict liability standard for the design aspect of the design defect claim and a negligence standard for the warning aspect of the same design defect claim is ludicrous, because both aspects will present the same after-acquired knowledge issue. Thus, there is simply no intellectually honest way to split them asunder.

Again manufacturers confront distinctions that lack comprehensibility. They are legitimately confused as to just what the law demands of them. At the adjudicative level, courts have saddled themselves with inconsistent doctrine. Translating this doctrine into jury instructions seriously compounds the problem. One can only imagine how jurors would react to an instruction based on the *Carter* opinion. The instruction would probably read as follows:⁷²

The plaintiff alleges that the asbestos supplied by the defendant was defectively designed. In deciding whether the asbestos was reasonably safe for use you are to consider that the supplier had knowledge of the dangers attendant to the use of asbestos even though at the time of manufacture it was not reasonably foreseeable that such danger existed.

The supplier's liability does not rest upon what he knew or should have known when he manufactured or sold the product; it rests on his placing into the stream of commerce a product which is determined at trial to have been dangerous. The damaging event may not have been reasonably foreseeable at the time of the manufacture or sale because the dangerous factor of the product might not then have been even reasonably knowable. The supplier would thus be free of culpability, but a price of his

72. This instruction is the author's. The second paragraph comes from *Carter*, see *infra* note 73.

doing business is to protect people from danger from his product—or to pay.⁷³

The defendant claims that his product met the state of the art at the time the product was manufactured and distributed for sale. If you find that the product met the standards of technology existing from 1942-1946 or that to have altered the design would not have been economically feasible, then the defendant is not liable. However, if a warning was technologically possible and economically feasible in the years 1942-1946, then defendant is liable whether or not it was able to foresee the dangers against which it was to warn. The fact that the danger was unforeseeable does not prevent the manufacturer from being held liable. Technological and economic feasibility if relevant go only to the ability to warn against danger, not whether the defendant was aware of the danger.

The proposed instruction would probably not only confuse a jury but would also call into question the sanity of a court that ordered the jury to decide an actual dispute utilizing its guidelines. Something has to give. The law should either adopt true strict liability or negligence in both design and failure-to-warn cases. The present schizophrenia in the law must come to an end.

D. A Rational Solution—Negligence for Design and Failure-to-Warn Claims

The time has come to make negligence the sole test for all product liability cases in which the claim is defective design or failure to warn. As in other negligence cases, yet unlike the *Barker* strict liability, risk-utility approach, the burden of proof on the issue of negligence should remain with the plaintiff. In this regard, the goals of S. 44 and its predecessor bills⁷⁴ were fully justified. The bills' faults occurred rather in the language they utilized to execute their intent. Instead of relying on classical language to give expression to the negligence concept, the bills created new language and definitions that would require

73. This paragraph is cited in *Carter*, 557 F. Supp at 1319. It is taken from *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 (Tex. 1977).

74. See *supra* note 2.

years of interpretation before courts would agree on their meanings.⁷⁵ Furthermore, the drafters added section upon section to

75. For the use of new language applicable to the liability standard, *see, e.g.*, H.R. 5626, *supra* note 2:

SEC.5(a) In any product liability action based upon the formula or design of a product, the defendant shall not be liable unless the plaintiff proves by a preponderance of the evidence, in addition to other facts required to be proved under State or Federal law (including other provisions of this Act)—

- (1) that the formula or design of the product was the immediate, physical and producing cause of the injury or damage of which the plaintiff complains; and
- (2) that an alternative formula or design meeting the requirements of subsection (b) was—
 - (A) available at the time of manufacture; and
 - (B) would have avoided or reduced the injury or damage of which the plaintiff complains.
- (b) A formula or design shall be considered to be an alternative for purposes of this section only if it—
 - (1) (A) Provides overall safety as good as, or better than, the overall safety of the formula or design of the product in question; and
 - (B) provides better safety as to the particular hazard which allegedly caused the injury or damage.

H.R. 5214, *supra* note 2:

SEC.5(a)(1) In any products liability action brought against a manufacturer for harm allegedly caused by a product, the manufacturer shall be liable to a claimant only if the claimant proves by a preponderance of the evidence—

- (A) that the product was unreasonably dangerous—
 - (ii) in design, under subsection (c), and that the manufacturer was negligent in selling the product in such condition;
 - (iii) because the manufacturer failed to provide adequate warnings or instructions, under subsection (d), and that the manufacturer was negligent in failing to provide such information; or
 - (B) that the unreasonably dangerous aspect of such product was the proximate cause of the harm complained of by the claimant; and
 - (C) that the particular product unit which allegedly harmed the claimant was manufactured by the defendant.
-
- (b) A product shall be considered unreasonably dangerous in construction only if it is determined that, when the product left the control of the manufacturer, the product deviated in a material way—
 - (1) from the design specifications or performance standards of the manufacturer; or
 - (2) from otherwise identical units of the same product line.
 - (c)(1) Except as provided in paragraph (4), a product shall be considered unreasonably dangerous in design only if it is determined that the manufacturer failed to adopt an alternative design that—
 - (A) was available to the manufacturer when the product was designed, under paragraph (2);
 - (B) was on balance better than the chosen design, under paragraph (3); and
 - (C) would have prevented the claimant's harm.

- (2) An alternative design shall be considered available to the manufacturer when the product was designed if the alternative design was known at that time or in the exercise of reasonable care should have been known by the manufacturer to exist and to be feasible for use in the product by the manufacturer.
- (3) An alternative design shall be considered better than the manufacturer's design if the alternative design—
 - (A) was significantly safer than the chosen design. The alternative design was safer than the chosen design if the alternative design would have provided both—
 - (i) better safety than that of the chosen design as to the particular hazard which allegedly caused the claimant's harm; and
 - (ii) better overall safety than that of the chosen design. The overall safety of the alternative design is better if the hazards it eliminates are greater than any new hazards it creates for any persons and for any uses;
 - (B) was not more expensive than the chosen design, unless the added safety benefits of the alternative design were significantly greater than the added expense;
 - (C) was not less useful or desirable than the chosen design, unless the added safety benefits of the alternative design were significantly greater than the losses of usefulness or desirability; and
 - (D) was not in violation of any statute, regulation, or mandatory safety standard of Federal or State government.
- (4) A product shall not be considered unreasonably dangerous in design where the claimant's harm resulted from—
 - (A) a manner of use of the product other than that which would be reasonably expected of an ordinary person who is likely to use the product; or
 - (B) an alteration or modification of the product other than that which would be reasonably expected of an ordinary person who is likely to use the product.

S. 44, *supra* note 2:

SEC.4(a) In any product liability action, a manufacturer is liable to a claimant if—

- (1) the claimant establishes by a preponderance of the evidence that—
- (B) the product was unreasonably dangerous in design or formulation, as defined in section 5(b);

SEC.5(b) A product is unreasonably dangerous in design or formulation if, at the earlier of the time of manufacture or Government certification of the product, a reasonably prudent manufacturer in the same or similar circumstances would not have used the design or formulation that the manufacturer used.

For new definitional standards, see, e.g., H.R. 5626, *supra*, note 2:

SEC.3(6) The term "product" means any tangible article (including attachments, accessories, and component parts of such articles) and the term "product unit" means any single item or unit of a product.

H.R. 5214, *supra* note 2:

SEC.8(4) The term "product" means any object which is capable of delivery either as an assembled whole or as a component part and is produced for introduction into trade or commerce. Such term does not include human tissue, organs, or human blood and its components.

SEC. 8(7). The term "harm" means (A) damage to property other than the

qualify the negligence test and limit its application.⁷⁶

product itself; (B) personal physical injuries, illness, or death; or (C) pain or mental harm resulting from such personal physical injuries, illness, or death. The term "harm" does not include commercial loss.

SEC. 8(11). The term "feasible" means practicable within the technical and scientific knowledge which is available, adequately demonstrated, and economically feasible for use by a product seller at the time of manufacture of a product.

S. 44, *supra* note 2:

SEC. 2(5). "harm" means (A) physical damage to property other than the product itself; (B) personal physical illness, injury, or death of the claimant; or (C) mental anguish or emotional harm of the claimant caused by the claimant's personal physical illness or injury; "harm" does not include commercial loss;

SEC. 2(8). "practical technological feasibility" means the technical, medical, and scientific knowledge relating to the safety of a product which, at the time of production or manufacture of a product, was developed, available and capable of use in the manufacture of a product, and economically feasible for use by a manufacturer.

76. H.R. 5626, *supra* note 2:

SEC. 5(c). In any product liability action based upon the formula or design of a product, the defendant shall not be liable for that portion, including the whole, of the personal injury, death, or property damage complained of which could have been avoided or reduced by the attachment to, inclusion in, or use with the product of an additional safety or protective device or substance, if the defendant proves by a preponderance of the evidence that at the time of manufacture—

- (1) the product was suited to more than a single function or manner of use;
 - (2) the attachment, inclusion or use of such additional device or substance would have been inappropriate or incompatible with a function or manner of use to which the product was suited;
 - (3) such additional device or substance was known or should have been known to be available for purchase or use by the person injured or damaged or by such person's employer;
 - (4) the person injured or damaged or such person's employer did not purchase or use such additional device or substance; and
 - (5) the use of such device or substance would have enabled the person injured or damaged to avoid or reduce the personal injury, death, or property damage of which the plaintiff complains.
- (d) In any product liability action based upon the formula or design of a product, the defendant shall not be liable if the defendant proves by a preponderance of the evidence that the product formula or design complied with mandatory standards or regulations adopted by the Federal Government which were applicable to the product at the time of manufacture and which pertained directly to the hazard of which the plaintiff complains.

H.R. 5214, *supra* note 2:

SEC. 7(a). In any product liability action for harm allegedly caused by a product—

- (1) if the claimant proves by a preponderance of the evidence that the aspect of the product or its use of which the claimant complains failed to comply with applicable mandatory Federal or State government safety standards existing at the time of manufacture and pertaining directly to that aspect of the product or its use, the

My proposed legislation makes adoption of the negligence standard simple and straightforward. This adoption of a negligence test would affect existing law in a number of ways. It would replace some of the concepts courts presently use and effectively overrule certain precedents. First, courts could no longer apply the consumer expectation test as the sole liability standard in a design defect or failure-to-warn case.⁷⁷ Second, the

claimant shall be deemed to have satisfied the proof requirements of section 5(a)(1)(A) or 6(a)(1)(A) with respect to such aspect of the product or its use unless the product seller proves by clear and convincing evidence that its failure to comply with such standards was a reasonably prudent course of conduct under the circumstances; and

- (2) if the product seller proves by a preponderance of the evidence that the aspect of the product or its use of which the claimant complains complied with applicable mandatory Federal or State government safety standards existing at the time of manufacture or thereafter and pertaining directly to that aspect of the product or its use, the claimant shall be deemed to have failed to satisfy the proof requirements of section 5(a)(1)(A) or 6(a)(1)(A) with respect to such aspect of the product or its use unless the claimant proves by clear and convincing evidence that such standards were unsound.

S. 44, *supra* note 2:

SEC. 5(b). A product is not unreasonably dangerous in design or formulation unless—

- (1) the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm; and
- (2) a means to eliminate the danger that caused the harm was within practical technological feasibility.

77. The following cases are illustrative of the diversity of jurisdictions that have expressed their liability standard in consumer expectation terms: *Burce v. Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976) (holding that plaintiff must show that the product was dangerous beyond the expectation of the ordinary consumer at the time of manufacture); *Vineyard v. Empire Mach. Co.*, 119 Ariz. 502, 505, 581 P.2d 1152, 1155 (1978) (finding that the alleged defect must make the product dangerous "to an extent beyond that which would be contemplated by the ordinary consumer") (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment (i) (1965)); *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982) (rejecting two-prong *Barker* test in favor of single test of consumer expectations); *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 467, 424 N.E.2d 568, 577 (1981) (holding that "product will be found unreasonably dangerous if it is dangerous to an extent beyond the expectations of an ordinary consumer"; reciting to the first prong of the *Barker* test and comment (i)); *see, e.g., Heaton v. Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975). In addition, a number of courts have adopted the two-prong *Barker* test discussed *supra* notes 14-26 and accompanying text, and these cases would also be overruled by the proposed legislation. *See, e.g., Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979); *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982); *Barker v. Lull Eng'g Co., Inc.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *Knitz v. Minster Mach. Co.*, 69 Ohio St. 2d 460, 436 N.E.2d 814 (1982).

defendant would not carry the burden of proving that its product was not defective.⁷⁸ The burden of proof for negligence would reside with the plaintiff. Third, the defendant would not be liable for information concerning dangers that it could not have reasonably foreseen at the time it distributed the product⁷⁹ or for the implementation of design changes that were not economically or technologically feasible at the time of distribution of the product.⁸⁰ Rather, the plaintiff would have to establish the negligence of the defendant. The plaintiff would be free to prove that at the time of product distribution the defendant either knew or should have known about the danger or the design alternative that could have avoided a known danger. At the same time, all claims of negligence for post-distribution failure to warn or failure to recall would remain in place. Finally, a plaintiff could not admit evidence of post-distribution product modification in those jurisdictions that adhere to the subsequent repair rule in negligence cases.⁸¹ Because the subsequent repair rule is almost universally accepted, it would *ipso facto* become the governing national rule in product liability design defect and

78. *Barker v. Lull Eng'g Co., Inc.* 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1973), generated much debate on the relative benefits of burden shifting, *see infra* text accompanying note 91, and is generally criticized. *See, e.g.,* Birnbaum, *supra* note 9, at 605-09; Henderson, *Defective Product Design*, *supra* note 9, at 782-97; Schwartz, *supra* note 19, at 464-71; Wade, *supra* note 9, at 573-75. Moreover, in the seven years since *Barker* was decided, only one state has seen fit to follow California's approach. *See Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979) (placing burden of proof on the defendant to establish that the benefits of the challenged design outweigh its inherent risk of danger).

79. Although the majority of jurisdictions presently apply a negligence standard in the failure-to-warn case, the proposed statute would overrule a number of decisions. *See supra* notes 67-68.

80. Applying a negligence test to the issue of technological and economic feasibility will probably change existing law significantly. As noted earlier, *see supra* notes 45-46, many states have specifically enacted "state of art statutes." Others have accomplished the same result by judicial decision. *See, e.g.,* *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980). Admittedly, "state of the art" is sometimes formulated as a defense. *See* authorities cited *supra* notes 45-46. However, the posturing of risk-utility consideration as a defense is procedurally awkward. *See* discussion *supra* notes 25-26. Placing the burden of proof of the negligence issue on the plaintiff should simplify litigation considerably.

81. *See, e.g.,* *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975) (evidence of subsequent remedial measures admissible for any relevant purpose in strict liability and inadmissible in negligence; court construing exclusionary rule which had no exceptions); *Sutkowski v. Universal Marion Corp.*, 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972); *Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251 (S.D. 1976) (admitting evidence of subsequent remedial measures in strict liability for any relevant purpose; case simply rubber-stamps *Ault*); *Caldwell v. Yamaha Motor Co., Ltd.*, 648 P.2d 519 (Wyo. 1982) (admitting evidence of subsequent remedial measures in strict liability for any relevant purpose; exclusionary purposes of Wyo. R. Evid. 407 applies only to cases of negligence).

failure-to-warn cases.⁸²

The proposed legislation will not, however, address production defect cases. Jurisdictions almost universally agree that strict liability governs these cases.⁸³ Following the good-sense rule that "If it ain't broke, don't fix it," there is no need to add definitional problems and legislative verbiage that could constrict the ability of courts to act on product defect questions that have yet to surface.⁸⁴

Despite my rejection of the consumer expectation test in this

82. Soo Hoo & Soo Hoo, *Evidence of Subsequent Repairs: Yesterday, Today, and Tomorrow*, 9 U.C.D. L. REV. 421 (1976); Annot., 74 A.L.R. 3d 1001, 1014-15 (1976); 29 AM. JUR. 2d *Evidence* § 275 (1967).

83. See Phillips, *Synopsis of the Developing Law*, *supra* note 39, at 344-45; MUPLA § 104(A), *supra* note 2. But see ARIZ. REV. STAT. ANN. § 12-683 (Supp. 1980):

In any product liability action, a defendant shall not be liable if the defendant proves that any of the following apply:

1. The defect in the product is alleged to result from inadequate design or fabrication, and if the plans or designs for the product or the methods and techniques of manufacturing, inspecting, testing and labeling the product conformed with the state of the art at the time the product was first sold by the defendant;

IND. CODE ANN. § 33-1.5-4 (1983) (West Supp. 1985):

- (a) The defenses in this section are defenses to actions in strict liability in tort. . . .
- (b) With respect to any product liability action based on strict liability in tort:
- (4) When physical harm is caused by a defective product, it is a defense that the design, manufacture, inspection, packaging, warning, or labeling of the product was in conformity with the generally recognized state of the art at the time the product was designed, manufactured, packaged, and labeled.

MICH. COMP. LAWS ANN. §§ 600.2945-.2946 (West Supp. 1983):

Sec. 2945. As used in sections 2946 to 2949 and section 5805, "products liability action" means an action based on any legal or equitable theory of liability brought for or on account of death or injury to person or property caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product.

Sec. 2946. It shall be admissible as evidence in a products liability action that the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling was done pursuant to the generally recognized and prevailing nongovernmental standards in existence at the time the product was sold or delivered by the defendant to the initial purchaser or user.

These statutes are troublesome because they appear to recognize the state-of-the-art defense, and therefore negligence theory, in manufacturing defect cases. Nonetheless, I know of no decision refusing to apply strict liability in a production defect case. Thus, no need exists to legislate in an area where the courts are having no problems.

84. For potential litigation problems that a statutory provision mandating strict liability in production defect cases would affect, see Twerski, *supra* note 26, at 419-21.

proposed statute, I will admit to some misgivings in abolishing it. In a lengthy article, I argued that with proper judicial oversight the consumer expectation test could fill a void in the law.⁸⁵ The consumer expectation test could address the problem of overzealous advertising that creates expectations yet falls below the threshold necessary to establish an action in express warranty or misrepresentation.⁸⁶

Nonetheless, I am now convinced that risk-utility balancing provides the only viable test for liability. *Campbell v. General Motors Corp.*⁸⁷ gives evidence that courts will probably not place sensible limitations on the consumer expectation test. Indeed, once the courts have a common law liability standard in torts litigation, they have an inclination to automatically make the issue one for the jury.⁸⁸ Furthermore, as Professor Schwartz has noted, the negligent failure-to-warn claim covers a good bit of conduct that the consumer expectation test would cover.⁸⁹ In this imperfect world, we must make choices. A simple and easily understood rule will ultimately bring about greater justice and fairness than a substantively superior one that trial judges and juries would probably mishandle.

My proposal's placement of the burden of proof on the plaintiff runs counter to *Barker v. Lull Engineering Co.*⁹⁰ In that case, the court shifted the burden of proof on risk-utility to the defendant because the defendant was in a better position than the plaintiff to prove that the alternatives suggested by plaintiff were impractical or uneconomical.⁹¹ Although this position has merit, the burden shifting makes it close to impossible for a defendant to obtain a directed verdict in a frivolous case. The adage that "he who bears the burden of proof never gets a directed verdict" is essentially accurate. No product liability system

85. See Twerski, *supra* note 16.

86. *Id.* at 897-901.

87. 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).

88. See generally W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 37 (5th ed. 1984).

89. Professor Schwartz is generally critical of the *Barker* court's creation of an independent consumer expectations prong. See Schwartz, *supra* note 19, at 475-81. In his thesis, he questions the weight given to "affirmative" statements that fall short of misrepresentation and express warranty. Compare *supra* note 19. Schwartz further observes that in many cases a negligent failure-to-warn claim will subsume the consumer expectations test. As he explains, "negative" communications in the form of warnings about the product's dangers optionally serve to lower reasonable expectations about function and safety. *Id.* at 476. Therefore, in cases where an effective warning corrects misimpressions, or, in the alternative, where the fact finder is convinced that an appropriate warning would have served this function, no need exists for an independent consumer test.

90. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

91. *Id.* at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237.

should permit meritless cases to proceed to jury verdict. The only available judicial screening devices to prevent jury lawlessness are the motions for directed verdict or the motion notwithstanding the verdict. These devices become a dead letter when the defendant bears the burden of proof.

The issue of the imputation to the defendant of after-acquired knowledge has been blown well out of proportion. With state-of-the-art defenses well in place in most jurisdictions, courts will not hold defendants liable for technological changes that they could not reasonably have attained at the time they distributed the product.⁹² Most of the courts that claim to apply strict liability for dangers or risks attendant to the use of a product are not prepared to impose liability for information that the defendant could not have reasonably foreseen at the time of distribution.⁹³ At best, the plaintiff may impute to the defendant information available at the time of distribution without having to prove the defendant's negligence in failing to obtain that information. Because, however, courts generally hold the defendant to the standard of an expert in the particular industry,⁹⁴ if the information was available at the time of distribution, then the plaintiff should have little difficulty in convincing a jury that the defendant could have reasonably foreseen it.

It is interesting to note that in the most heralded product liability cases of the decade, DES and asbestos, courts relied for the most part on negligence grounds.⁹⁵ In fact, in many of the

92. See *supra* notes 45-46 and accompanying text.

93. Courts treat failure to warn as either an aspect of a product's design or as an independent basis of liability. When given the latter status, they read the "duty to warn" literally and generally do not expect the manufacturer to warn of unknown or unforeseeable risks. See Wade, *supra* note 29, at 747 & n.52; see also cases cited in *supra* notes 67-68.

94. As Dean Prosser noted, when liability is predicated on negligence, the manufacturer is held to the standard of an expert in his field. W. PROSSER, *LAW OF TORTS* § 96 (4th ed. 1971); see, e.g., *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 159 (8th Cir. 1975); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973); *Moren v. Samuel M. Langston Co.*, 96 Ill. App. 2d 133, 237 N.E.2d 759, 765 (1968); *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 203, 241 N.W.2d 822, 830 (1976); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 452, 479 A.2d 374, 386 (1984); *Seward v. Natural Gas Co.*, 11 N.J. Super. 144, 78 A.2d 129 (1950), *rev'd on other grounds*, 8 N.J. 45, 83 A.2d 716 (1951); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 28.4 (1956).

95. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (DES), *cert. denied*, 449 U.S. 912 (1980); *Payton v. Abbott Laboratories*, 386 Mass. 540, 437 N.E.2d 171 (1982) (DES); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (DES), *cert. denied*, 105 S. Ct. 123 (1984); *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982) (DES); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973) (asbestos), *cert. denied*, 419 U.S. 869 (1974); *Starling v. Seaboard C.L. R.R. Co.*, 533 F. Supp. 183 (S.D. Ga. 1982) (asbestos); *Aguilar v. Johns-Manville Corp.*, No. 400769 (San Diego Cty. Super. Ct. Sept. 8, 1981) (refusing to

asbestos cases plaintiffs recovered punitive damages, indicating that these plaintiffs established not only fault but grievous fault as well.⁹⁶ Moreover, the same court that decided *Beshada* has unwittingly embraced the section 402A comment (k)⁹⁷ exception exempting drugs from strict liability.⁹⁸ The use of after-acquired knowledge had potential for the greatest impact in the drug field because drugs tend to have a long latency period and side effects

apply *Sindell* in an asbestos case) (order without opinion).

96. See, e.g., *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811 (6th Cir. 1982) (upholding \$500,000 award on appeal); *Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982) (awarding \$343,000 punitive damages against Johns-Manville and \$95,000 punitive damages against Celotex, another asbestos manufacturer); *Hansen v. Johns-Manville Corp.*, No. G-79-124 (S.D. Tex. 1982) (\$1,000,000), *aff'd in part, rev'd in part*, 734 F.2d 1036 (5th Cir. 1984) (allowing award of punitive damages but reducing amount to \$300,000).

97. See *infra* note 137 for the full text of RESTATEMENT (SECOND) OF TORTS § 402A comment (k) (1965).

98. *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984). In *Feldman* the New Jersey Supreme Court opened its opinion by expressly rejecting the blanket application of the § 402A comment k unavoidably unsafe product exception to prescription drugs. The court wrote that "drugs, like any other products, may contain defects that could have been avoided by better manufacturing or design. Whether a drug is unavoidably unsafe should be decided on a case-by-case basis. . . ." *Id.* at 447, 479 A.2d at 383. The court further stated that comment k would not eliminate strict liability for failure to provide a proper warning even if a prescription drug were found to be unavoidably unsafe. *Id.*

Noting that *Feldman* involved a strict liability, failure-to-warn cause of action, the New Jersey Supreme Court next discussed the difference between the negligence and strict liability theories:

This difference between strict liability and negligence is commonly expressed by stating that in a strict liability analysis, the defendant is assumed to know of the dangerous propensity of the product, whereas in a negligence case, the plaintiff must prove that the defendant knew or should have known of the danger.

Id. at 450, 479 A.2d at 385. The court stated that the issue in strict liability, failure-to-warn cases was whether, assuming that the manufacturer was aware of the defective nature of the product, it [the manufacturer] acted in a reasonably prudent manner in marketing the product or providing the warnings given. At this point, however, the court's analysis reveals some confusion. Discussing available knowledge in the defective warning situation, the court followed the test of RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965), and asked, "Did the defendant know, or should he have known, of the danger, given the scientific, technological, and other information available when the product was distributed. . . ?" 97 N.J. at 452, 479 A.2d at 386. The court then shifted the burden of proof to defendant to show that it [the manufacturer] lacked actual or constructive knowledge of the defect at the time of marketing.

Because the *Feldman* court is in effect saying that it will apply strict liability and assume that defendant knew of the dangerous propensity of the product unless defendant can prove that it did not know and should not have known of the danger, the cause of action becomes negligence with the burden on defendant to prove no actual or constructive knowledge of the danger associated with its product. Whether a New Jersey court decides to apply negligence or "strict liability" to a given case involving prescription drugs, the court will be applying a negligence standard to the manufacturer's conduct. Therefore, the RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965) exemption of drugs from strict liability enters *Feldman* through the back door.

often do not surface until there has been substantial use of the drug.⁹⁹ On the other hand, engineering safety cases rarely involve questions of after-acquired risk knowledge.¹⁰⁰ With those two major areas adequately covered by the negligence principle, there exists little need for polluting the legal atmosphere with strict liability terminology.¹⁰¹

Unfortunately, a small cadre of courts continues to insist on saddling a defendant with true strict liability, effectively imposing on the defendant all the risk information available at the time of trial. As Dean Wade has demonstrated, however, most of the policy reasons that support strict liability cut against the utilization of a "time of trial" standard.¹⁰² I can only conclude that strict liability language adds little but confusion to the proper decision in a design defect or failure-to-warn case. It represents the straw man of modern product liability law. The time has come to return to the normalcy of the well-understood and easily applied negligence principle.

Finally, there remains the question whether a federal negligence standard would alter the result in *O'Brien v. Muskin Corp.*¹⁰³ Candor requires one to admit that a court intent upon accomplishing the result in *O'Brien* could do so even under a negligence regime. I would like, however, to make two observations about this problem. First, even under the unwieldy bills that have been introduced, courts could still reach the *O'Brien* result.¹⁰⁴ Second, the imposition of a federal standard would probably have a leavening effect on state courts. Congress would be sending the message that the nation feels that courts have unreasonably expanded liability.¹⁰⁵ Moreover, the fact that federal courts will be interpreting the meaning of the negligence standard will also have an inhibiting effect. Although the United

99. See Wheeler & Kress, *supra* note 69, at 141-43.

100. *Id.* at 142.

101. See Birnbaum, *supra* note 9; Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983).

102. Wade, *supra* note 29, at 754-56 (1983).

103. 94 N.J. 169, 463 A.2d 298 (1983).

104. See, e.g., S. 100, *supra* note 1, § 5(b)(2)(A) (requiring proof of practical technological feasibility and favorable risk-utility assessment to declare product "not unreasonably dangerous"). H.R. 7000, *supra* note 2, § 5(c)(1) (setting forth basic risk-utility analysis). But see S. 44, *supra* note 2, § 5(b) (requiring alternative design as an element of prima facie case). It should be noted that S. 44 would totally prohibit a plaintiff's recovery no matter how dangerous the product unless an alternative design could be established. As noted in the text this position is hard to justify. See *supra* text accompanying *supra* note 35.

105. Twerski & Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 221, 233 (1978-79).

States Supreme Court will probably not regularly intervene to bring state and federal courts into line,¹⁰⁶ one cannot disregard the Court's potential for involvement. State and federal courts will likely read the federal negligence standard for design and failure-to-warn cases as a mandate for moderation in this genre of litigation.

II. THE CRISIS OF PUNITIVE DAMAGES

Courts and scholars have both extensively addressed the impact of punitive damages on product liability litigation.¹⁰⁷ There

106. See § 9 of the proposed bill. See also S. 100, *supra* note 1, § 18.

107. The writings of Professor David Owen have been very influential. In his 1976 article, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976), Owen gave strong support to the position that punitive damages have a legitimate role to play in products litigation. In his 1982 article, *Problems in Assessing Punitive Damages Against Manufacturing Defective Products*, 49 U. CHI. L. REV. 1 (1982) [hereinafter cited as Owen, *Assessing Punitive Damages*], Professor Owen is far more tentative. Although he still argues for their retention, he points to the potential for serious abuse of punitive damages. See also Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, nn.1-2 (1983) (comprehensive listing of scholarly literature).

In *Fischer v. Johns-Manville Corp.*, 193 N.J. Super. 113, 121-23, 472 A.2d 577, 582-83 (App. Div. 1984) the court reviewed the case law and noted that the following jurisdictions have allowed for punitive damages in products liability cases: Alaska—*Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981) (revolver); Arkansas—*Forrest City Mach. Works, Inc. v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981) (grain cart); California—*Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (automobile fuel system); Delaware—*Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887 (Del. 1983) (sulfuric acid drain cleaner); Florida—*Piper Aircraft Corp. v. Coulter*, 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983) (aircraft part); Hawaii—*Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975) (helicopter part); Illinois—*Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982) (asbestos); Indiana—*Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028 (N.D. Ind. 1981) (motor boat); Minnesota—*Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), *cert. denied sub. nom.* *Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980) (flammable child's pajamas); Missouri—*Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. Ct. App. 1978) (idle cam); New York—*Baleno by Baleno v. Jacuzzi Research, Inc.*, 93 A.D.2d 982, 461 N.Y.S.2d 659 (1983) (hydrotherapy unit); Ohio—*Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811 (6th Cir. 1982) (asbestos); *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981) (roll bar on jeep); Oklahoma—*Thiry v. Armstrong World Indus.*, 661 P.2d 515 (Okla. 1983) (asbestos); Oregon—*State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268 (1980); Pennsylvania—*Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982) (asbestos), and *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973) (prescription drug); South Carolina—*Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64 (D.S.C. 1979), *aff'd per curiam*, 644 F.2d 877 (4th Cir. 1981) (roofing material); Tennessee—*Johnson v. Husky Indus., Inc.*, 536 F.2d 645 (6th Cir. 1976) (charcoal grill); Texas—*Rawlings Sporting Goods Co., Inc. v. Daniels*, 619 S.W.2d 435 (Tex. Civ. App. 1981) (football helmet); Virgin Islands—*Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828 (3d Cir. 1983) (motorcycle); Wisconsin—*Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980) (fuel tank). *But see* *Jackson v. Johns-*

is little need to repeat the arguments pro and con. Two arguments that support the imposition of federal standards controlling punitive damages have, however, received inadequate attention.

A. *Risk-Utility Analysis and Punitive Damages*

Courts have almost exclusively imposed punitive damages in design defect and failure-to-warn cases.¹⁰⁸ The inadvertent production defect case that occurs because of imperfect quality control rarely, if ever, involves the kind of reckless conduct that would support punitive damages. Only design defect and failure-to-warn cases involve the kind of "conscious design choice" that permits a plaintiff plausibly to allege that the defendant behaved so egregiously that a court should impose punitive damages. As noted earlier, both design and failure-to-warn cases require the plaintiff to establish that the defendant failed to meet the standard for product safety that risk-utility balancing mandates.¹⁰⁹ By definition, this balancing process requires a conscious weighing of alternative designs and warnings against the cost of implementing such changes. To inject punitive damages blithely, without carefully limiting the occasions in which courts may impose them, threatens the entire structure of product liability litigation.

It is simply unfair to ask defendant-manufacturers to balance safety, utility, aesthetics, and cost and then to censure them with punitive damages merely because we disagree with their assessment. It is altogether too easy, after the fact, to dredge up an in-house memorandum in which the defendant honestly considered cost factors and to utilize it as "smoking gun" evidence of the defendant's evil intent. As Professor Owen has noted, the argument that the manufacturer "traded [your] life for a dollar [in profit]" has great jury appeal.¹¹⁰ Furthermore, if a manufacturer places itself in jeopardy of suffering punitive damages every time it subjects its risk-utility balancing to scrutiny, one can expect that documentation will be driven underground.¹¹¹

Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984) and the en banc decision reversing the original panel, 750 F.2d 1314 (1985).

108. See cases cited *supra* note 107.

109. See authorities cited *supra* note 41.

110. Owen, *Assessing Punitive Damages*, *supra* note 107, at 11.

111. *Id.* at 16-19; see also Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives*, *supra* note 41, at 369-72.

One can say little in favor of relegating important management decisions to the paper shredder. Courts must exercise heavy control in this emotion-laden area precisely because the issues that support punitive damages so closely relate to the issues that support legitimate or marginally erroneous risk-utility decision making.

B. Punitive Damages and Decision Making

When, in the context of litigation, manufacturers recognize that they have made design errors or failed to warn about dangers adequately, they are naturally inclined to settle the case. By and large, experienced lawyers can calculate with some accuracy the range within which the potential judgment would fall and are thus able to settle.¹¹² Discounting for the risk of potential loss and weighing that risk against the possibility of attaining a verdict at the higher reaches of the projected range is a process with which the plaintiffs' bar is extremely familiar. To be sure, this is not an exact science; rather, it is an art form that operates within discernible guidelines.

When the prospect of punitive damages enters the picture, these guidelines disappear. It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon. Furthermore, a defendant who believes that the situation does not call for punitive damages cannot factor their potential into settlement discussions. To do so is to set a pattern for all future settlements in countless cases already in litigation or yet to be brought. In short, unless the situation truly calls for punitive damages, they sabotage settlement negotiations by thrusting a huge "unknown" into the negotiations.

C. Punitive Damages—A Rational Solution

To bring stability, predictability, and fairness to punitive damages, manufacturers need clearly articulated standards that set forth the kind of aggravated conduct for which courts will impose punitive damages. To ensure that courts control those standards, a plaintiff should have to prove by "clear and con-

112. See, e.g., C. BADWAY, EVALUATION AND SETTLEMENT OF PERSONAL INJURY CASES (1980); N. SHAYNE, EVALUATING AND NEGOTIATING SETTLEMENTS IN PERSONAL INJURY CASES (1982).

vincing evidence" that the defendant violated them. The imposition of a standard higher than the "preponderance of evidence" standard provides the trial judge with a mechanism for rejecting punitive damages when the plaintiff has failed to demonstrate clearly that egregious fault caused the design error or the failure to warn. The key is to provide the trial judge with a screening mechanism to exclude punitive damages from run-of-the-mill products cases.

The proposed statute thus imposes both a high threshold for the nature of the conduct that justifies the imposition of punitive damages and the "clear and convincing evidentiary standard" for proving that the defendant breached that standard. It does not, however, remove the issue from the jury. These safeguards adequately protect defendants. The proposed statute eschews artificial limitations on punitive damages that either impose an artificial cap or prohibit repetitive punitive damage awards against an individual defendant for the same design or warning error.¹¹³ Instead, the jury considers these factors in rendering its verdict. The trial judge and the reviewing court may also consider them in deciding whether the award is excessive.

One can marshal strong arguments in favor of the more radical limitations on punitive damages.¹¹⁴ I have rejected them for two reasons. First, tough standards and a higher evidentiary burden should provide sufficient protection and reduce the problem to manageable proportions. Second, the political realities dictate a more measured response. Consumer groups have waged a vigorous attack on artificial limitations on punitive damages.¹¹⁵ To allow a truly malevolent corporation to wash its hands by paying a sum certain that bears no relation to its bad faith does not seem fair. Compensatory damages do not eliminate this unfairness because the corporation's malevolence may far exceed the damages it will have to pay to injured consumers. Indeed, there may be few actual injuries, or these injuries may be minor; thus, the corporation may still gain significant profit from the

113. See H.R. 5214, *supra* note 2, § 11; S. 44, *supra* note 2, § 12(g) (as amended); S. REP. No. 476, 98th Cong., 2d Sess. 55 (1984).

The approach suggested herein which seeks substantive limitations on punitive damages but which rejects capping was adopted by the Wisconsin court in *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

114. See *Roginsky v. Richardson-Merrell Inc.*, 254 F. Supp. 430 (S.D.N.Y. 1966), *aff'd in part, rev'd in part*, 378 F.2d 832, 839 (2d Cir. 1967); see also *Jackson v. John-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (en banc rehearing).

115. S. 2631 *Hearings*, *supra* note 2, at 132, 271 (statement of David I. Greenberg, Legislative Director, Consumer Fed'n of Am.); S. 44 *Hearings* (Part 1), *supra* note 2, at 341 (statement of Public Citizen's Congress Watch).

sale of the product. Sheer luck should not excuse malevolence where, in fact, it is found to exist. One cannot lightly set aside these arguments; they have very strong political appeal. Consequently, any attempt to control punitive damages must avoid the extremes.

III. THE CRISIS OF CONFLICTING REPARATION SYSTEMS—TORTS AND WORKERS' COMPENSATION

A federal product liability law must unquestionably address the injustices that result from the conflict between the tort and the workers' compensation systems.¹¹⁶ In most states, an employer who pays workers' compensation benefits to an employee injured at the workplace while operating a piece of defective machinery has a subrogation lien against the plaintiff's ultimate tort recovery from the product manufacturer.¹¹⁷ The employer retains this lien even if it was primarily responsible for the injury.¹¹⁸

The present situation is intolerable. The no-fault workers' compensation system bears no responsibility whatsoever for the employers' faulty conduct. By permitting the subrogation lien in favor of the employer, it does more than protect the workers' compensation system from tort recovery: it protects workers' compensation from itself. It does so by benefiting from the tort recovery system without having to pay allegiance to the principles of the system from which it seeks recovery. The tort system would not allow the third-party action without inquiry into the fault of the parties *inter se*.¹¹⁹

This problem has substantial significance because employees implicate employer fault in over half of all employment related product liability claims.¹²⁰ Manufacturers justifiably complain

116. Much of this discussion is reflected in my earlier article dealing with S. 2631. See Twerski, *supra* note 26, at 463-69.

117. See 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 74.00 (1983); see also Casey, *The Relationship Between Products Liability and Worker Compensation—Third Party Rights Against Negligent Employers*, 32 FED. INS. COUNS. Q. 23 (1981).

118. See Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483, 488.

119. W. PROSSER & W. KEETON, *supra* note 88, § 50.

120. INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS REPORT 10, 61-66 (1978). According to the study, plaintiffs implicate employer negligence in 56.3% of all employment related product liability claims. The conclusion that negligence was involved in such a surprisingly high percentage of claims was based on responses to the following question: "Would the in-

that under most state rules the most guilty party often walks away from the lawsuit without contributing anything to the plaintiff's recovery. Instead, the product liability (tort) system bears the entire cost of the injury.

At the other extreme, several states have permitted the products manufacturer to join the employer in order to recover contribution based on proportional fault.¹²¹ In these states, the third-party action has invaded the immunity of the workers' compensation system. What a plaintiff cannot accomplish through the direct action against the employer, the manufacturer can accomplish through the contribution action.¹²² If there was wisdom in creating a system immune to full scale tort recovery, then it is hard to justify this end-run that subjects the employer to the same liability.

sured have implicated the employer but for the Sole Remedy Rule?" The answer to this question, which by inference leads to the conclusion that employer fault was probably involved, resulted in 50.1% affirmative and 49.9% negative answers. When the question was phrased to reflect the percentage of claims with reference to total dollars paid out, the breakdown was 56.3% affirmative and 43.7% negative. The insured's somewhat greater likelihood of impleading the employer, but for the Sole Remedy Rule, in the bigger cases explains this disparity. The 29% larger average payment in cases when the plaintiff affirmatively answered the question set forth above corroborates this indication. See *id.* at 67, Table 10-2.

121. See, e.g., *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *cert. denied*, 436 U.S. 946 (1978). But see Contribution Among Joint Tortfeasors Act § 2, ILL. REV. STAT. ch. 70, § 302 (1979). Professor Larson contends that the 1979 statute would prohibit the result in *Skinner* because it authorizes contribution "where 2 or more persons are subject to liability in tort arising out of the same injury." Larson, *supra* note 118, at 499-500.

122. In *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), the New York Court of Appeals held that an action brought by the manufacturer against the employer for indemnity was "very different" than a direct action by the employee against the employer. *Id.* at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390. While the latter was barred by the Workman's Compensation Act, the recovery by third party plaintiff (the manufacturer) was "based on a separable legal entity of rights." *Id.* The court could therefore hold negligent employer financially responsible to the manufacturer for the employer's full share of the blame in decedent's wrongful death which, depending on the jury's findings, would range from no apportionment to full indemnity. *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92.

The Illinois Supreme Court reached a similar result in holding that their Workmen's Compensation Act did not preclude a contribution action by the manufacturer against the employer. *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *cert. denied*, 436 U.S. 946 (1978). Thus, even though the plaintiff employee could not bring an action against his employer, the third-party plaintiff (manufacturer) could seek recovery from the employer whose alleged "misuse of the product or assumption of the risk of its use" contributed to employees' injuries. *Id.* at 15, 374 N.E.2d at 443. But see *supra* note 121.

Resolving the Conflict

Subtracting the workers' compensation recovery from the tort recovery and abolishing the employer subrogation lien present the simplest method for resolving the conflict between the two reparation systems.¹²³ Because it adopts such an approach, the proposed law would permit the plaintiff to retain the *very same benefits* he now enjoys and, at the same time, shift part of the cost from the manufacturer to the employer where it rightfully belongs.

One might argue that the proposed statute would accomplish "mirror image" injustice.¹²⁴ In effect, the fault-based defendant could shift partial liability for an injury that is entirely the manufacturer's fault to the no-fault system. A moment's reflection, however, will reveal that this situation breeds little injustice. The workers' compensation system, which was established to provide limited recovery for work-related injury, would, in fact, be paying for a work-related injury.

To deny the employer who was truly not at fault his third-party action may be somewhat unfair. It does not, however, violate basic principles of fairness to recognize that when a no-fault system operates side-by-side with a fault system, it is best to permit each system to work separately.¹²⁵ Methods exist to assure that only the truly nonnegligent employer recovers the full subrogation lien and that the negligent employer does not recover the portion of the subrogation lien that represents its percentage of fault.¹²⁶ These methods, however, would require that

123. This approach was advocated by Professor Richard Epstein in *Coordination of Worker's Compensation Benefits with Tort Damage Awards*, 13 FORUM 464 (1978) and in the AMERICAN INSURANCE ASSOCIATION, PRODUCT LIABILITY LEGISLATION PACKAGE 65-66 (1977). It was subsequently proposed in S. 2631, *supra* note 2, § 11; H.R. 5214, *supra* note 2, § 10; and MUPLA, *supra* note 2, § 114. It has been enacted in CONN. GEN. STAT. ANN. § 52-572(r) (West Supp. 1984).

124. See Davis, *The Interaction of Worker's Compensation and Products Liability*, TRIAL, Nov. 1979, at 31, 33.

125. This debate is of ancient vintage. See James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941). The argument in favor of the James position is stronger when contribution is being sought across two different liability systems.

126. See INSURANCE SERVICES OFFICE, *supra* note 120, at 72-74; Draft Uniform Product Liability Law (UPLL) § 113, reprinted in 44 Fed. Reg. 2996, 3001 (1979). The MUPLA, *supra* note 2, § 114, changed the UPLL approach that allowed the manufacturer contribution up to the amount of the worker compensation lien "where the employer's failure to comply with any statutory or common law duty contributed to the claimant's injuries." UPLL § 113. The UPLL approach does have some support in case law. See *Santisteven v. Dow Chem. Co.*, 506 F.2d 1216, 1220 (9th Cir. 1974); *Lambertson*

a court try the issue of fault and apportion it between the employer and manufacturer to assure that the employer does not receive more than his equitable share in the subsequent contribution action.¹²⁷ Such an approach would not only increase transaction costs, it would also present to the jury difficult apportionment questions that relate to the workplace setting where fault apportionment may be difficult to accomplish.¹²⁸

Finally, the proposed statute will preclude a manufacturer from bringing a contribution action against an employer. This will assure the immunity of the workers' compensation system. Although at present only a handful of states provide for such contribution, the dissatisfaction with the present system could cause other states to follow the lead of New York and Illinois by permitting contribution to redress the grievances of manufacturers.¹²⁹ The proposed statute resolves the conflicting interests in a Solomon-like fashion. It enjoys broad-based support from insurers and manufacturers. Consumer groups have no partisan interest in the matter because plaintiffs will retain the full recovery the tort system grants them. The legislation only affects contribution between the defendant manufacturer and the employer. If anything, eliminating the subrogation lien should increase employers' care by holding them liable for the workers' compensation share of the ultimate recovery. Consumers and manufacturers should both welcome this nudge toward added safety.

IV. THE CRISIS OF THE INNOCENT DEFENDANT

Most jurisdictions hold retailers and wholesalers strictly liable as sellers of defective products.¹³⁰ These retailers and wholesalers complain that for the most part they must ride along as de-

v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679 (1977).

127. See authorities cited *supra* note 126.

128. *Id.*

129. See *supra* note 122.

130. See RESTATEMENT (SECOND) OF TORTS § 402A (1965). See, e.g., Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965); Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (1975); Brannon v. Southern Ill. Hosp. Corp., 69 Ill. App. 3d 1, 386 N.E.2d 1126 (1978); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Ortiz v. Farrell Co., 171 N.J. Super. 109, 407 A.2d 1290 (1979); Mead v. Warner Prunyn Div., 57 A.D.2d 340, 394 N.Y.S.2d 483 (1977); Chandler v. Northwest Eng'g Co., 111 Misc. 2d 433, 444 N.Y.S.2d 398 (1981); Hoffman v. Loos & Dilworth, Inc., 307 Pa. Super. 131, 452 A.2d 1349 (1982). But see Ellis v. Rich's Inc., 233 Ga. 573, 212 S.E.2d 373 (1975); Price v. Gatlin, 241 Or. 315, 405 P.2d 502 (1965); Walker v. Decora, Inc., 221 Tenn. 504, 471 S.W.2d 778 (1971).

fendants in cases in which they bear no ultimate liability.¹³¹ Even if courts enforced judgments against these intermediate sellers, they would be entitled to full indemnity because they bear no actual responsibility for the product defect.

The proposed bill permits courts to release the nonmanufacturing seller from the case unless: (1) it cannot assert jurisdiction over the manufacturer; (2) there exists a "reasonable likelihood" that the plaintiff will ultimately be unable to collect a judgment against a manufacturer; or (3) the plaintiff alleges primary negligence against the nonmanufacturing seller.¹³² For all practical purposes the proposed bill tracks the philosophy of previous legislative efforts. The most significant change is that the intermediary remains in the case if there exists a "reasonable likelihood" that the plaintiff will be unable to collect the judgment against the manufacturer. The previously introduced bills required a court to determine that the claimant "would be unable" to enforce a judgment against a manufacturer. Even with its "reasonable likelihood" standard, the suggested change creates a potential that an innocent plaintiff will suffer if the court guesses wrong and insolvency problems develop in the lag time between pleading and judgment.

Nonetheless, trade-offs are in order. The transaction costs of keeping a "dummy" defendant in the case are significant. If the plaintiff can be assured that a court has made a good faith effort to determine whether trouble is over the horizon, that should be sufficient. It would simply be unfair to adopt an alternative that loads nonproductive legal costs on a system that is already overburdened with them. In essence, the one-in-a-million case should not govern the law of product liability.

V. THE CRISIS OF IGNORANCE

Damages provide the critical link between legal rules and the behavior of individuals in the real world. Although the fairness and economic efficiency of our tort system depend upon appropriate damage awards, we have no useful damage award data on which to evaluate the efficacy of our legal rules. To the extent we rely on these awards to allocate funds for the development of safer products, legislators and manufacturers alike cannot con-

131. S. 44 Hearings (Part 1), *supra* note 2, at 199 (statement of Dirk Van Dongen, President, National Association of Wholesalers—Distributors).

132. See *infra* §§ 4, 5 of the proposed bill.

tinue to operate under this veil of ignorance.

Consequently, we need a comprehensive study of the actual facts concerning damages in products liability litigation. It is time to know which fears are real and which are imagined. Unlike previously introduced bills, this bill seeks no new study of future legislative alternatives to the present liability system. Before a legislature undertakes any such initiative, it must know with far greater precision the dimensions of the problems facing both consumers and manufacturers. The proposed bill calls for a thorough empirical study of damages and their effects on consumers and industry.¹³³

VI. STATUTORY REFORM—STRUCTURE AND ANALYSIS

The product liability statute that I propose differs significantly from past legislative proposals. To date, congressional committees have been presented with comprehensive product liability codes that purport to deal with all phases of the cause of action.¹³⁴ They have addressed the following issues: production defect, design defect, failure to warn, instructions, express warranty, product misuse, product alteration, contributory fault, assumption of risk, unavoidably dangerous products, inherently dangerous products, obvious dangers, technological feasibility, liability of wholesalers and retailers, joint and several liability, statutes of repose and statutes of limitation, workers' compensation, punitive damages, and subsequent remedial measures. In fact, the bill introduced last year attempted to compress two hundred years of tort case law into twenty-nine printed pages.¹³⁵ Little wonder that it was self-contradictory, ambiguous, and substantively unfair to both consumers and manufacturers.¹³⁶

The legislation I propose does not seek to rewrite the law of

133. This study should address questions such as the following: How much money is truly sufficient to compensate a seriously injured plaintiff? What, in fact, is the actual relationship between economic loss damages, and pain and suffering damages in product liability cases? Is there a difference between damages depending on product category? Do drug cases draw damages awards that are greater than injuries of comparable severity arising out of auto defects? Are punitive damages the monster that they are made out to be? Has the availability of repetitive punitive damages been a significant factor in product liability litigation, and, if so, have such damage awards been unfair to corporations? What is the relationship between punitive damages and settlement practice?

134. See *supra* notes 1 and 2.

135. S. 44, *supra* note 2, § 90.

136. S. 44 *Hearings* (Part 2), *supra* note 2, at 481-94 (letter from Professor Aaron D. Twerski to Hon. Ernest F. Hollings).

torts nor to legislate in problem-free areas. It does not curb the courts from developing reasonable case law with regard to issues that have not yet been fully explored. It eschews the use of convoluted language that seeks to limit traditional fact-finding by juries. Instead, the proposed federal statute takes dead aim at the crisis issues. In my opinion, the five topics my proposed legislation addresses constitute the only issues that threaten the integrity of products litigation. Having taken the position that federal legislation need only respond to those areas that threaten the integrity of product liability litigation, I will now explain why I have excluded other issues that previous bills have included.

A. *Unavoidably Dangerous Product*

Many of the proposed bills have provided special exceptions from liability for the "unavoidably dangerous product".¹³⁷ These sections attempt to rephrase comment (k) to section 402A of the *Restatement (Second) of Torts* in more elegant language.¹³⁸ In

137. S. 100, *supra* note 1, §§ 5(b)(2)(B), 5(b)(3); H.R. 2729, *supra* note 2, § 5(c)(4)(C); S. 44, *supra* note 2, § 5(C); S. 2631, *supra* note 2, § 5(C); H.R. 7000, *supra* note 2, §§ 7(a), (b).

RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965) covering "unavoidably unsafe products" states:

k. Unavoidably unsafe products. 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. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

138. See, e.g., S. 100, *supra* note 1:

Sec. 5(b)(2). A product is not unreasonably dangerous in design or formulation

light of the adoption of a negligence standard for both design and failure-to-warn cases, there is no need to add a special section dealing with unavoidably dangerous products. It could only needlessly confuse the courts and complicate litigation.

One need not deny that defendants should not be held liable for all unavoidable dangers that can result from the use of a product. Allergic reactions to drugs such as penicillin exemplify this product category. Still, legislators need not create a special statutory exemption to absolve penicillin manufacturers from liability. Given the negligence standard that governs all design and warning cases, penicillin simply does not constitute an unreasonably dangerous product.¹³⁹ Its benefits far outweigh its known risks.

Manufacturers may still have to warn consumers from time to time about unavoidable risks so that consumers can choose whether they wish to take the chance with the medication or suffer the ills that will befall them if they do not take the drug. None of the proposed bills free the manufacturer of an unavoidably dangerous product from warning about "unavoidable dangers."¹⁴⁰ Thus, the manufacturer has either reasonably designed

if the manufacturer proves by a preponderance of the evidence that, at the relevant point in time—

- (B) the harm was caused by an unavoidably dangerous product. . . .

Sec. 5(b)(3). As used in paragraph (2)(B), "an unavoidably dangerous product" means a product that, at the relevant point in time—

- (A) is useful and desirable to the public;
- (B) has a known but reasonable risk which, in the light of the state of scientific and technical knowledge at that time, cannot be made safe without impairing the effectiveness of the product's intended and ordinary use; and
- (C) would have been made by a reasonable manufacturer using that particular design or formulation.

S. 44, *supra* note 2:

Sec. 5(c). A product is not unreasonably dangerous in design or formulation if the harm was caused by an unavoidably dangerous aspect of a product. As used in this paragraph, an "unavoidably dangerous aspect" means that aspect of a product which could not, in light of knowledge which was reasonably accepted in the scientific, technical, or medical community at the time of manufacture, have been eliminated without seriously impairing the effectiveness with which the product performs its intended function or the desirability, economic and otherwise, of the product to the person who uses or consumes it.

139. See RESTATEMENT (SECOND) OF TORTS § 402A comment (k) (1965) (quoted *supra* note 137).

140. See, e.g., H.R. 7000, *supra* note 2:

Sec. 7(a). Notwithstanding section 5 or 6, a product seller shall not be subject to liability for harm caused by an unavoidably dangerous aspect of a product unless—

- (1) the product seller knew or had reason to know of such aspect

the so-called "unavoidably dangerous" product (in effect, has not designed it negligently) or has adequately warned against the product's danger. Because the proposed bill adequately provides for both contingencies by predicating liability only after negligence has been established, there is no need for the separate section.

B. Comparative Fault

In an article dealing with an earlier legislative initiative, I suggested the need to settle the controversy over the applicability of comparative fault to strict product liability.¹⁴¹ Even then, I did not advocate stripping the state courts of the right to decide in which cases they should reduce the plaintiff's verdict by the percentage of his or her fault.¹⁴² I now recant my earlier opinion. Not only is there no need to legislate in this area, I believe that legislation would likely create havoc.

The comparative negligence revolution is almost complete. At last count, forty-three states had adopted some form of comparative fault.¹⁴³ The vast majority of states that have passed on

and . . .

- (2) failed to meet a duty to provide instructions or warnings under section 5 or 6.

See also Twerski, *supra* note 26, at 430 (discussing S. 2631).

141. See Twerski, *supra* note 26, at 458-63.

142. *Id.* at 463.

143. (1) Alaska, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); (2) Arizona, ARIZ. REV. STAT. ANN. § 12-1205-09 (Supp. 1984); (3) Arkansas, ARK. STAT. ANN. §§ 27-1963 to -1965 (1979); (4) California, Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); (5) Colorado, COLO. REV. STAT. § 13-21-406 (Supp. 1984); (6) Connecticut, CONN. GEN. STAT. ANN. § 52-572o (Supp. 1984); (7) Delaware, DEL. CODE ANN. tit. 10, § 10-8132 (Supp. 1984); (8) Florida, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); (9) Hawaii, HAWAII REV. STAT. § 663-31 (1976); (10) Idaho, IDAHO CODE §§ 6-803 to -806 (1979); (11) Illinois, Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); (12) Indiana, IND. CODE ANN. §§ 34-4-33-1 to -6 (West Supp. 1984); (13) Iowa, IOWA CODE § 668.3 (1984); (14) Kansas, KAN. STAT. ANN. § 60-258(a) (1983); (15) Kentucky, Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984); (16) Louisiana, LA. REV. STAT. ANN. § 2323 (West Supp. 1985); (17) Maine, ME. REV. STAT. ANN. tit. 14, § 156 (1980); (18) Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984); (19) Michigan, MICH. COMP. LAWS ANN. § 600.2949 (West Supp. 1984); (20) Minnesota, MINN. STAT. ANN. § 604.01 (West Supp. 1984); (21) Mississippi, MISS. CODE ANN. § 11-7-15 (1972); (22) Missouri, Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983); (23) Montana, MONT. CODE ANN. §§ 27-1-702 to -703 (1983); (24) Nebraska, NEB. REV. STAT. § 25-1151 (1979); (25) Nevada, NEV. REV. STAT. § 41.141 (1979); (26) New Hampshire, N.H. REV. STAT. ANN. § 507:7-a (1983); (27) New Jersey, N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (Supp. 1984); (28) New Mexico, Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); (29) New York, N.Y. CIV. PRAC. LAW AND RULES § 1411 (McKinney 1976); (30) North Dakota, N.D. CENT. CODE § 9-10-07 (1976); (31) Ohio, OHIO REV. CODE ANN. § 2315.19 (Page 1981); (32) Oklahoma, OKLA. STAT. ANN. tit. 23, §§ 13-14

the applicability of comparative fault to product liability cases have permitted the reduction to take place when plaintiff has been at fault.¹⁴⁴ In some instances, states have exempted some particular form of plaintiff conduct from comparative fault.¹⁴⁵ Nevertheless, these exceptions may, on a case-by-case basis, be totally justified. Furthermore, no matter how sweeping the language of legislation, courts will find the latitude to carve out exceptions when the failure to do so will result in grave injustice.

There is, however, a more serious problem that militates against a federal solution. Although four-fifths of the states have adopted comparative fault, they have differed sharply as to the preferred form of comparative fault. Sixteen states have adopted pure comparative fault.¹⁴⁶ The large majority, however, have enacted one of the "modified" forms of comparative fault that permit a plaintiff to recover only if the plaintiff's negligence was either "not as great as"¹⁴⁷ or "not greater than"¹⁴⁸ that of the defendant; otherwise, the common law contributory negligence

(West Supp. 1984); (33) Oregon, OR. REV. STAT. § 18.470 (1981); (34) Pennsylvania, PA. CONS. STAT. ANN. § 42-7102 (Purdon 1982 & Supp. 1984); (35) Rhode Island, R.I. GEN. LAWS §§ 9-20-4 to -4.1 (1984); (36) South Dakota, S.D. CODIFIED LAWS ANN. § 20-9-2 (1979); (37) Texas, TEX. REV. CIV. STAT. ANN. art. 2212(a) (Vernon Supp. 1985); (38) Utah, UTAH CODE ANN. § 78-27-37 to -43 (1977); (39) Vermont, VT. STAT. ANN. tit. 12, § 1036 (Supp. 1984); (40) Washington, WASH. REV. CODE ANN. §§ 4.22.005 to .920 (Supp. 1985); (41) West Virginia, *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979); (42) Wisconsin, WIS. STAT. ANN. § 895.045 (West 1983); (43) Wyoming, WYO. STAT. § 1-1-109 (1977). *See also* Puerto Rico, P.R. LAWS ANN. tit. 31, § 5141 (1968); Virgin Islands, V.I. CODE ANN. tit. 5, § 1451 (Supp. 1982).

144. *See, e.g.*, *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *Busch v. Busch Constr. Co.*, 262 N.W.2d 377 (Minn. 1977); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978); *Duncan v. Cessna Aircraft*, 665 S.W.2d 414 (Tex. 1984); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). *But see* *Correia v. Firestone Tire & Rubber Co.*, 446 N.E.2d 1033 (Mass. 1983); *Youngs Mach. Co. v. Long*, 692 P.2d 24 (Nev. 1984).

145. *See* ARIZ. REV. STAT. ANN. § 12-2505A (Supp. 1984). There is no right to comparative negligence in favor of any claimant who has intentionally, willfully, or wantonly caused or contributed to the injury or wrongful death. IND. CODE ANN. § 34-4-33-2 (a) (West Supp. 1984). "As used in this chapter: 'Fault' includes any act or omission that is negligent, willful, wanton or reckless toward the person or property of the actor or others, but does not include an intentional act." *See also* *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 273 N.W.2d 233 (1979).

146. These states are Alaska, Arizona, California, Colorado, Connecticut, Florida, Illinois, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington. *See supra* note 143.

147. These states include Arkansas, Idaho, Kansas, Maine, Nebraska, North Dakota, South Dakota, Utah, and Wyoming. *See supra* note 143.

148. This list includes Delaware, Hawaii, Indiana, Iowa, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, and Wisconsin. *See supra* note 143.

rule governs. The federal legislative proposals adopt the "pure" comparative fault approach in all product liability cases. They give no attention to how the state and federal systems will interact. If Congress enacted a statute that failed to address the interaction of these two systems, I believe that serious trouble would follow.

Consider the following hypothetical. Two drivers exhibit negligent conduct that contributes to the collision of their respective cars. In addition, a brake defect in one of the cars contributed to the collision. A jury found the following fault percentages:

Driver of Car No. 1 19% at fault

Driver of Car No. 2 51% at fault

Car Manufacturer 30% at fault

Under the proposed federal bills that adopt pure comparative fault, the drivers of both cars could sue each other and the car manufacturer and could recover the totality of their damages less the percentage attributed to their own fault. The result in those states that follow the modified form of contributory fault, however, would be very different. The driver of car no. 2 bears fifty-one percent of the fault and thus could not recover anything. Why should his rights change merely because the accident involved a defective product?

Any attempt to resolve this problem by applying pure comparative fault to one part of the action and modified comparative fault to the nonproduct part is doomed to failure. The case would take on the character of chop suey. The systems cannot operate on a mix-and-match basis. I conclude that because there is little to gain and much to lose by federal legislation in this area, Congress should leave this area of law to the states.

C. Misuse and Alteration

The proposed federal product liability bills contain convoluted and complex language on the issue of product misuse and alteration.¹⁴⁹ Courts would likely read the language to the jury verbatim; their instincts of self-defense and protection from appellate reversal would mandate this practice. Moreover, the misuse and alteration issues would ultimately raise the proximate cause is-

149. S. 100, *supra* note 1, §§ 9(c), (d), (f); S. 44, *supra* note 2, § 10; H.R. 2729, *supra* note 2, §§ 9(b)(5)(A), 9(b)(5)(B)(i), 9(b)(5)(B)(ii); S. 2631, *supra* note 2, § 10; H.R. 5214, *supra* note 2, § 5(c)(4); H.R. 7000, *supra* note 2, §§ 12(c), (d); H.R. 5626, *supra* note 2, §§ 7, 8.

sue.¹⁵⁰ If lawyers have learned anything about the law of torts in the last century, it is that proximate or legal cause has no simple verbalizations.¹⁵¹ No alternative to good judging exists to resolve this issue at the directed verdict stage. Once the court gives the case to the jury, complex verbalizations tend to impede the desired product—the reaction of the community about the fairness of recovery in the particular case.¹⁵²

Finally, no evidence indicates that courts have dealt with the misuse and alteration issue irresponsibly. By and large, comparative fault principles have operated to reduce manufacturers' liability.¹⁵³ In fact, by imposing pure comparative fault, manufacturers will probably not prevail as often because, in many of the misuse and alteration cases, plaintiff's fault exceeds the fault at-

150. For an analysis of the relationship between proximate cause and the misuse/alteration problem, see Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1978); Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With an Old Meaning*, 29 MERCER L. REV. 447 (1978); W. PROSSER & W. KEETON, *supra* note 88, at § 102.

151. The attempts to capture the essence of proximate cause are legion. See, e.g., A. BECHT & F. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* (1961); L. GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927); H.L.A. HART & A. HONORE, *CAUSATION IN THE LAW* (1959); W. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* (1963); McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925); RESTATEMENT (SECOND) OF TORTS §§ 435-453 (1965); Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocations of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1.

152. In *Marshall v. Nugent*, 222 F.2d 604 (1st Cir. 1955), Chief Judge Magruder presents the clearest articulation of this view.

When an issue of proximate cause arises in a borderline case, as not infrequently happens, we leave it to the jury with appropriate instructions. We do this because it is deemed wise to obtain the judgment of the jury, reflecting as it does the earthy viewpoint of the common man—the prevalent sense of the community—as to whether the causal relation between the negligent act and the plaintiff's harm which in fact was a consequence of the tortious act is sufficiently close to make it just and expedient to hold the defendant answerable in damages. That is what the courts have in mind when they say the question of proximate causation is one of fact for the jury . . . similar to the issue of negligence, which is left to the jury as an issue of fact. Even where on the evidence the facts are undisputed, if fair-minded men might honestly and reasonably draw contrary inferences as to whether the facts do or do not establish negligence, the court leaves such issue to the determination of the jury, who are required to decide, as a matter of common-sense judgment, whether the defendant's course of conduct subjected others to a reasonable or unreasonable risk, i.e., whether under all the circumstances the defendant ought to be recognized as privileged to do the act in question or to pursue his course of conduct with immunity from liability for harm to others which might result. . . .

Id. at 611 (citations omitted).

153. See, e.g., *Murray v. Fairbanks Morse*, 610 F.2d 149 (3rd Cir. 1979); *Sun-Valley Airlines Inc. v. Avco Lycoming Corp.*, 441 F. Supp. 598 (D. Idaho 1976); *Thibault v. Sears Roebuck & Co.*, 118 N.H. 801, 395 A.2d 843 (1978); *General Motors v. Hopkins*, 548 S.W.2d 344 (Tex. 1977).

tributed to the manufacturer. In this area, Congress ought to let well enough alone.

D. Statutes of Repose and Limitations

The federal legislation that I have proposed does not provide for a statute of repose. The enactment of a negligence standard for design and warning cases removes much of the need for a repose statute. For plaintiffs to establish a *prima facie* case, they will have to prove that a reasonable person in the defendant's position would have acted otherwise. In cases where the time lag is substantial, the negligence is difficult to establish. Furthermore, political realities caused the drafters to include a long repose period in the draft bill that only applied to capital machinery.¹⁵⁴ Other proposed repose statutes would create exceptions for the latent injury cases which are the source of so much of the controversy.¹⁵⁵

The proposed repose periods can bring little solace to manufacturers. At the same time, they call forth extraordinary opposition from consumers. In the case of latent production defects, the consumer position has merit. If a plaintiff can establish that a product was, in fact, defective at the time sold, there is little reason that the age of the product should serve as a defense. Because politics preclude the accomplishment of significant protection for manufacturers at the federal level, there is no good reason to jeopardize important substantive reform for the sake of so little. There is also much to be said for the experiment of federalism on this issue. Many states have enacted statutes of repose,¹⁵⁶ and it would be worthwhile to monitor the results at the state level before taking precipitous federal action.

The enactment of a statute of limitation tied to discovery of injury would represent a real accomplishment. Some of the state statutes truly prejudice claimants.¹⁵⁷ If Congress enacts a repose

154. S. 100, *supra* note 1, § 11; S. 44, *supra* note 2, § 12; S. 2631, *supra* note 2, § 12.

155. *E.g.*, S. 100, *supra* note 1, § 11 (b)(3); S. 44, *supra* note 2, § 12(b)(3); S. 2631, *supra* note 2, § 11(B)(2) (alternate section); H.R. 7000, *supra* note 2, § 10(5)(2)(B).

156. *See, e.g.*, Alabama, ALA. CODE § 6-5-502 (c) (Supp. 1984); Arizona, ARIZ. REV. STAT. ANN. § 12-551 (West 1982); Florida, FLA. STAT. ANN. § 95.031 (West 1982); Illinois, ILL. ANN. STAT. ch. 110, § 13-213(d) (Smith-Hurd 1984). For a more thorough listing of state statutes of repose, see *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 879 (E.D.N.Y. 1984).

157. *See, e.g.*, TENN. CODE ANN. § 28-3-104(b) (1980); VA. CODE ANN. § 8.01-230 (1984). Statutes which run from the time of injury have been narrowly construed. *See, e.g.*, *Fleishman v. Eli Lilly & Co.*, 62 N.Y.2d 888, 467 N.E.2d 517, 478 N.Y.S.2d 853

statute, then fairness dictates a balance between it and a discovery statute. States, however, are actively reviewing their statutes of limitation.¹⁵⁸ Many have responded to the very special problems raised by latent disease cases.¹⁵⁹ In this area, federal legislation provides neither salvation for manufacturers nor a bonanza for consumers and, therefore, Congress should leave this legislation to the states.

CONCLUSION

A need exists to clarify the law of product liability in several areas that have reached the "crisis" stage. The bill that I have proposed would accomplish the following reforms. First, section four addresses the crisis in standards for liability in defective design and failure-to-warn cases. It eliminates strict liability and, instead, judges these cases on a negligence standard. It then gives the plaintiff the burden of proving negligence. It also discards the consumer expectation test in these defective design and failure-to-warn cases and prohibits the introduction of post-distribution modification evidence in those states that forbid the use of such evidence in negligence cases. Finally, it does not hold manufacturers liable for failing to warn about dangers that they could not have foreseen at the time of distribution, nor does it hold them liable for not implementing design changes that were not economically or technologically feasible at the time of distribution.

Second, section seven responds to the crisis of standards for the imposition of punitive damages. It permits these damages only in cases of reckless disregard of human safety. To obtain punitive damages, the plaintiff has to establish the defendant's recklessness by clear and convincing evidence.

Third, section six deals with the crisis in rules for allocating damages between the tort and workers' compensation systems. It reduces an employee-plaintiff's product liability claim by the amount of workers' compensation benefits. It also denies an em-

(1984); *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981).

158. Courts and legislators have been actively reviewing these policies in which the statute of limitations bars a cause of action before discovery of the injury. *See, e.g.*, *Poffenberger v. Risser*, 290 Md. 631, 431 A.2d 677 (1981); *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983); CONN. GEN. STAT. ANN. § 52-577a (West Supp. 1984); ILL. ANN. STAT. ch. 110, § 13-213(d) (Smith-Hurd 1984).

159. ALA. CODE § 6-5-502(b) (Supp. 1984); IDAHO CODE § 6-1303(2)(b)(4) (Supp. 1984); KAN. STAT. ANN. § 60-3303(b)(D) (1983).

ployer, or its workers' compensation insurer, any implied indemnity against a manufacturer or seller for a defective product claim and denies a third-party tortfeasor any implied indemnity against the employer.

Finally, section five addresses the crisis in the rules governing the liability of intermediary sellers who bear no responsibility for product quality. These sellers, namely wholesalers and retailers, are held liable for their primary negligence. They are also held liable as manufacturers if the plaintiff cannot assert jurisdiction over the defendant or if the court determines that there is a reasonable likelihood that the plaintiff would be unable to enforce a judgment against the manufacturer.

These four very short and easily understandable sections contain the substantive provisions that would accomplish these goals. They should not complicate the law nor confuse juries. It is time for the adoption of this "moderate and restrained" product liability legislation.¹⁶⁰

VII. THE PROPOSED STATUTE

A BILL

To regulate interstate commerce by providing for uniform treatment of selected product liability problems, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Sec. 1. This Act may be cited as the "Product Liability Act."¹⁶¹

160. I have purloined this phrase from the late Professor Brainerd Currie. See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

161. I have taken many of the sections of my proposed bill from bills that have already been introduced. In many instances I have deleted or altered language to fit the more limited statutory scheme outlined in the article.

DEFINITIONS

Sec. 2. As used in this Act—

- (1) “claimant” means any person who brings a product liability action, and if such an action is brought through or on behalf of an estate, the term includes the claimant’s decedent, or if such an action is brought through or on behalf of a minor, the term includes the claimant’s parent or guardian;¹⁶²
- (2) “clear and convincing evidence” is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; the level of proof required to satisfy this standard is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt;¹⁶³
- (3) “commerce” means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside of that State; or (B) which affects trade, commerce, or transportation described in clause (A);¹⁶⁴
- (4) “manufacturer” means (A) any person who is engaged in a business to design or formulate and to produce, create, make, or construct any product (or component part of a product); (B) a product seller with respect to all aspects of a product (or component part of a product) which are created or affected when, before placing the product in the stream of commerce, the product seller designs or formulates and produces, creates, makes, or constructs an aspect of a product (or component part of a product) made by another; or (C) any product seller not described in clause (B) which holds it-

162. This provision’s source is S. 100, *supra* note 1, § 2(1).

163. *Id.* § 2(2).

164. *Id.* § 2(3).

self out as a manufacturer to the user of the product;¹⁶⁵

- (5) "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity);¹⁶⁶
- (6) "preponderance of the evidence" is that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur;¹⁶⁷
- (7) "product" means any object, substance, mixture or raw material in a gaseous, liquid or solid state which is capable of delivery itself, or as an assembled whole in a mixed or combined state or as a component part or ingredient, which is produced for introduction into trade or commerce, which has intrinsic economic value, and which is intended for sale or lease to persons for commercial or personal use;¹⁶⁸
- (8) "product seller" means a person who, in the course of a business conducted for that purpose, sells, distributes, leases, installs, prepares, blends, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce;¹⁶⁹
- (9) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States, or any

165. *Id.* § 2(7).

166. *Id.* § 2(8).

167. *Id.* § 2(10).

168. *Id.* § 2(11). My bill excludes human tissue, blood, or organs. The reason for this exclusion is that the bill does not deal with production defects. This obviates the need for a specific exclusion of this problem from the product liability legislation.

169. *Id.* § 2(12). Because my proposed bill does not purport to be a comprehensive product liability code, the exclusions from coverage present in S. 100 and predecessor bills need not be dealt with.

political subdivision thereof.¹⁷⁰

PREEMPTION OF OTHER LAWS

Sec. 3(a). This Act supersedes any State law regarding recovery for any loss or damage caused by a product to the extent that this Act establishes a rule of law applicable to any civil action brought against a manufacturer or product seller for loss or damage caused by a product.¹⁷¹

- (1) This Act shall not be construed to waive or affect any defense of sovereign immunity asserted by any State under any provision of law.
 - (2) Nothing in this Act shall be construed to supersede any Federal law, except the Federal Employees Compensation Act (5 U.S.C. §§ 8101-8193 (1982)).
 - (3) Nothing in this Act shall be construed to waive or affect any defense of sovereign immunity asserted by the United States.
 - (4) Nothing in this Act shall be construed to affect the applicability of any provision of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§ 1602-1611 (1982)).¹⁷²
- (b)(1) Nothing in this Act shall be construed to supersede—
- (A) any environmental protection law that authorizes a State or a person to institute an action for civil damages, civil penalties, injunctions, restitution, cost recovery, punitive damages, or any other form of relief resulting from contamination or pollution of the environment, or the threat

170. *Id.* § 2(15).

171. *Id.* § 3(b)(1). The preemption clause in my proposed bill is far more limited. This reflects the more limited scope of the bill.

172. *Id.* §§ 3(b)(2)(3) and (4).

- of such contamination or pollution, caused by any product defined by State or Federal law as a toxic substance or waste, hazardous substance or material, hazardous waste or other contaminant or pollutant;
- (B) a right arising under the common law of a State to bring an action to abate a nuisance or otherwise protect against contamination or pollution of the environment, or the threat of such contamination or pollution, caused by any product; or
 - (C) any law relating to a civil action for loss or damage, cleanup costs, civil penalties or injunctive relief, if the loss or damage for which a remedy is sought was caused by the release into the environment, or the threat of release into the environment, of a toxic substance or waste, hazardous substance or material, hazardous waste or other contaminant or pollutant.
- (2) As used in this subsection—
- (A) “contaminant or pollutant” includes (i) anything defined or designated as a contaminant or pollutant under any Federal or State law, and (ii) any element, substance, compound, mixture, or organism which, after release into the environment and upon exposure, ingestion, inhalation, impact, attachment, or assimilation into any organism either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, injury, behav-

- ioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction), or physical deformations, in such organisms or their offspring;
- (B) "environment" has the meaning given to such term in section 101(8) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9601(8) (1982));
 - (C) "hazardous substance" has the meaning given to such term in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9601(14) (1982));
 - (D) "hazardous waste" has the meaning given to such term in section 101(29) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9601(29) (1982));
 - (E) "law" means any law or authority, whether statutory or common; and
 - (F) "release" has the meaning given to such term in section 101(22) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9601(22) (1982)), and, in addition, the term includes any depositing or placing into the environment.¹⁷³

173. *Id.* § 3(c)(1). The drafters of S. 100 included these sections to satisfy the states' attorneys general who were concerned about the possible impact of a federal product liability act on environmental torts. The exclusions make it clear that environmental torts are not covered by the Act.

STANDARDS FOR PRODUCT DESIGN AND WARNING

Sec. 4. In any product liability action in which the claimant alleges that the product is defective because of improper design, failure to warn, or failure to provide adequate instructions, the manufacturer or product seller shall be liable to the claimant only if the claimant establishes by a preponderance of the evidence that the manufacturer or the product seller was negligent, in that the conduct which brought about the defective condition of the product resulted from the failure to act as a reasonable manufacturer or product seller under the same or similar circumstances. The standard of care set forth herein shall govern whether the action is based on (A) strict liability or absolute liability; (B) breach of implied warranty of merchantability; or (C) breach of implied warranty of fitness for particular purpose. Nothing set forth herein shall prevent a claimant from bringing a cause of action for express warranty or any intentional tort.¹⁷⁴

RESPONSIBILITY OF PRODUCT SELLERS

Sec. 5. A product seller shall be treated as the manufacturer of a product and shall be liable for harm to the claimant caused by a product as if it were the manufacturer of the product if—

- (1) the manufacturer is not subject to service of process under the laws of the State in which the action is brought; or
- (2) the court determines that there is a reasonable likelihood that the claimant would be unable to enforce a judgment against the manufacturer.¹⁷⁵

174. This section is totally new and reflects the author's view of a simple and straightforward articulation of the negligence standard.

175. This section reflects the goals set forth in § 8 of S. 100, *supra* note 1. It deletes many of the provisions of S. 100 because this bill does not purport to set forth all the elements of a product liability cause of action. When § 5 is put together with § 4, most of the substantive goals of § 8, S. 100 are accomplished. An intermediate products seller will be strictly liable for production defects (as if it were a manufacturer) if the provisos

EFFECT OF WORKERS' COMPENSATION BENEFITS

Sec. 6(a). In the case of any product liability claim brought by or on behalf of an injured person entitled to compensation under any State or Federal workers' compensation law, damages shall be reduced by the amount paid as workers' compensation benefits for the same injury plus the present value of all future workers' compensation benefits payable for the same injury under the workers' compensation law.

- (b) Unless the manufacturer or product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employee caused by a product, neither the employer nor the workers' compensation insurance carrier of the employer shall have a right of subrogation, contribution, or implied indemnity against the manufacturer or product seller or a lien against the claimant's recovery from the manufacturer or product seller, if the harm arose from the sale of a defective product by the manufacturer or product seller.
- (c) In any product liability action in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, no third-party tortfeasor may maintain any action for implied indemnity or contribution against the employer or any coemployee of the person who was injured.¹⁷⁶

of § 5(1) or (2) are triggered. The intermediate seller will also be liable for the manufacturer's design defects, failure to warn, or failure to adequately instruct according to the provision of § 4 if the provisos of § 5(1) or (2) are triggered. Section 5(2) reflects a change in language which would require a court to determine that there is a "reasonable likelihood" that the claimant would be unable to enforce a judgment against the manufacturer. In any event, it should be noted that under § 4, an intermediate seller is liable for its own primary negligence.

176. This section is an amalgam of language from MUPLA, *supra* note 2, § 114, and S. 100, *supra* note 2, § 10.

PUNITIVE DAMAGES

Sec. 7(a). Punitive damages may be awarded to the claimant if the claimant proves by clear and convincing evidence that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers, or others who might be harmed by the product.

(b) The trier of fact shall determine whether punitive damages should be awarded, and the amount of those damages, if any. In making this determination, the trier of fact shall consider:

- (1)** The likelihood at the relevant time that serious harm would arise from the product seller's misconduct;
- (2)** The degree of the product seller's awareness of that likelihood;
- (3)** The profitability of the misconduct to the product seller;
- (4)** The duration of the misconduct and any concealment of it by the product seller;
- (5)** The attitude and conduct of the product seller upon discovery of the misconduct and whether the conduct has been terminated;
- (6)** The financial condition of the product seller;
- (7)** The total effect of other punishment imposed or likely to be imposed upon the product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of criminal penalties to which the product seller has been or may be subjected; and
- (8)** Whether the harm suffered by the claimant was also the result of the claimant's own reckless disregard for

personal safety.¹⁷⁷

PRODUCT LIABILITY REVIEW PANEL

Sec. 8(a). The Judicial Conference of the United States shall establish a Product Liability Damages Review Panel (hereinafter in this section referred to as the "Panel") to conduct the studies required by this section. The Panel shall consist of three individuals selected on the basis of their expertise regarding civil actions and recovery for loss or damage caused by a product.

(b) The Panel shall conduct an empirical study of damages in relation to the product liability litigation system. As part of this study the Panel shall evaluate—

- (1)** the nature and adequacy of damages in providing recovery for any loss or damage caused by a product;
- (2)** the relationship between economic loss and pain and suffering damages;
- (3)** whether damage awards differ among product categories and location of litigation;
- (4)** whether damage awards for economic loss, pain and suffering, and punitive damages differ depending on claimants' economic status, sex, race, or ethnic origin;
- (5)** the financial impact on industry and consumers of punitive damage awards;
- (6)** the impact of attorneys' fees on the product liability system; and
- (7)** all such other relationships between damages and the operation of the product liability system that the Panel shall see fit to investigate.

(c) The results of the study shall be submitted to the Congress within 2 years after the

177. This section borrows heavily from MUPLA, *supra* note 2, § 120. Unlike MUPLA, damages are determined by the jury.

date of enactment of this Act.

- (d) A member of the Panel who is not an officer or employee of the Federal Government shall be entitled to receive compensation at a rate of basic pay in effect for grade GS-18 of the General Schedule pursuant to section 5332 of Title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of the duties of the Panel.
- (e) There are authorized to be appropriated for the purposes of this section such sums as may be necessary in fiscal year 1985. Such sums shall remain available until expended.¹⁷⁸

REVIEWABILITY

Sec. 9. It is the intent of the Congress that, in other than exceptional cases, the Supreme Court of the United States shall not review issues relating solely to the sufficiency of the evidence in cases arising under this Act which have been finally decided by the highest court of any State.¹⁷⁹

178. This section is new and reflects the author's view of the necessity of empirical data about damages before adequate alternative compensation systems can be proposed.

179. This provision's source is S. 100, *supra* note 1, § 18.