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The Products Liability Revolution - Proposals for Continued Legislative Response in the Automotive Industry

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The Products Liability Revolution—Proposals for Continued Legislative Response in the Automotive Industry

Stephen J. Werber*

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I. INTRODUCTION

The law of automobile product liability in the United States developed initially through a process of evolution, as evidenced by the more than four decades between the leading decisions of *McPherson v. Buick Motor Co.*\(^1\) and *Henningsen v. Bloomfield Motors, Inc.*\(^2\) Since *Henningsen*, the restrained evolution of judicial development has become a revolution with its major focus of attack in several significant areas, including: (1) crashworthiness; (2) strict liability in tort;\(^3\) (3) burden of proof to establish the existence of a “defect”;\(^4\) and (4) apportionment of liability judgments, i.e., comparative fault versus joint and several liability.\(^5\)

The conflux of developments in these areas has resulted in a legal quagmire for the automotive industry and has enabled virtually any person injured in an automobile collision to bring suit with the assurance that the ultimate issues will be determined by a jury. As submitted by the Pennsylvania Supreme Court, the manufacturer of a product has become the “guarantor” of that product’s safety.\(^6\) If a line can be drawn between “guarantor”\(^7\) and “in-

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1. 217 N.Y. 382, 111 N.E. 1050 (1916).
4. See infra notes 24-49 and accompanying text.
5. See infra notes 50-118 and accompanying text.
8. Guarantor is defined as "[h]e who makes a guaranty." Black's Law Dictionary 634 (rev. 5th ed. 1979). Guaranty is defined as "[t]o undertake collaterally to answer for the payment of another's debt, or the performance of another's duty, liability or obligation; to assume the
surer" that line is barely discernible in automotive and other product liability litigation. The purpose of this Article is twofold: first, to trace and comment upon these areas of legal development and revolution; and second, to suggest an effective legislative program which would protect the legitimate needs of the consumer while providing adequate and necessary support to an industry recognized as a major component of the American economy.

II. JUDICIAL EVOLUTION OF AUTOMOBILE PRODUCT LIABILITY

A. Crashworthiness

The concept of automotive crashworthiness was almost uniformly rejected as recently as the early 1970's. The leading case rejecting the doctrine was Evans v. General Motors, Corp., decided by the Seventh Circuit Court of Appeals. In 1971 this author, with Michael Hoenig, detailed the policy considerations in support of continued rejection of the crashworthiness doctrine and found that the Evans decision reflected the majority position. Two years after Evans, the Eighth Circuit Court of Appeals accepted the doctrine of crashworthiness in Larsen v. General Motors, Corp. The Larsen court, utilizing only negligence principles, found no rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident, as the accident and the resulting injury, usually caused by the so-called "second collision" of the passenger with the interior part of the automobile, all are foreseeable. Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable.

Larsen was greeted with immediate approval by commentators who appreciated the apparent step taken to protect the consumer. These commenta-
tors were either convinced that the industry possessed the ability to accept and pass on to the consumer the costs of such litigation or simply assumed such a capacity existed. Larsen and its adherents have won the day. Virtually every court which has ruled on the issue of automotive crashworthiness during the past decade has permitted the questions raised to reach the trier of fact. Moreover, these decisions are no longer predicated on the relatively clear principles of negligence theory, but are also premised upon traditional breach of warranty and strict liability in tort concepts. The crashworthiness doctrine has been given a broader legal base than could ever have been anticipated by the court which first promulgated it.

A recent decision accepting the doctrine, Leichtamer v. American Motors Corp., is significant in that it extends heretofore established boundaries. The opinion not only adopts the crashworthiness strict liability concept, but within this framework also asserts broad principles relating to the nature of the proofs permissible, expands the permissible use of advertising in support of a claim, and extends the availability of punitive damages. Although conceptually premised on Larsen, the decision in Leichtamer extends Larsen beyond its originally intended scope or purpose. The abuses of the rules of evidence and the principles established in Leichtamer should be limited to the narrow factual circumstances under which that case arose.

Automotive crashworthiness cases can readily become examples of de facto insurer liability through judicial determination. Such a result is preordained if the courts apply the concepts expressed in Azzarello v. Black Bros. Co., and the concurring opinion of Judge Campbell in Turner v. General


In second collision cases Florida now permits a plaintiff to proceed under theories of negligence or strict liability or both. Ford Motor Co. v. Hill, [1980-1981 Transfer Binder] PROD. LIAB. REP. (CCH) ¶ 9026 (Fla. Sup. Ct., July 23, 1981). The court observed the need for improvements in the standard jury instructions relating to the distinction between design and manufacturing defects. Id. at 20,864 n.4. The court failed, however, to note the potential for inconsistent jury verdicts. See infra note 49.
18. Such a possibility, however, is unlikely in view of the recent decision in Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, 432 N.E.2d 814 (1982). Although not a crashworthiness case, the opinion approves, follows and appears to expand Leichtamer. The court dispensed with any requirement that to impose strict liability in tort, a defect be unreasonably dangerous. Id. at 466, 432 N.E.2d at 818.
19. 480 Pa. 547, 391 A.2d 1020 (1978). It has been observed that "were it not so unacceptable and 'unprincipled,' the decision . . . would quickly force dismissal of many of the problems [of definition and burden of proof] raised in this discussion." Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 VAND. L. REV. 593, 636 (1980).
These decisions appear to take the position that a product is defective if it lacks any element necessary to make it safe or possesses any element which makes it unsafe. Although the opinion decries insurer liability, the Azzarello approach leads directly to the question posed by Professor Wade's analysis of these cases: "What is the distinction between an insurer and a guarantor?" Moreover:

How, one may ask, could any automobile today turn out not to be actionable under these tests? In a collision an automobile may possibly catch fire—no matter where the gas tank is located or how it is protected. Should we require every car to have an automatic sprinkling system, regardless of how that might affect its gasoline mileage? A governor limiting the speed to ten miles per hour would make it much safer—but probably not safe enough. Clearly, safety must be a relative matter. . . .

Unless the courts take appropriate steps in accordance with proper judicial restraint, the questions posed will always be answered in favor of liability. Safety will become an unattainable absolute premise for imposition of insurer liability.

B. Strict Liability in Tort

The legal premises and policies of strict liability in tort are an outgrowth of commercial law principles of warranty. This doctrine evolved from a desire to place liability upon the party whom the courts believed to be primarily responsible for the injury which occurred. It did so by freeing warranty theory from the strictures of the statute of limitations, notice and privity. As a

20. 584 S.W.2d 844, 853-55 (Tex. 1979) (Campbell, J., concurring).  
21. The case of Bailey v. Boatland of Houston, Inc., 585 S.W.2d 805 (Tex. Civ. App. 1979) goes one step further. In Bailey, the court held that evidence could not be introduced to show that a proffered design alternative (a "kill" switch) was unavailable at the time of manufacture and could not have been incorporated as a safety device. Id. at 812.  
23. Id. at 568.  

The doctrine of strict liability evolved to place liability on the party primarily responsible for the injury occurring, that is, the manufacturer of the product. Any distinction based upon the source of the defect undermines the policy underlying the doctrine that the public interest in human life and safety can best be protected by subjecting manufacturers of defective products to strict liability in tort when the products cause harm.

Id. at 464-65, 424 N.E.2d at 575 (citations omitted).  
result, courts were able to relieve plaintiffs of the assertedly onerous burden of proof problems presented in traditional negligence actions.\textsuperscript{7}

Strict liability approaches in the product field are traceable to the concurring opinion of Justice Traynor in \textit{Escola v. Coca Cola Bottling Co. of Fresno}.\textsuperscript{8} Judicial acceptance of the doctrine took place in the short span of approximately one decade after its initial promulgation in the seminal California Supreme Court decision, \textit{Greenman v. Yuba Power Products, Inc.}\textsuperscript{9} By the mid-1970's a majority of states had adopted strict liability in tort; today almost all jurisdictions have adopted some version of the doctrine.\textsuperscript{10} The speed of acceptance was truly revolutionary.\textsuperscript{11}

A major impetus to acceptance of the doctrine came with adoption of the Restatement (Second) of Torts, section 402A,\textsuperscript{12} which survived a difficult and checkered history.\textsuperscript{13} Several drafters of section 402A had serious reservations as to whether it could properly be applied to design litigation cases. The Reporter for the Restatement (Second) of Torts, Dean Prosser, observed that there are two particular areas in which the liability of the manufacturer, even though it may occasionally be called strict, appears to rest primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence.

One of these involves the design of the product, which includes plan, structure, choice of materials, and specifications.\textsuperscript{14}

Commentators, such as Professor Henderson, have recognized the complexities inherent in design defect litigation. This recognition led Professor


\textsuperscript{8} 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

\textsuperscript{9} See infra note 39.

\textsuperscript{10} W. KEETON, D. OWEN & J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY 195 n.1 (1980).

\textsuperscript{11} W. KEETON, D. OWEN & J. MONTGOMERY, supra note 30, at 195-96, stated: "Indeed, the general adoption of the doctrine in this country from 1963 to the mid-1970's is one of the most rapid and dramatic doctrinal developments ever to occur in the law of torts." Professor Wade observed, "The combination of Greenman and 402A provided the impetus for converting evolutionary change into revolutionary change." Wade, supra note 22, at 555.

}\textsuperscript{12} Restatement (Second) of Torts § 402A (1965). See infra note 39.

\textsuperscript{13} The history is briefly summarized by Judge Wisdom in Putnam v. Erie City Mfg. Co., 338 F.2d 911, 918-19 (5th Cir. 1964), and is discussed at greater length in Hoenig, \textit{Product Designs And Strict Tort Liability: Is There A Better Approach?} 8 Sw. U. L. Rev. 109, 112 (1976).

\textsuperscript{14} W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 644-45 (4th ed. 1971).
Henderson to assert a significant warning as early as 1973. In 1976, this warning was reiterated in an article which reconfirmed the polycentric nature of design defect litigation and concluded that such issues exceed the capacity of the judicial system. Responding to criticisms advanced by others, Professor Henderson stated:

What began as an attempt to address the question of whether this particular means (adjudication) is suited to achieving the ends of increased product safety has, once again, been subtly transformed into an assertion that the ends justify the means. To such an assertion I am forced to reply that it begs the very question sought to be answered. Even if it were true that the court could weigh the various factors differently, the fact remains that the problem of weighing the various factors would retain its full measure of polycentricity.

Utilization of strict liability principles in design defect litigation increases the complexity of the issues.

From its inception, design defect litigation, and its special application in crashworthiness litigation, was beyond the pale of section 402A. The American Law Institute, when adopting section 402A, could not have considered fully the crashworthiness principles to which strict liability concepts are not applied since they had not yet been approved by any American jurisdiction. Nevertheless, section 402A, which provides for liability for physical harm caused by the selling of a product in a "defective condition unreasonably dan-
gerous to the user or consumer," has been and remains the pre-eminent statement of the doctrine. Unlike many judicial developments wherein a concept can properly be applied to a subsequently recognized purpose, the current indiscriminate utilization of strict liability principles to both design defect and crashworthiness cases is a misuse of the doctrine.

Despite the availability of section 402A and its sanctification by numerous courts, other courts have exhibited considerable difficulty in adopting and applying a clear statement of the doctrine. For several years the New York Court of Appeals rejected any form of strict liability on the premise that its consumers already were protected adequately under warranty law. Not until 1973 did this court yield to the tide of strict liability and ultimately discuss the doctrine in a crashworthiness action. In Ohio, initial approval of strict liability principles occurred in 1966 when the Ohio Supreme Court adopted the concept of strict liability in warranty. This concept extended warranty protection to those consumers lacking privity of contract with the manufacturer. More than a decade later that court finally adopted section 402A, but neither version was applied to a crashworthiness section until 1981. Even California, the state from which national acceptance commenced, evinces a checkered history in determining the parameters of strict liability.
struggled with this doctrine, their collective judgment has been rendered. In a period of less than twenty years strict liability has become an integral part of American common law and has inspired an acute increase in product liability litigation. The doctrine is being applied increasingly to crashworthiness actions. It is not necessary to return to the days of yesteryear nor to reject all design defect litigation in order to preclude the excesses of strict liability. All that is needed is that the revolution which began in 1963 be restrained through proper legislative programs. A uniform legislative approach can make necessary modifications and restore a proper balance to design defect litigation generally and to automotive crashworthiness specifically.

III. **Burden of Proof and the Meaning of “Defect”**

The appropriate burden of proof to be imposed upon a plaintiff in a product liability action is inextricably intertwined with the term “defect.” Unless “defect” can be defined, it is impossible to realistically allocate the burden of proof. The concept of “design defect” is even more difficult to define and place in a proper burden-of-proof perspective. The broader and more liberal the definition of defects the less rigid and demanding the plaintiff’s burden of proof. In their efforts to compensate for all injury, some courts have defined and redefined the meaning of defect to permit the eradication of a meaningful burden of proof obligation for injured parties.

The statement that “courts continue to flounder” while attempting to

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as this court’s product liability decisions . . . have repeatedly emphasized that one of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action. . . . [W]e conclude that once the plaintiff makes a prima facie showing that the injury was proximately caused by the product’s design, the burden should appropriately shift to the defendant to prove . . . that the product is not defective.

Barker v. Lull Eng’g Co., 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. This decision is discussed more fully at infra notes 70-80 and accompanying text.


49. At the very least, strict liability concepts must not be applied in design defect litigation. See infra note 51 and accompanying text. An excellent example of the confusion engendered by the Restatement definition of “defective condition unreasonably dangerous” is Fisher v. Cleveland Punch & Shear Works Co., 91 Wis. 2d 85, 280 N.W.2d 280 (1979). The court upheld a jury verdict of no liability under section 402A while affirming a verdict for the plaintiff on a theory of negligent design. The court was apparently unimpressed by the fact that a product found not to be defective could somehow have been negligently designed. Id. at 99, 280 N.W.2d at 286. It has been suggested that the jury misapprehended the meaning of the term “defect” while the court misapprehended the meaning of “unreasonably dangerous.” Wade, supra note 22, at 564.


determine whether a product is defective remains true. It is increasingly evident that "defective design is an amorphous [sic] and elusive concept." Numerous commentators have addressed the problem without providing a uniform judicially acceptable solution. The complexities are so great that a new defense has been suggested which imaginatively seeks the return of some negligence principles within a "process defense." If accepted, this approach would partially avoid the need for resolving the definitional morass. Although the use of negligence principles as the proper means to resolve product liability actions is not new, the suggested defense is premised upon an entirely new perspective.

It is no longer a fruitful task to add to the literature seeking to properly define defect. Arguments in favor of returning to a negligence standard have been presented clearly and require no lengthy reiteration. Various cases demonstrate the wisdom of those who advocate a strategic withdrawal from the presently strained forward lines of strict liability, design and crashworthiness doctrines.

Strong new voices have joined recently in urging that negligence principles be utilized to resolve design defect litigation. The primary author of the

51. Self v. General Motors Corp., 42 Cal. App. 3d 1, 6, 116 Cal. Rptr. 575, 578 (1974). Contrary to the expectation expressed in this opinion, courts have been unable to summarily dispose of extravagant claims of defective design. This failure continues to permit the courts to be drowned in a sea of unmeritorious demands for payment of the wages of recklessness and folly while seeking the benefit of protection against injury.


54. Hoenig, supra note 33, at 134-36. In 1973, Professor Wade suggested that design cases be "handled under the negligence techniques." Wade, On The Nature Of Strict Tort Liability For Products, 44 Miss. L.J. 825, 837 (1973). Professor Prosser has observed:

The proof of strict liability for a defective product does not appear to differ in any significant respect from the proof of negligence. In a negligence case the plaintiff has the initial burden of establishing three things. The first is that he has been injured by the product. . . . The second is that the injury occurred because the product was defective, and this also is no less true of strict liability. . . . The third is that the defect existed when the product left the hands of the defendant; and this again is no less true of strict liability.

Prosser, Strict Liability to the Consumer in California, 18 HASTINGS L.J. 9, 50-51 (1966). See also W. PROSSER, supra note 34, § 96.

55. See generally Birnbaum, supra note 19; Schwartz, The Uniform Product Liability Act—A Brief Overview, 33 VAND. L. REV. 579 (1980). See also Wade, supra note 22, at 552, 570, where he reiterated his view that design defect litigation requires a negligence/risk-analysis standard premised upon whether a product is unreasonably dangerous or, more clearly, "not reasonably safe."
Uniform Model Product Liability Act (Act), Professor Victor Schwartz, observed that the Act "balances risk against utility and does not rely on hindsight." This utilization of a fault standard is required because:

Strict liability cannot be justified, however, for either design defects that are predicated on a failure to warn or instruct. Such claims should be based on a practical fault standard. Some courts have attempted to apply strict liability in these areas. They have sought to justify the result under a theory of "risk distribution" . . . . The problem with this approach is that the "risk distribution" rationale provides no stopping point short of absolute liability . . . .

Utilization of a more lenient definition of defect, an eased burden of proof upon claimants and restrictions on the admissibility of evidence proffered by defendants are neither necessary nor proper. The development of such standards by some courts raises the "spectre of absolute liability." Design defect litigation, crashworthiness litigation and related products design cases are too polycentric for proper resolution under current principles. A return to negligence principles would restore proper fault concepts to their rightful position as the foundation of liability while simplifying the judicial and jury tasks. Such a return, coupled with the utilization of comparative fault, would result in a just and fair recovery for defect-caused injury.

The various judicial and other approaches to defining defect are numerous, especially if each sophistication is considered, i.e., where risk analysis is set forth in multiple varieties with slightly different emphasis on similar factors. Nevertheless, defect definitions can be categorized. The case of Cater-

56. Schwartz, supra note 55, at 586.
57. Id. at 585.
58. Birnbaum, supra note 19, at 648. Birnbaum concluded:

Liability for conscious design defects is tortious liability, and the time has come for courts to stop creating obfuscatory tests that can only confuse jurors and deny litigants a consistently fair and just result. Imposing a negligence standard for design defect liability is in many cases only to define in a coherent fashion what litigants are in fact arguing and what jurors are in essence analyzing. When this is not the case, it should in all fairness be the case. The confused and inconsistent body of product liability case law that has emerged in the last fifteen years seriously undermines the integrity of the tort system. As a constructive response, it is time for courts to adopt, unequivocally and forthrightly, a pure negligence/risk-utility test in design defect cases.

Id. at 649.
59. See infra notes 119-44 and accompanying text.
pillar Tractor Co. v. Beck served such a purpose. Before attempting to categorize the available definitional standards the court expressed its underlying philosophy:

[Most authorities appear to agree that manufacturers are not absolute insurers of their products. Strict liability will not impose legal responsibility simply because a product causes harm. A product must be defective as marketed if liability is to attach, and "defective" must mean something more than a condition causing physical injury.]

The definition of defect and burden of proof standards adopted by the court illustrate just how infinitesimal that "something" can be. Nothing must be established by the plaintiff beyond the fact that the injury was proximately caused by the product due to a condition which existed at the time of manufacture. Such a result is at odds with the stated policy of the court.

Five primary tests of defect were described by the Beck court. These are: (1) deviation from the norm; (2) reasonable fitness for intended use; (3) Restatement (Second) Torts, section 402A; (4) risk/utility analysis; and (5) the Barker approach.

Deviation from the norm is premised on evidence that the product does not match the quality of similar products. This is a basic test often utilized to meet the burden of proof in a negligence action. The Beck court rejected this approach primarily because of its belief that an entire product line can be defective and because the burden of proof is placed upon the plaintiff. By its rejection of this definition for all cases, the Beck court ignored the fact that this lucid approach often results in the imposition of liability and was not intended for use in conscious design choice litigation. Indeed, advanced design concepts would be deterred if this test were used outside the area of component failure. A new design could have no basis for comparison and could thereby be found to be outside the norm simply because no norm existed.

Reasonable fitness for intended use is developed from the law of warranty and commercial expectation. This approach stressed consumer expectancy, thereby making recovery more likely for latent than for patent defects. Moreover, the Beck court believed that this standard would shield the manufacturer whenever consumer expectancy was too low. Again, the court properly observed the difficulties of the doctrine without recognition that in proper cases this can be an effective tool for the imposition of liability. Since it is premised on reasonable consumer expectancy, the reasonableness element of negligence law is inherent in this standard. The real cause of rejection may well be this negligence overtone.

61. 593 P.2d 871 (Alaska 1979). This case is also unique as it appears to be the only opinion since Barker v. Lull Eng’g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), which has fully accepted the strained Barker approach. A partial acceptance is found in Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, 432 N.E. 2d 814 (1982).
62. 592 P.2d at 879 (emphasis added).
63. Id. at 880.
64. See Barker v. Lull Eng’g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
65. 593 P.2d at 881-82.
66. Id. at 882.
Section 402A requires that a product be "unreasonably dangerous" and in a condition not contemplated by the consumer, thereby barring recovery for obvious or generally known dangers. Such a result was believed by the Beck court to unduly limit the scope of liability and to unduly increase the plaintiff's burden of proof. It can also be argued that this doctrine often incorporated the unacceptable consumer expectancy standard. Again the Beck court rejected a definition utilized by a substantial number of jurisdictions. Contrary to the belief of the court, this approach reduces the burden of proof which would have been imposed under a negligence standard.

A risk/utility analysis recognizes the variety of factors relevant to product defect litigation and calls for a balancing of these factors. Proper jury instructions defining risk/utility analysis, however, require a balancing and consequent intrusion of negligence terminology. This definition is rejected despite the fact that it is one of the few approaches which can instruct the jury in design defect matters. It is the only available standard, other than negligence, which permits a defendant to document all of the factors which went into its conscious design choice decision. Liability for an intended unsafe design choice, as well as for an inadvertent final design error, can be imposed through proper risk/utility analysis. A design choice made strictly for economic reasons, however, would be most difficult for a manufacturer to defend.

Permeating each of the four recognized definitions is the role of negligence principles. This substantiates the fact that negligence principles must be retained in product defect litigation. Nevertheless, the Beck court adopted the fifth approach and thus added its weight to an ill-conceived standard approaching, if not attaining, absolute insurer liability.

The Barker approach adopts alternative methods of defect definition and burden of proof requirements. An injured party under this doctrine can either: (1) establish that the product did not perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; or (2) prove that the product's design proximately caused the injury, at which time the burden of proof is shifted to the defendant to establish that the design benefits outweigh the risk of danger.

The first alternative is a viable one which contains many of the elements and benefits of the previous four definitions. The second alternative presents a situation in which the court makes it possible for every product case to reach the jury as it merely requires a causal relationship between the product and

67. See Restatement (Second) of Torts § 402A (1965). See also supra note 39.
68. 593 P.2d at 882-83.
69. The Restatement definition has been adopted by a majority of jurisdictions. See generally Prod. Liab. Rep. (CCH) ¶ 4015 (May 1982).
70. 593 P.2d at 883.
72. 593 P.2d at 884, citing Barker v. Lull Eng'g Co., 20 Cal. 3d at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239.
73. Wade, supra note 22, recognized this:

The true significance of the Barker rule on the burden of proof is its effect in determining when a design case goes to the jury. Barker declares that the requirement for a "prima facie showing [is] that the injury was proximately caused by the product's design." If this is enough to take the case to the jury, the role of the judge will
the injury. The *Barker-Beck* test is an admission that the term "defect" is not truly definable. The resulting standard is an assertion that the definition of defect can be created from a bolt of cloth without using a cutting pattern.\(^4\)

The second alternative is applicable only when ordinary consumer expectations are not met. It is to be used only when the design exposes the user to "excessive preventable danger."\(^5\) A jury issue remains after a finding that the ordinary consumer would not find the product defective. Thus another formidable army is sent into the battle against an already weakened defendant.

The early shift in the burden of proof is designed to require that the manufacturer, allegedly the party with greater ability to present proof on technical and complex issues, prove a negative, i.e., that the product was not defective. Proof of a negative is generally more difficult than proof of an affirmative. Excessiveness of preventable danger is to be measured by the benefits of the design against the inherent risk of danger in that design. It is unlikely that a jury, when faced with a serious injury, would find that the benefits of design outweighed the inherent risk when the burden is solely upon the defendant. This determination is to be made with not only the benefit of hindsight, but with the "victim" before the court. Under such an approach no jury can readily find against a severely injured plaintiff and in favor of a large corporation. Moreover, the premise that the manufacturer is best able to produce the evidence in regard to technical matters is no longer valid. There exists a plethora of expert witnesses who can be called upon by counsel. Liberal discovery rules permit counsel for an injured party to learn virtually anything and everything that his defense counterpart can learn.\(^6\)

The early shift in the burden of proof contains within it still another unfair blow to the defendant. In these cases, plaintiffs will be able to submit to juries concise and simple cases which can emphasize the degree of injury. Defendants, however, will be forced to submit lengthy and complex cases on diff-

\(^4\) Id. at 573 (footnote omitted). Such a result occurs even if the shift in the burden of proof is viewed as more conceptual than practical. See Birnbaum, supra note 19, at 608-09. The likelihood of far more frequent verdicts in favor of plaintiffs, regardless of the true weight of the evidence, can be expected.

\(^5\) A cutting pattern is needed. The subsequent history of *Barker* in the appellate courts of California suggests that these courts are having difficulty applying its purportedly straightforward definition and burden of proof standard. It appears that the appellate courts are seeking to interpret *Barker* in a restrained fashion so as to circumvent the inherent unfairness of the decision. See, e.g., Cavers v. Cushman Motor Sales, 95 Cal. App. 3d 338, 157 Cal. Rptr. 142 (1979); Garcia v. Joseph Vince Co., 84 Cal. App. 3d 868, 148 Cal. Rptr. 843 (1978); Korli v. Ford Motor Co., *PROD. LIAB. REP.* (CCH) \# 8340 (Cal. Ct. App., Sept. 18, 1978) (prior to decertification, this opinion was reported at 84 Cal. App. 3d 895, 149 Cal. Rptr. 98 (1978)). See also Heritage v. Pioneer Brokerage & Sales, Inc., *PROD. LIAB. REP.* (CCH) \# 8521 (Alaska, June 1, 1979). These subsequent decisions are discussed by Wade, supra note 22, at 565, and by Birnbaum, supra note 19, at 608.

cult technical issues not even addressed as part of plaintiffs' cases in chief. Juries often react to lengthy cases with the attitude of "where there is smoke there is fire." An extensive defense can be taken as an indication of smoke even if not portrayed as a smoke screen by plaintiff's counsel. Experienced litigators know that if their case requires substantially more time and raises substantially more complex issues than does the case of their adversary, the likely result is that their case is lost. The likelihood of obtaining a jury verdict premised on the facts will frequently be unattainable with such a procedural device regardless of the actual merits of the cases. Inasmuch as the jury system is capable of returning fair verdicts on the fact whenever given a legitimate opportunity to do so, it is appalling to make such a possibility largely theoretical.

The assigned burden of proof is dependent upon the definition of defect. Despite the significant and growing number of successful product defect actions on a national scale, the judicial tendency is insidiously moving toward rejection of any realistic balancing of the burden of proof. Any burden upon the plaintiff which requires some evidence of culpable conduct by the defendant is being eroded. The stated reason for this tendency is simply that utilization of the traditional common law approaches to burden of proof requirements imposes too great a burden upon injured parties in product litigation.

Rather than retain a balanced approach to burden of proof issues, courts adopting the Barker-Beck approach appear to accept the premise that a manufacturer is liable unless proven otherwise. Only such a premise as this can support a rule that requires a defendant to defend the integrity of its entire product in order to refute an unspecified defect assumed as a matter of law. In many situations no technical evidence will be needed to support a plaintiff's case in chief. Even the condition of the product can be established by lay testimony, possibly even that of the injured party. If a plaintiff submits this minimal evidence, the defendant must submit evidence to support the integrity of the entire product. This is true, even if, as with an automobile, it has more than 5,000 parts and various independent systems, all of which must be consolidated into a working whole and any one of which may or may not have been the cause of the accident or the injury upon which the suit is premised. Conversely, there is no burden of proof upon the plaintiff to specify the system alleged to be defective, nor the specific part, unless the case is premised on component failure.

Many courts have considered and rejected the Barker-Beck approach.  

77. See generally A. Morrill, Trial Diplomacy, Selected Text 95-96 (1973).
78. See supra note 50 and accompanying text.
79. See cases cited supra note 27.
80. Although technically correct, it is also fair to note that by virtue of the facts surrounding the injury and occurrence, a defendant is often able to narrow the focus of a specific design area or component issue. This is also a probable expectation if the plaintiff is required to actually meet the proximate cause requirement found in Barker without an inference of such causation arising from the fact of product use and injury.
81. Defects fall into three generally recognized categories: (1) design; (2) component failure; and (3) failure to adequately warn or instruct. Accord Barker, 20 Cal. 3d at 428, 573 P.2d at 453, 143 Cal. Rptr. at 235 (1978); W. Prosser, supra note 34, § 99.
82. See, e.g., Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568.
Whether other courts will follow remains to be seen.8 This resistance to Barker-Beck will, in the long run, benefit the consumer. The product will remain on the market, the producer will remain in business, the employees will not be put out of work and the manufacturer will be more safety conscious and more responsive to legitimate safety concerns.4

Distinct from the problems of defining defect and establishing proper burden of proof standards are other related issues. A brief discussion of some of the more important of these issues is necessary for a better understanding of the reform proposals which conclude this Article.

IV. Evidentiary Issues

A. Contributory Negligence

A cornerstone of strict liability is the exclusion of evidence relating to the plaintiff's contributory negligence, unless that conduct constitutes an assumption of the risk or unforeseeable misuse of the product.8 Regardless of whether the burden is upon the plaintiff to establish freedom from contributory negligence,8 or upon the defendant to establish its presence,8 the adher-

(1981); Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322, reh'g denied, 282 Or. 411, 579 P.2d 1287 (1978). Of the 17 state supreme courts and various other courts which have considered a proper definition of defect since Barker, only one has fully accepted the Barker approach. See Birnbaum, supra note 19, at 601. One reason may be that Barker has "further confused the delineation between strict liability and negligence concepts." Id.

83. For example, the opinion in Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 466 n.1, 424 N.E.2d 568, 576 n.1 (1981), observed the Barker approach and stated: "The appropriateness of this additional test was not raised by either party and we express no position thereon." Thereafter, in Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, 466, 432 N.E.2d 814, 818 (1982), the Barker approach was partially approved.

84. Most product manufacturers are deeply concerned with safety and seek to produce the safest possible product as a function of their ethical obligations to society as well as the need to be competitive. To the extent that litigation can heighten this concern, it should do so with a more balanced burden of proof standard. Those manufacturers who fail to take proper steps to promote product safety can readily be found liable under traditional burden of proof standards. To the extent that such manufacturers leave the market, the general public is benefited.


87. Federal Rule of Civil Procedure 8(c) requires that a party affirmatively set forth the defense of contributory negligence. FED. R. CIV. P. 8(c).
ents of absolute strict liability have removed the issue from many cases.

In a crashworthiness action, a defendant may be permitted to present evidence of the speed of the respective vehicles involved in the accident in order to establish the forces involved or the movement of the plaintiff in relation to injury causing factors. This evidence, however, may not be admissible on the issue of plaintiff's wrongful conduct as a complete defense. If the very same accident results in a suit between individuals, however, the conduct of both would be reviewed by the jury to determine both negligence and contributory negligence or to apportion fault. If the actions were consolidated, a jury could conclude that the plaintiff was contributorily negligent and thus could not recover against the individual defendant or could have the judgment reduced. Yet, the same jury could permit a full recovery against the manufacturer defendant (regardless of culpability) on a strict liability theory. No reason exists in law or logic to permit one class of defendants to escape unscathed due to the conduct of the plaintiff, while another class of defendants is required to pay for the entire loss created by the injury.

There is no remaining reason to bar conduct constituting contributory negligence in a comparative law jurisdiction. Such conduct is not an absolute defense in “pure” comparative fault states and is a complete defense in “modified” comparative fault states only if the plaintiff’s improper conduct was excessive. In modified comparative fault states, a policy decision was reached by the legislatures that a person who substantially contributes to his own injury merits no recovery from others. This policy is defeated by the rejection of contributory fault evidence in actions against manufacturers. Making distinctions between conduct constituting abuse, misuse, or assumption of the risk on the one side and contributory negligence on the other has no valid purpose in cases such as those described above. Difficult distinctions, such as whether a drinking driver is contributorily negligent or has assumed the risk of his conduct, need not be resolved by juries or courts with the conflicting results such determinations necessarily yield. Even if the behavior is deemed assumption of the risk, it might be inadmissible if the risk assumed is “general” instead of “specific,” or if it was not related to the type of injuries sustained.

A recent decision of the Oregon Supreme Court, recognizing and re-


89. For an example of a “pure” comparative negligence statute, see WASH. REV. CODE ANN. § 22.005 (West Supp. 1982), and for a “modified” form, see WIS. STAT. ANN. § 331.045 (West 1958).

90. Cf. Twerski, Selective Use of Comparative Fault, 16 TRIAL 30 (Nov. 1980). A more realistic approach is exemplified by the decision in Vargus v. Pitman Mfg. Co., 510 F. Supp. 116, PROD. LIAB. REP. (CCH) ¶ 9016 (E.D. Pa., Mar. 11, 1981). In Vargus the court permitted assumption of the risk, in its primary and strict sense, to constitute a complete defense to an action in strict liability and was thus in accord with the Pennsylvania Comparative Negligence Act, 42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982).

This limitation perpetuates a hard-to-apply distinction that, after the extension of comparative negligence principles to strict liability actions, is no longer useful.

Characterizing behavior as misuse, assumption of the risk or ordinary contributory negligence was sometimes useful to the trier of fact when products liability depended on an extension of negligence or warranty doctrine and included the harsh common law approach to defenses. But when the doctrine of strict products liability in tort and comparative negligence are available, any distinction made between the defenses only interferes with the fact finder’s ability to examine the behavior of both parties and assess appropriate liabilities.

The same author points out that of eleven states which have specifically ruled on the question, six have abolished the distinction and five have retained it. A majority of courts have correctly found it appropriate to apply comparative fault to strict liability actions in order to permit the entirety of each party’s contribution to the injury to be brought to the attention of the fact finder. Retention of a distinction premised upon the categorization of plaintiff’s conduct negates the benefits of this joiner.

B. State of the Art and Government Regulation

The areas of “state of the art” and “government regulation” must be considered as they relate to evidentiary issues. Both areas are the subject of treatment in various product liability reform acts and in the Model Uniform Product Liability Act. A legislative response is necessary to resolve the judicial

92. Comment n provides:

Contributory Negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of the risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).


94. Id. at 495, 503-04.

95. The distinction has been rejected in Alaska, California, Mississippi, New Hampshire, New York and Wisconsin; it has been retained in Florida, Idaho, New Jersey, Oregon and Texas. Id. at 513.

96. MODEL UNIFORM PRODUCT LIABILITY ACT §§ 107-08 (1979).
confusion surrounding the proper function of this type of evidence.97

1. State of the Art

State of the art evidence can be introduced to assist a plaintiff in establishing a prima facie case when the product fails to meet industry norms, or where a safer alternative was practicable and technologically feasible at the time of manufacture. Such evidence can be part of a manufacturer's effort to establish the absence of a defect by proving that the harm was not foreseeable in light of the knowledge available,98 or that available technology precluded production of a practicable safer alternative.99

It is uniformly recognized that there are real dangers inherent in raising state of the art evidence to the level of conclusive presumption, or possibly even rebuttal presumption status.100 Such dangers have been overemphasized. Courts have consistently determined that such evidence in negligence cases is admissible only as some evidence of defect or nondefect.101

This uniformity, however, is not observed in strict liability actions. Here a split exists premised on the conduct versus product distinction. This distinction does not justify rejecting state of the art evidence in strict product liability actions, or in any product liability action, regardless of legal theory. State of the art evidence bears directly on the question of “defect” and can only loosely be considered within the realm of “conduct.” A product incapable of practical technological improvement at the time of manufacture should not be declared defective merely because subsequent technological change made a safer product possible. The hindsight test favored by some courts and commentators ignores reality and is grossly inequitable.102


98. This is a frequent assertion in chemical, drug, asbestosis and similar cases. The Model Uniform Product Liability Act § 107(E) (1979) provides if a seller proves that it was not within “practical technological feasibility” as defined in section 107(D) for it to make the product safe in regard to design, warnings or instructions so as to prevent harm, the seller, in general, is not liable for defects in design or failure to warn. See Schwartz, supra note 55, at 588.


100. The strongest criticism being that an entire industry can be laggard and fail to adopt known, available safety devices. This was noted at least as early as the case of The T. J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).


102. In Phillips v. Kimwood Mach. Co., 269 Or. 485, 494, 525 P.2d 1033, 1037 (1974), the court held that the test for strict liability in tort was whether “a reasonably prudent manufacturer would have so designed and sold the article in question had he known of the risk involved which injured the plaintiff.” See also Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 153 (1979). A respected commentator has gone even further and stated:

[I]t is not relevant that [the manufacturer] neither knew nor could have known nor ought to have known in the exercise of ordinary care that the unreasonable risk actually existed. It is enough that he knew of the risk and dangers he would
This concept is utilized as part of the formula by which juries are to determine whether a manufacturer acted in a reasonably prudent manner. If the manufacturer acted prudently, no liability will be found under this standard of conduct. Some courts have, as a matter of law, imputed knowledge of the dangerous condition of the product to the manufacturer when instructing the jury as to the factors to be balanced in reaching a decision. Such an imputation effectively creates a situation in which it would be difficult for a fact finder to find for a manufacturer. For example, in an automobile collision wherein the plaintiff did not wear an available seat belt, the injured party could assert that the manufacturer 'should have installed a passive restraint system instead of the active restraint system in the vehicle.' Knowledge of the danger of not doing so would be imputed to the manufacturer. This approach has been soundly criticized largely in connection with the decision in *Cepeda v. Cumberland Engineering Co.*

Keeton, Products Liability—Inadequacy of Information, 48 Tex. L. Rev. 398, 404 (1970). Such a standard effectively negates any proof of available technology and state of the art. The feasibility of any design alternative is rendered irrelevant. No further extension of strict liability into absolute liability can readily be envisioned. Ultimately, such an approach will make a manufacturer liable for failure to warn of an unknown danger. Such an absurdity is not beyond the capacity of some courts. See *Little v. PPG Indus.*, 19 Wash. App. 812, 818, 579 P.2d 940, 947 (1978), modified, 92 Wash. 2d 118, 594 P.2d 911 (1979), in which the appellate court declared:

> 'If the product has dangerous propensities—even though they are unknown to the manufacturer and reasonable care has been taken to make and market the product—unless the dangerous [sic] are obvious or known to the user, the manufacturer will be held strictly liable if it has not adequately warned the user of the dangers inherent in the use of the product . . . .
>

How a manufacturer can warn of a specific danger, without a means to know that the danger exists, remains unstated.


104. A passive system operates without any need for action by the vehicle operator. On the other hand, an active system requires the vehicle occupant to affirmatively buckle a seat belt system. Passive systems, such as airbags and certain seat belt restraint systems, were developed in the 1970's and were not technically feasible for most production vehicles until the late 1970's. Subsequent experience has shown that substantial numbers of vehicle occupants disengage even passive restraint systems. See *Werber, A Multi-Disciplinary Approach to Seat Belt Issues*, 29 Clev. St. L. Rev. 217, 218 n.7, 239 (1980). After conducting a survey of 79,000 Volkswagen Rabbit automobiles equipped with passive belts and 300,000 automobiles with ordinary (active) belts, the National Highway and Traffic Safety Administration reported a "dramatic" reduction in highway deaths due to the passive belt systems. The death rate for the passive belt equipped automobiles was approximately one-third the rate for other automobiles. *5 Prod. Safety & Liab. Rep. (BNA)* 729 (Sept. 30, 1977).

105. 76 N.J. 152, 386 A.2d 816 (1978). In *Cepeda* the plaintiff was injured after a safety shield was removed from the pelleting machine he was operating. It was conceded that had the shield been in place the injury would not have occurred. Removal required the use of a wrench. The court ruled in part that such a product could be defective because it lacked a fail safe device which would have rendered the machine inoperable if the shield was removed. Such devices were technically feasible at the time of manufacture, but were not in use. *Id.* at 180-81, 386 A.2d at 830-31. The decision was soundly criticized by Birnbaum, *supra* note 19, at 619, who viewed the
A significant problem that emerges from a hindsight balancing test (in which knowledge of the risk at the time of trial is imputed to the manufacturer) is that manufacturers may be held liable for dangerous propensities that were scientifically unknowable at the time the product was placed into the stream of commerce. If a manufacturer is precluded from defending on grounds of the scientific impossibility of having foreseen the potential hazards, a risk-utility analysis becomes a shallow fiction. It is questionable whether a criterion for liability purportedly based on a notion of reasonableness can be justly and fairly applied when cognition of risks is imposed as a matter of law rather than as a matter of fact.

The threat of imposing what is tantamount to absolute liability on the manufacturer for all harm resulting from the use of its product is suggested in other areas of the Cepeda opinion as well. At best, a duty to warn known purchasers of the product should be imposed as a result of improvements in the state of the art. In other circumstances a product recall might be in order.

The division in the courts in connection with applying state of the art evidence to strict liability actions has two aspects. First, some courts simply distinguish between strict liability and negligence actions; and second, some courts seem to distinguish between strict liability malfunction cases and strict liability design cases. Considerable confusion can result within a single jurisdiction. Most importantly, state of the art evidence must be accorded the weight it deserves.

2. Government Regulation

Evidence of compliance or noncompliance with applicable government regulations can be instrumental in deciding evidentiary issues. Several states have legislatively determined that compliance with such regulations creates a decision as a muddled version of Barker requiring a manufacturer to employ safety device upon safety device. Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979), overruled Cepeda on the remarkable grounds that Cepeda imposed too great a burden of proof upon the plaintiff. The hindsight perspective of Cepeda was retained, however. Id. at 167, 406 A.2d at 148.


107. Such recalls can be voluntary and will be helpful where the manufacturer can provide the safety improvement. It is also possible for mandatory recalls to be ordered by various government agencies such as authorized by section 152 of the National Traffic and Motor Vehicle Safety Act of 1966 and regulations thereunder. Pub. L. No. 89-563, § 102, 80 Stat. 718 (1966) (codified at 15 U.S.C. § 1391 (1976)); 49 C.F.R. § 577.6 (1981).


presumption of non-defect.110 In at least one state, government regulation compliance is an absolute defense to a claim predicated on negligence.111 Voices have been raised against this development in an effort to limit the function of government regulation in product defect cases.112

Government regulation provides uniformity and enables a manufacturer to plan and design within recognizable parameters. If the government standard is specific and is recognized as a proper defense, it will obviate the necessity of juries becoming arbiters of design on a retroactive basis with knowledge of facts which were unknown to the manufacturer. Where an agency has carefully considered all aspects of the safety issue, as does the National Highway and Traffic Safety Administration (NHTSA), and has the capacity and willingness to make independent tests and obtain independent studies,113 it is evident that industry input is not the deciding factor in the ultimate safety regulations that follow. Federal Motor Vehicle Safety Standards114 are technologically meaningful, carefully written and are accurate reflections of practicable state of the art technology. Permitting automobile manufacturers

110. See, e.g., Ark. Stat. Ann. § 34-2804 (Supp. 1981) (evidence that product is not unreasonably dangerous); Colo. Rev. Stat. § 13-21-403(1)(b) (Supp. 1981); Utah Code Ann. § 78-15-6(3) (1977). See also Model Uniform Product Liability Act §§ 107-08 (1979) which provide that compliance with legislative or administrative regulations related to design or performance requires a finding of no defect unless the plaintiff proves a reasonably prudent seller would and could have taken additional precautions. Conversely, proof of noncompliance establishes a defect unless the seller shows that the failure to comply was a reasonable, prudent course of conduct under the circumstances. Schwartz, supra note 55, at 588-89.


112. See Claybrook, Auto Protection: Beyond Federal Standards, 16 Trial 38 (Nov. 1980). The author's main arguments against providing meaningful weight to government regulation compliance are that such standards:

[S]et minimum thresholds, not necessarily state-of-the-art levels of performance.
Do not reflect the capability of the particular defendant because they are issued on an industry-wide basis, not tailored to a particular company.
Must concentrate on high payoff problems without covering many crucial aspects of performance.
Often remain unchanged for long periods and become outdated.
Usually do not regulate the safety of products over their foreseeable lifetime.
Are often a function of political legislative decisions, with less reliance on evidence as used by the courts.

Id.

113. For example, the Department of Transportation has sponsored numerous safety related studies and conducted many automobile safety tests. Its authority and mandate to do so are discussed in Chrysler Corp. v. Department of Transp., 472 F.2d 659, 671 (6th Cir. 1972). The Department has been responsible for many reports, including, Tri-Level Study of the Causes of Traffic Accidents, Vol. I—Research Findings, U.S. Dep't of Transp., Final Report No. HS 801-334 (Jan. 1977); Impact Tests of a Near-Production Air Cushion Restraint, Final Report (Synopsis) (1974); Teknekran Research, Inc., 1979 Survey of Public Perceptions On Highway Safety (July 1979). It has been noted that "[t]he administrative agency charged with promulgating, applying and testing these standards employs numerous engineers and spends millions of dollars annually for crash safety research, testing and evaluation." Hoenig, Products Liability Problems and Proposed Reforms, 1977 Ins. L.J. 213, 246.

to obtain judicial benefits based upon regulation compliance is cost effective
and better supports the economic burden imposed by required compliance test-
ing and design modifications. A proper evidentiary role for compliance evi-
dence should sometimes bar a plaintiff from recovery. Such a role would make
recovery more difficult and require that a plaintiff produce meaningful evi-
dence of defect. At the very least it should negate the Barker-Beck approach
to defect definition and burden of proof.\textsuperscript{110}

Compliance evidence will be submitted to rebut the evidence of defect
offered during plaintiff's case in chief. A presumption of non-defect arising
from such evidence will meet the defendant's rebuttal obligation, thereby re-
quiring the plaintiff to come forward with sufficient evidence to support any
determination of defect. Failure to rebut this presumption would result in a
dismissal of the action through the use of a directed verdict. There is nothing
novel in this approach. When the regulations are reasonably recent the pre-
sumption of non-defect would be conclusive.

Only federal regulation can provide adequate uniformity in product safety
standards. The NHTSA has proven its capacity to meet its responsibility of
ensuring automotive safety. On a broader level, it is clear that only a legisla-
tive approach can resolve the numerous theoretical and practical problems cur-
rently existing in product liability litigation. A national act, or at least uniform
legislation enacted by the individual states, is necessary to return a semblance
of order, foreseeability and meaningful responsibility to the field. Only such an
approach can impose proper restraints on the revolution created by the judici-
ary and properly weigh the relative needs of both industry and consumers. The
courts have abdicated their responsibility to industry by focusing solely on a
social policy of protecting the injured. Such an abdication requires legislative
correction. Without such correction case aberrations such as Kampman v.
Dupham,\textsuperscript{116} Cepeda v. Cumberland Engineering Co.\textsuperscript{117} and Austin v. Ford
Motor Co.\textsuperscript{118} will become commonplace.

V. APPORTIONMENT OF LIABILITY JUDGMENTS

A. Comparative Fault

An initial question relating to apportionment of damages arose as the
number of states adopting comparative fault principles rapidly grew at a time
somewhat paralleling the development and acceptance of strict liability.\textsuperscript{119}

\textsuperscript{115} See supra notes 61-84 and accompanying text.
\textsuperscript{116} 192 Colo. 448, 560 P.2d 91 (1977), discussed infra note 162.
\textsuperscript{117} 76 N.J. 152, 185-88, 386 A.2d 816, 832-34 (1978), discussed supra note 105.
\textsuperscript{118} 86 Wis. 2d 628, 273 N.W.2d 233 (1979), discussed infra note 135.
\textsuperscript{119} See supra note 6. General acceptance in both fields occurred during the period of the
mid-1960's through the 1970's. See also Plant, Comparative Negligence and Strict Tort Liability,
40 LA. L. REV. 403, 404 (1980), where it was argued that utilizing comparative principles in
strict liability actions is consistent with the policy of Greenman, more realistic from the economic
perspective of small manufacturers, and suggested that such an approach would not impede de-
velopment of safer designs. Plant pointed out that: "[N]ot only have the majority of decisions applied
such principles but those that have rejected application have not based their position on policy
grounds. The refusal has been for conceptual or semantic reasons rather than policy considera-
tions." Id. at 417.
From its inception, strict liability theory precluded the defense of contributory negligence. Traditionally, comparative negligence statutes applied solely to negligence actions. Thus, a major gap arose in the orderly development of product liability law. In a single action a plaintiff’s contributory fault would be considered in regard to his negligence, i.e., contribution to the injury causing occurrence; yet, this same conduct would be precluded in regard to plaintiff’s strict liability claim. Acute counsel quickly learned to delete negligence claims from appropriate product liability actions, thereby enabling them to avoid all evidence reflecting adversely upon their client’s behavior. Not only were potential judgment values enhanced, they were made possible in situations wherein a plaintiff’s conduct was the height of folly.

Various commentators quickly analyzed the situation and largely agreed that comparative fault principles should apply to strict liability actions. A significant number of judicial opinions soon concurred. The necessity for such a merger of legal policy, soundly crossing semantic and technical barriers, is well illustrated in automobile crashworthiness cases.

Driver error is the single most common cause of injury producing accidents. Unless such behavior is admissible, a vast number of specious cases would result. The distinction between the cause of an accident and the cause


121. See infra note 146 and accompanying text.


124. See Final Report, supra note 113, at 19. Improper driving was a factor in 87% of all accidents reported in 1976 and in 77% of the fatal accidents for that period. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 48 (1977). Drinking is indicated as a factor in at least one-half of the fatal accidents. Id. at 52. Other forms of driver error include inattention, distraction, drowsiness, drug abuse, improper vehicle maintenance and lack of basic driving skills.
of injury or enhanced injury underlies crashworthiness theory.\footnote{125} It is imperative that this distinction be limited. Logic, policy and inherent fairness dictate a unitary approach when weighing the factors which created the entire injury producing sequence. Collision related injuries require two events—the first and second collisions. Without the first the second cannot occur. The fact finder must be apprised of the cause or causes of both collisions. Such knowledge will permit a proper evaluation of the total picture and its distinct parts. Courts presently recognize that the relative fault of an offending driver and a manufacturer can be apportioned.\footnote{126} Nothing stands in the way of permitting the same apportionment when the offending driver is also the plaintiff. Any other approach would exalt form over substance to an unprecedented degree. The underlying cause of action cannot be permitted to become a tool for negation of a fair apportionment of fault. Courts have become aware that they can justly apportion fault while retaining strict liability.\footnote{127} A similar apportionment between collision and injury causes should be made.

The trend toward applying comparative principles in strict products liability actions is a constructive one. It indicates that courts place a high value on fairness to both parties to the action. Under a comparative system a negligent plaintiff will not recover a windfall gain. He will recover only those damages for which he is not at fault. Conversely, the manufacturer will be liable only for the damage produced by his defective product.

Courts should place more emphasis upon fairness than semantic and conceptual purity . . . . They need not be self-conscious about applying either comparative negligence or comparative fault in strict products liability cases. Strict products liability is a "quasi-fault" doctrine. The "apples and oranges" argument is not persuasive in light of this. It does not warrant a denial of loss allocation, nor even a semantic maneuver to justify a fault comparison.\footnote{128}

This development, while valuable, is inadequate for the full protection of defendants in certain cases. For comparative fault to be a viable complement to strict liability, the vestiges of joint and several liability must be abolished. The social and legal justifications for joint and several liability are incompatible with the social and legal justifications for comparative fault.\footnote{129}

Retention of joint and several liability in comparative fault jurisdictions creates a situation in which the findings of the jury can be overcome by an arbitrary application of law. This application results in the casting of one or more defendants into the role of insurer for the others. Perhaps the most obvious case in which such a situation arises is automotive crashworthiness. If plaintiff is properly driving his vehicle through an intersection and that vehicle

\footnotesize{125. See supra notes 12-17 and accompanying text.  
127. See cases cited supra note 123.  
128. Carestia, supra, note 122, at 71 (emphasis and citations omitted).  
129. For a discussion of joint and several liability see infra notes 146-94 and accompanying text.}
is struck by another (whose driver is clearly at fault), distinct claims for relief are available. The offending driver is defendant A and the manufacturer of the plaintiff’s vehicle is defendant B. A jury will find A to be the primary tortfeasor. Assume a ninety to ten percent division of fault and a two million dollar judgment. To the extent that A is judgment proof, B, who is jointly liable, will satisfy the judgment. The jury believes that B should pay $200,000 and A $1.8 million. If A can pay only $500,000 as his maximum insurance or less, the manufacturer, B, becomes liable for the $1.3 million differential. The jury function has been subverted and the manufacturer insures that the total judgment will be paid. B is then the de facto insurer of A. Under modern crashworthiness law, it is almost inevitable that some modicum of liability will be imposed on the manufacturer, thereby creating potential liability for the entire sum.

The American Trial Lawyers Association (ATLA), a major group supporting comparative fault principles as necessary to prevent the all-or-nothing result of common law contributory negligence has recently published a symposium dealing with product liability issues. It is not surprising to observe that ATLA now seeks to completely abolish evidence of conduct in product defect litigation. A major contributor to the symposium addressed the question of whether comparative fault should be applied in strict liability actions. The article contends that in many strict liability actions comparative fault should not be applied, especially when the conduct of the injured party is equivalent to contributory negligence.

The proponents of comparative fault appear to be as concerned with the preclusion of conduct evidence as they are with the fairness of comparative fault principles. For example, Professor Twerski asserts the validity of the reasoning in Austin v. Ford Motor Co. where the court refused to compare the plaintiff's conduct of improperly driving her vehicle at ninety miles per hour with defendant's marketing of a vehicle with defective seat belts. The underlying premise was that behavior cannot be compared to end product because the concept of strict liability removes fault issues from consideration. Such a premise ignores the fact that an end product is the function of the conduct of numerous persons. Whether a jury focuses on conduct per se or the product

130. Under the New York Accident Indemnification Law, 27 N.Y. Ins. Law § 610 (McKinney Supp. 1982), the minimum required for personal injury liability insurance is $10,000 for personal injury to one person ($20,000 coverage for more than one person) and $50,000 for one death ($100,000 for more than one death). In Ohio, the Financial Responsibility Law requires no insurance unless there is an unpaid judgment against the owner of the vehicle, in which case the owner must obtain liability coverage to a minimum of $12,500 for personal injury to one person ($25,000 for more than one person). OHIO REV. CODE ANN. § 4509.51 (Page 1973). In an era of six and seven figure liability judgments, competent counsel will often seek a deeper pocket than that provided by the adverse, at fault, driver and/or vehicle owner.

131. Continued adherence to principles of joint and several liability multiplies the bad results which arise from a refusal to apply comparative fault principles to strict liability actions. See infra notes 146-94 and accompanying text.

132. 16 Trial 30 (Nov. 1980).

133. Twerski, supra note 90, at 30. See also Twerski, The Use and Abuse of Comparative Negligence in Products Liability, 10 Ind. L. Rev. 797 (1977).

134. Twerski, supra note 90, at 31, 35.

135. 86 Wis. 2d 628, 273 N.W.2d 233 (1979).
per se if that product is defective, the defect is directly related to a flawed decision making or production process. Juries are being asked to simply compare the type of conduct which results in a product defect with the type of conduct which causes an accident. No amount of terminological exercise can remove the fact that conduct-fault resulted in the defective product. A jury apportioning fault directly in regard to a known individual’s behavior can also apportion fault which arises indirectly through an unknown person’s behavior. Numerous juries have already established that this task can be performed.136

Professor Twerski argues that the *Austin* result was correct for two reasons: (1) the negligence of the plaintiff was not directed to her use of the product. The negligence was directed to herself and other drivers; and (2) if contributory negligence is permitted as a defense, Ford’s safety features only exist to protect non-negligent drivers.137

The first justification ignores the fact that plaintiff’s negligence was the precipitate or proximate cause of the accident. This behavior occurred during the use of the product. Certainly it can be said that Mrs. Austin did not care about the abuse of her automobile, but her actions were directly and specifically related to that automobile. General negligence or not, if she had not been driving her automobile recklessly, she would not have been involved in a high speed collision. Her negligence was not a considered act directed toward her safety or the safety features of the vehicle. A negligent act, by definition, is unintentional. Nevertheless, Twerski asserts that her general negligence cannot be compared to the defendant’s acts in the manufacture of a defective seat belt which is a specific wrong causing specific harm.138

To attempt a distinction between general and specific negligence is creative, but unrealistic. “Where the product itself ‘shouts out’ the inherent danger, the user is cautioned to utilize proper care by the very best of all warnings—his own sense and knowledge that his carelessness will result in harm.”139

The second argument attempts too much. An automobile manufacturer designs safety features to protect negligent and non-negligent vehicle occupants alike. No technological means exist to nullify a safety device based on such a distinction. Similarly, motor vehicle occupants should be compelled to take reasonable steps of self protection. All parties recognized that, like cigarettes, automobiles can imperil longevity. No safety device is fail-safe and no driver is error free. When the defect in the automobile combines with the defect in operator conduct, injury results. The acts must occur together. Professor Twerski is apparently seeking a moment in time in which the rules of the road yield to the policy of injury compensation. In other words, he would have us distinguish between the combination of circumstances that led to the accident and those which led to the injury. This distinction can be used to delineate the causes of various injuries but fails when applied to the broader scale of accident-injury causation.

The laws of physics are immutable; injury cannot occur without force.

136. See supra note 123.
137. Twerski, supra note 90, at 33.
138. Id.
That force is generated by the collision. For a jury to be told to disregard the actions which placed the force into motion is to defy both logic and physics. It is precisely conduct equatable with contributory negligence which must be part of a jury's apportionment function. The vast majority of courts have recognized this fact and are more realistic in their ultimate analyses and results. Even Professor Twerski recognized that

[There are cases where the plaintiff's failure to repair a product or the plaintiff's misuse of a product should be utilized to reduce a verdict even if the theory is strict products liability.]

This process of line drawing is yet in its infancy. Nevertheless, recent case law gives evidence that courts are willing to follow their common sense instincts when the issues are clearly and crisply presented for decision.

Thus it is admitted that conduct can be compared to defect or, more specifically, that comparative fault principles are consistent with strict liability principles, at least when a line can be drawn to encompass them. How this process of line drawing is to be achieved is unstated, and the process itself is unattainable. The distinctions suggested by Professor Twerski will fail of their own inherent complexities and the contradictory decisions that would be spawned.

Finally, Professor Twerski sets forth a myriad of arguments against application of comparative fault in strict liability actions. These arguments have been refuted by courts and commentators alike. At least one of these arguments, however, requires a response. Professor Twerski, at related but quite separate points, stated: "It makes little sense to reduce the defendant's liability exposure when the plaintiff has responded as expected." He also stated: "[I]n essence, once a product with a design defect is marketed, we know with substantial certainty that there will be a victim."

Just as foreseeability of an accident is not an independent basis for imposing negligence liability, such foreseeability must not be equated with an expectancy that an injury will occur. It is the conduct of an individual that will turn foreseeability into the "expected" act. A punch press manufacturer may have no expectancy that a person will lose a hand when a safety shield is removed and not returned prior to activating the machine. That manufacturer has the right to expect that this will not occur even though he can foresee the possibility. Only when the circumstances of removal, plus operation, plus carelessness arise will the injury occur. Presses have been utilized for many years without causing injury. To discount the circumstances which finally turned foreseeable misuse into expected injury from such misuse is to say that justice is not only blind to the status of the parties, but is also blind to the facts of the case.

140. Twerski, supra note 90, at 35.
141. See supra notes 122-23.
142. Twerski, supra note 90, at 31.
143. Id. at 30.
144. Nevertheless, a cause of action in just such a case was upheld in Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 386 A.2d 816 (1978). See supra note 105.
Of course, automobiles will occasionally fall off a bridge or be driven into a body of water. It is foreseeable that this will happen. If it does occur, someone will likely be injured or drowned. There is "substantial certainty" of several such injuries every year. Consumers and manufacturers alike can be said to expect this to occur, yet neither acts on that premise. No court has yet suggested that every expectancy of injury must be protected against. Furthermore, no court has ordered vehicles to be equipped with oxygen tanks, inflatable rafts or pontoons to avoid the risk of being labelled defective. Expectancy is not the issue. To parlay substantial certainty of injury to an expectancy of injury to culpability is too devious a means to an end of compensation. Expectancy goes beyond the concept of foreseeable misuse—already a broad base for imposition of liability—into the realm of pure speculation.

It is known with substantial certainty that a drunk driver is likely to crash some day and cause one or more deaths. If Professor Twerski's approach were fully accepted, this expected conduct would not be admissible even in an action brought on behalf of a deceased drunk driver against the automobile manufacturer. As with the conduct of Mrs. Austin, the drunk driver's conduct could be labelled as mere general negligence instead of product oriented or safety oriented negligence. Paradoxically, this very same conduct would support a suit against the estate of the same drunk driver if such an action were brought by one of the victims of his driving. In such a case, it is the defendant manufacturer who is improperly penalized, not the negligent driver.

The use of comparative fault in strict liability actions penalizes no one. Its use declares simply and equitably that a product failure and a human failure require similar appraisal to provide fair compensation for the harm caused by each.

B. Joint and Several Liability

Regardless of whether the governing comparative fault statute is specifically limited to negligence, or is more broadly framed to include all personal injury actions such as strict liability, an overriding question is the effect upon the outmoded doctrine of joint and several liability. A few statutes specifically provide for retention of joint and several liability, while other statutes specifically abolish the doctrine. Other statutes are silent. The vacuum left by many legislatures has been filled by judicial interpretation and

145. See supra note 135 and accompanying text.
147. E.g., MISS. CODE ANN. § 11-7-15 (1972); REV. STAT. § 41.141 (1979); R.I. GEN. LAWS § 9-20-4 (Supp. 1982).
intervention.

The judicial approach was virtually unanimous in determining that comparative fault could coexist with joint and several liability until the mid-1970's. As to that period, Professor Schwartz stated: "The concept of joint and several liability of tortfeasors has been retained under comparative negligence, unless the statute specifically abolishes it, in all states that have been called upon to decide the question."\textsuperscript{151} The inherent unfairness of such an approach has been instrumental in developing a trend to abolish joint and several liability in comparative fault actions. This trend was observed by Professor Schwartz:

There is a minority trend in the direction of abrogating the common law doctrine of joint and several liability. A Wisconsin federal district court held a manufacturer-defendant responsible only for his causal negligence . . . . Oklahoma courts apply joint and several liability when damages cannot be apportioned . . . .

The comparative negligence statutes of Kansas, Ohio, Vermont, Pennsylvania, New Hampshire and Louisiana explicitly abolish joint and several liability. However, the Pennsylvania statute, and New Hampshire courts impose joint and several liability when the plaintiff can only recover from one defendant because of immunities or other procedural bars.\textsuperscript{152}

Other jurisdictions which retain joint and several liability have permitted "equitable adjustments approaching apportionment."\textsuperscript{153} There is a secondary question posed by decisions\textsuperscript{154} wherein joint and several liability remains if the co-defendant is immune from suit.\textsuperscript{155}

The trend toward abrogation of joint and several liability is consistent with the unitary approach which mandates application of comparative fault in strict liability actions. Both developments require that the court review the total picture of ultimate liability to produce equitable results. The Kansas Supreme Court may have been the first to terminate joint and several liability in comparative fault actions.\textsuperscript{156} The principles and reasoning of these negligence based decisions apply with equal force to strict liability actions.

In Brown v. Keill,\textsuperscript{157} the court noted that under the Kansas statute the concept of joint and several liability no longer applied even if one of the parties at fault could not be joined as a defendant or be held legally responsi-

\textsuperscript{151} V. Schwartz, supra note 146, § 16.4, at 253.
\textsuperscript{152} V. Schwartz, supra note 146, § 16.4, at 120 (Supp. 1981) (footnotes omitted).
\textsuperscript{153} Id. at 120-22 (citations omitted).
\textsuperscript{154} E.g., Simonsen v. Barlo Plastics Co., 551 F.2d 469, 473 (1st Cir. 1977).
\textsuperscript{155} See generally, V. Schwartz, supra note 146, § 16.5, at 254 (Supp. 1981). The better view is to consider the negligence of all contributing parties regardless of whether they can be joined as defendants. Such a position is "more compatible with the goals of comparative negligence" as it determines the negligence of all concurrent tortfeasors. Id. § 16.5, at 122 (Supp. 1981). See also infra notes 186-91 and accompanying text.
\textsuperscript{157} 224 Kan. 195, 580 P.2d 867 (1978) (automobile owner, whose vehicle was involved in a collision while being driven by his son, sued the other driver for property damage).
The purpose of the statute was found to be twofold: (1) to abolish contributory negligence as a bar to recovery; and (2) to impose individual liability for damages based on the proportionate fault of all parties to the occurrence. The opinion indicates complete awareness of the fact that no longer will the inability of one judgment debtor to pay his share fall solely upon the remaining judgment debtors. In its full and well-reasoned statement in support of its break with tradition, the court stated:

The legislature intended to equate recovery and duty to pay to degree of fault. Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not. Previously, when the plaintiff had to be totally without negligence to recover and the defendants had to be merely negligent to incur an obligation to pay, an argument could be made which justified putting the burden of seeking contribution on the defendants. Such an argument is no longer compelling because of the purpose and intent behind the adoption of the comparative negligence statute.

The second decision, Miles v. West, clarified further the policy consid-

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158. Id. at 207, 580 P.2d at 876.
159. Id. at 197, 580 P.2d at 870.
160. Id. at 203, 580 P.2d at 873-74. The court's ruling was premised in part on the belief that a contrary ruling would have rendered § 60-258a(d) of the Kansas statute meaningless. That section provides:

Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

KAN. STAT. ANN. § 60-258a(d) (1976).
161. 224 Kan. 284, 580 P.2d 876 (1978). Plaintiffs were involved in a collision when a vehicle operated by their husband/father collided with another vehicle. Brown was subsequently relied upon in Geier v. Wikel, 4 Kan. App. 2d 188, 603 P.2d 1028 (1979), to decide that the fault of a released party would be taken into account when determining liability of nonreleased defendants. The release was not a bar to the action.

An injured party whose claim for damages is exclusively subject to the Kansas comparative negligence statute may now settle with any person or entity whose fault may have contributed to the injuries without that settlement in any way affecting his or her right to recover from any other party liable under the act. The injured party is entitled to keep the advantage of his or her bargaining, just as he or she
Miles specifically rejected the contrary approach adopted by Colorado, which it viewed as the harsh result comparative negligence was intended to prevent. In reaching its conclusion, the Miles court balanced the detrimental effect of a plaintiff able to recover only a portion of the injury value against the benefit of a recovery despite his contributory negligence. This balance required abolition of joint and several liability:

The ill fortune of being injured by an immune or judgment-proof person now falls upon plaintiffs rather than upon the other defendants . . . . The risk of such ill fortune is the price the plaintiffs must pay for being relieved of the burden formerly placed upon them by the complete bar to recovery based on contributory negligence.

Shortly thereafter, the Oklahoma Supreme Court, in Laubach v. Morgan, without reference to the Kansas precedents, reached the same conclusion in a case in which the plaintiff was thirty and the defendants fifty and twenty percent at fault respectively.

As a first step in its analysis, the court in Laubach concurred with Walton v. Tull, which reiterated that the basic purpose of comparative fault is to distribute total damages among those who caused them. This policy is consistent with the primary policy of strict liability in tort which seeks to place liability upon the party primarily responsible for the injury. Nothing in the policies which support strict liability suggests that primary responsibility should be equated with total liability regardless of fault. Abolition of negligence proof requirements does not, and cannot, constitute abdication of fault as the basic premise for a just determination of liability.

As the Kansas courts before it, the Laubach court observed that where fault can be attributed it should be apportioned accordingly:

This principle of entire liability is of questionable soundness under a comparative system where a jury determines the precise amount of fault attributable to each party . . . . If a jury is capable of apportioning fault between a plaintiff and defendant, it should be no more difficult for it to allocate fault among several defendants.

must live with an inadequate settlement should the jury determine larger damages or a larger proportion of fault than the injured party anticipated when the settlement was reached.

Id. at 190, 603 P.2d at 1030.

162. 224 Kan. at 286, 580 P.2d at 880. The Colorado decision, Kampman v. Dunham, 192 Colo. 448, 560 P.2d 91 (1977), applied joint and several liability in a comparative fault action. The ruling resulted in an adverse driver being held responsible for 100% of the judgment even though he was found to be only 1% at fault. Kampman best illustrates the perverse and unfair results of a rigid application of outmoded dogma.

163. 224 Kan. 287, 580 P.2d at 880.


165. The action in Laubach arose out of a three-vehicle collision.

166. 234 Ark. 882, 356 S.W.2d 20 (1962).

167. Id. at 893, 356 S.W.2d at 26.

168. See supra note 25 and accompanying text.
Holding a defendant tortfeasor, who is only 20 percent at fault, liable for [the] entire amount of damages is obviously inconsistent with the equitable principles of comparative negligence . . . .

The opinion also resolved the issue of the effect abrogation of joint and several liability could have on an injured plaintiff when a defendant is judgment proof.

It is argued this could work a hardship on a plaintiff if one co-defendant is insolvent. But the specter of the judgment-proof wrongdoer is always with us, whether there is one defendant or many. We decline to turn a policy decision on an apparition. There is no solution that would not work an inequity . . . in some conceivable situation . . . .

The pseudo-logic of earlier decisions which retained joint and several liability in comparative fault cases was shattered by the forthright statements quoted above. A similar result was achieved in the case of Barron v. United States, which adopted a line of reasoning similar to Laubach. All the more remarkable is that each decision resulted in a substantial reduction of the damages recovered because a joint tortfeasor could not be sued due to immunity, or by the operation of an applicable workmen's compensation statute. Each opinion expressly or tacitly recognized the absence of any judicial policy supporting full recovery in all cases regardless of fault.

The essence of the reasoning which supports retention of joint and several liability is that it may foster full compensation to an injured party regardless of that party's relative innocence or the relative culpability of the defendants. This is not a supportable basis for decision; it is instead a rationalization utilized to attain a dubious result.

The weakness of any policy retaining joint and several liability in compar-
ative fault product liability actions is implicitly conceded by jurisdictions which have adopted some form of "equitable apportionment" among joint tortfeasors.\(^{178}\) In these cases, the underlying theory of the action is readily found irrelevant.

The theory of equitable apportionment is the unhappy result of forcibly marrying comparative fault to joint and several liability. The end product evokes memories of the hybrid discussed by Professor Cavers\(^ {178} \) as one solution to the famous decision in \textit{Adams v. Knickerbocker Society}.\(^ {177} \) As noted in a recent California decision,\(^ {178} \) equitable apportionment is premised upon (1) diminishing recovery in proportion to the injured parties' contribution to the injury;\(^ {179} \) and (2) retaining individual liability for the total compensable loss while permitting each defendant to obtain contribution on the basis of comparative fault principles.\(^ {180} \)

This solution does not adequately resolve the case in which one or more of the defendants is insolvent or cannot be made to pay its share. Absent this situation, the plaintiff has no reason to seek more than a proportional share from any defendant; each will pay as required by the judgment. Only if one defendant fails to pay will another defendant be required to make up the difference, and that defendant, just as the plaintiff, will be unable to recover from the defaulting judgment debtor.

To be consistent with precepts of fairness and the policies which underlie comparative fault, at least two specific goals should be met by principles of apportionment: (1) to move contribution from a per capita basis to a proportionate basis; and (2) to permit each defendant a legitimate opportunity to reduce its ultimate liability exposure by placing a ceiling on that liability.

In an uncollectible judgment debtor situation, the plaintiff will look to the remaining defendant or defendants to make him whole. The defendant will seek to limit liability to its share of fault, only to find that the principles of apportionment have become inapplicable. Liability premised upon proportionate fault, the mainstay of the action until this moment, has suddenly disappeared.

This process illustrates that the principle of apportionment and its supporting superstructure comprise an enormous \textit{non sequitur}. The right to equitable apportionment is not sufficiently applied in the very situations where it should prevail. The full risk of loss remains on the individual defendant despite the equitable principles of comparative fault because some courts are applying the equities inequitably.

The ultimate question is not one of legislative intent. Rather, the ultimate

\(^{175}\) The concept was seen as early as Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), but received its modern label and a lengthy exposition in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). \textit{See also} Transit Casualty Co. v. Spink Corp., 94 Cal. App. 3d 124, 134, 156 Cal. Rptr. 360, 366 (1979).


\(^{177}\) \textit{Id.} at 19-32.


\(^{179}\) \textit{Id.} at 134, 156 Cal. Rptr. at 366 (citing Li v. Yellow Cab Co., 13 Cal. 3d 804, 828-29, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975)).

\(^{180}\) \textit{Id.} (citing American Motorcycle Ass'n v. Superior court, 20 Cal. 3d at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188 (1978)).
question is simply the traditional problem of who should properly bear the risk of loss for the wrongful acts of a third party. A true paradox is found when the courts place this burden upon a defendant whose share of proportionate fault is less than that of the plaintiff's. 181

So long as our justice system remains founded on the premise of fault—which underlies all tort compensation theories—it is improper to impose liability without fault. Adherence to joint and several liability under modern comparative fault principles approaches the imposition of absolute liability through a bootstrap operation. In other words, since defendant A is ten percent liable due to his fault contribution, the court will arbitrarily and absolutely impose all remaining fault upon A whenever it believes an injured person is entitled to a more complete recovery than obtainable from the joint tortfeasors. The courts which follow and accept the proposition that this result is premised upon a “pragmatic policy determination” are merely saying that their policy is to protect the injured party regardless of the fairness of the result. Equitable apportionment is an effort to cure the inherently unfair and illogical results flowing from application of joint and several liability. From a pragmatic viewpoint, the effort falls short of this goal, as it simply does not work. How a rule which is “pragmatically sound, as well as realistically fair,” 182 when applied among concurrent tortfeasors becomes unsound and realistically unfair when applied to all parties remains unclear. This particular issue was noted in Laubach v. Morgan 184 where the court found comparative fault encompassed all parties and stated:

The underlying principle of comparative negligence is founded on


182. “Fault” is used in a broad sense. Even where a claim is premised upon a theory of breach of warranty or strict liability, the “defect” or “danger” or inability to meet the norms of warranty law exists only because of a human error in design or production. This fault exists in the absence of moral blameworthiness and regardless of whether the defendant acted with reasonable care. As noted by Prosser:

It is now more or less generally recognized that the “fault” upon which liability may rest is social fault, which may but does not necessarily coincide with personal immorality. The law finds “fault” in a failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual, and in acts which are normal and usual in the community, and without moral reproach in its eyes. It will impose liability for good intentions and for innocent mistakes. . . . In the legal sense, “fault” has come to mean no more than a departure from the conduct required of man by society for the protection of others, and it is the public and social interest which determines what is required. The twentieth century has seen the development of entire fields of liability in which the defendants are held liable for well-intentioned and entirely moral and reasonable conduct, because it is considered to be good social policy that their enterprises should pay their way by bearing the loss they inflict.

W. PROSSER, supra note 34, at 18 (footnotes omitted).


attaching liability in direct proportion to the respective fault of each person whose negligence caused the damage. The logical extension of this doctrine would apply it as among multiple tortfeasors as well as between plaintiff and defendant. If liability attaches to each tortfeasor in proportion to his comparative fault, there will be no need for added litigation by defendants seeking contribution.\(^{186}\)

Rejection of joint and several liability in such cases is the only completely satisfactory method of resolution. Only by having all parties before the court in a single action is it possible to apportion fault. A further action for contribution not only creates further litigation, but destroys the risk of loss principles embodied in comparative fault. Unquestionably, the most flagrant abuse of both legislative intent and policy is found in crashworthiness actions where the very quality and character of the respective parties can be entirely dissimilar.

Abolition of joint and several liability in comparative fault actions results in many benefits, including: (1) consistency with the equitable principles of comparative fault; (2) promotion of realistic settlement potential; (3) prevention of additional litigation; (4) removal of the economic burden unfairly imposed on solvent defendants; (5) limitation of the insurer role imposed upon certain classes of defendants; and (6) consistency with jury determinations, thereby avoiding an invasion of the jury function.

Arguably, a detriment of such abolition is that it potentially limits the amount of damages an injured person will actually receive. No policy or law requires that an injured party invariably recover the full amount of the judgment obtained. The judgment-proof debtor is well known. Moreover, the injured party will receive payment for that portion of the injury caused by any given solvent debtor.

In the context of automobile crashworthiness litigation, manufacturers are often the target defendants even though the conduct of another party was the primary cause of the collision. Retention of joint and several liability in such cases forces the manufacturer to become the excess carrier for that third party regardless of its relative fault. Such a result forces the manufacturer to settle cases in a grossly disproportionate manner because it must pay for the wrongful acts of parties other than itself. Frequently it will be more beneficial to try the case than to yield to the resultant inflated settlement demands. With the easing of the plaintiff's burden of proof,\(^{186}\) it is evident that at least nominal fault will be placed upon the manufacturer by any jury aware of its financial condition and ability to pay. If the manufacturer is not concerned with the payment of the debt of other parties, a fair settlement offer can be made. Alternatively, the manufacturer can defend a case with the expectation of limiting its damages to a sum based on nominal contribution to the injury producing occurrence where the settlement demand is overly inflated. Defense counsel and their clients can take solace in even those limited victories in which the proportion of fault is realistically related to what actually transpired. The victory is, however, Pyrrhic if the ultimate liability is compounded

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185. *Id.* at 1075.

186. See *supra* note 50-118 and accompanying text.
by adding the total cost of other defendants' liability. Such a result deprives
the manufacturer of the true value of its day in court and deprives the jury of
its right to determine fault by rendering that determination meaningless. The
enormous increased costs judicially passed on to the manufacturer are in turn
partially or fully passed on to the consumer. The ultimate in risk and loss
spreading is thereby attained. The price of its attainment, however, is too high.
The manufacturer should be liable for its proportionate fault and no more.
Such a policy will promote settlement, deter groundless litigation, continue to
promote automotive safety and at the same time ease the economic burden
imposed on both the manufacturer and consumer.

Various courts and commentators, 187 as well as the Model Uniform Prod-
ut Liability Act, 188 have taken a middle ground in seeking to avoid the un-
fairness of imposing the entire loss created by the absent or insolvent defen-
dant upon either the plaintiff or the defendant. In doing so, a false distinction
is made between cases in which some degree of culpability is found as to the
plaintiff and cases in which the plaintiff is without fault. 189 The assertion that
a plaintiff's culpability differs from that of a defendant's because plaintiff's
actions bear only on the risk of self-injury is fallacious. An injured person's
conduct can often impose risk of harm upon others. This risk may be direct, as
in situations where his fault contributes to an automobile collision endangering
passengers, bystanders or occupants of other vehicles, or the risk may be indi-
rect as in situations where danger invites rescue, thereby endangering the
rescuer.

One commentator, Professor Pearson, favors retaining joint and several
liability to protect the non-negligent plaintiff, while abolishing it for the negli-
gent plaintiff, and has observed:

This result is consistent with the general legal attitude toward
plaintiffs who are faced with an absent or insolvent defendant; the
law does not guarantee to every plaintiff a defendant who has
neither of these characteristics. Perhaps the closest analogy to allo-
cation by shares of negligence is allocation by causation. If two
persons act independently to cause discrete and divisible incremen-
tsof harm to the plaintiff, neither person is liable for the unsatisfied
loss caused by the other; liability is several, not joint. And if a per-
son is not liable for harm caused by another, neither should be lia-
uble for harm attributable to other[s] based upon the division of the
negligence. 190

Although stating that "rules of joint and several liability ought to be
rethought," 191 Professor Pearson's rethinking fails to justify the awkward re-
sult advocated through distinguishing between negligent and non-negligent
plaintiffs.

187. E.g., Pearson, Apportionment of Losses Under Comparative Fault Laws—An Analysis
of the Alternatives, 40 LA. L. REV. 343 (1980); Wade, Comparative Negligence—Its Develop-
ment in the United States and Its Present Status in Louisiana, 40 LA. L. REV. 299 (1980).
189. See supra note 187.
190. Pearson, supra note 187, at 363 (footnotes omitted).
191. Id. at 371.
It has been suggested that three alternatives are available when dealing with the problem of the insolvent tortfeasor: (1) let the claimant bear the loss if he is contributorily negligent; (2) let the tortfeasor bear the loss; or (3) spread the loss among all parties at fault.\footnote{192} Professor Wade argues that the first two alternatives are unfair and that the third is the proper solution.\footnote{193} This is a marginally acceptable position whenever the plaintiff has contributed to the harm because the allocation of liability is recomputed, taking his share of culpability into account and retaining a ratio of fault to liability. In this context, joint and several liability is abrogated. This approach, however, requires that the defendant or defendants bear the entire loss caused by the insolvent defendant whenever the plaintiff is without fault. Thus, in a significant number of cases the actual liability of the defendant can be significantly increased. The result is to retain joint and several liability—with the degree of liability reapportioned among remaining tortfeasors—whenever there is a faultless plaintiff. The principles applicable to a defendant's liability cannot in fairness be made to depend upon the actions of the plaintiff. Such principles are and must be viewed as independent. It is improper to impose liability to this extent, even though a similar approach is effective when a plaintiff's negligence is present.\footnote{194} The fairer, though sometimes harsh, approach is to leave this loss upon the plaintiff. As between two innocent parties, there is no legitimate basis for apportioning the liability so that it falls upon defendants. The law does not guarantee a solvent defendant. Joint and several liability is an improper device to provide such a guarantee.

VI. ILLUSTRATED PROBLEMS OF THE REVOLUTION

The ramifications of the trends relating to strict liability, crashworthiness, burden of proof and retention of joint and several liability in comparative negligence actions can be illustrated by a hypothetical.\footnote{195} It is hoped that observation of the injustice now prevailing will lead to greater judicial restraint or, alternatively, corrective legislation.

The typical crashworthiness case involves a single vehicle or multi-vehicle accident caused by the negligent action of one or more drivers. A two-vehicle accident will be hypothesized:\footnote{196}

Plaintiff (P) is driving a 1973 subcompact vehicle and is not wearing an

\footnotes{
193. \textit{Id.}
194. In such cases, a defendant will be liable for a sum in excess of his fault. The closer that additional amount is to the total verdict, the closer the approximation to joint and several liability. The sharing of the loss, however, justifies the result and gives at least a modicum of protection to all parties rather than a full measure of protection to one party. The result is not ideal, but it is practicable.
195. The facts of several actual cases have been consolidated to create the pattern set forth in this hypothetical. Such a pattern, however, could easily occur.
196. In a single car collision where only the driver is injured, the sole defendant will usually be the manufacturer or another entity in the chain or distribution. Other potential defendants, such as the state highway department, may exist. In such cases, the issues will resemble those in which the co-defendant is the adverse driver. If a passenger is injured, the driver and manufacturer are the most likely defendants. Again, the issues parallel those of the adverse driver although they can be further complicated by issues such as immunity and assumption of risk.}

available seat belt restraint system. As P approaches an intersection, he fails to notice that the traffic signal is changing to red and enters the intersection under the yellow caution light. The vehicle has a broken door latch on the driver's side which P has not had repaired, even though his mechanic told him that the condition of the latch was extremely dangerous.

Defendant (A) is driving a 1980 luxury sedan approximately twice the weight of P's vehicle. A is driving sixty miles per hour in a twenty-five mile per hour zone while under the influence of alcohol. A does not slow down as he approaches the intersection. As a result, the luxury sedan strikes P's vehicle in the area of the driver's side door hinges. The door opens and P is ejected. P sues A on a theory of negligence.

Defendant (B) is the manufacturer of the 1973 subcompact vehicle operated by P. P sues B on the ground that the door latching system was defective. The only cause of action is strict liability in tort. It is alleged that due to a defective latch on the driver's side door, P was ejected and thereby sustained a lumbar fracture of his spinal cord rendering him a paraplegic.

Prior to the decision in Larsen v. General Motors Corp., the complaint against B would have been dismissed on a motion for summary judgment as no claim for relief could be stated. P, however, would have a claim remaining against A.

Prior to the development of comparative fault, P's conduct was probably enough to entitle B to either summary judgment or a directed verdict due to P's contributory negligence in failing to have the door latch repaired. If the case reached the jury, a finding for P against A would be possible, as the jury could simply disregard the minimal contributory negligence of P, if any, insofar as A is concerned. It is likely that the same jury would return a verdict for B, the manufacturer, due to the greater role of P's contributory negligence or assumption of risk. A proper result could deny all recovery.

Because such results were unacceptable as a matter of social policy, courts and various state legislatures have taken corrective action. Regrettably, the actions were often uncorrelated and have produced an inequitable solution. To take into account more of the changes made within the last few decades several additional assumptions are needed:

P is found to have been five percent at fault in causing the initial collision; A is found to have been ninety percent at fault in causing the initial collision and resultant injuries; and B is found to have been five percent at fault in causing the injuries. P is awarded a total present value sum for all injuries of $2.5 million. A pure comparative negligence statute is in ef-
fect. Under a crashworthiness theory, \( P \) can reach the jury on the issue of door latch failure. If the most liberal burden of proof standards are applied, his \textit{prima facie} case can consist of: (1) use of the vehicle; (2) ejection; (3) injury proximately caused by ejection; and (4) the door latch design was unchanged.

The proofs under (3) and (4) will be the most difficult to establish, yet, both can be readily accomplished. \( P \)'s treating physician will most likely be qualified to express the opinion that the lumbar fracture occurred outside the vehicle, as a considerable number of studies suggest that this is the most likely place for a spinal cord injury to occur.\(^{206}\) \( P \) can personally testify to the fact that the door latch was not modified in any way. An argument can be made that the latch was broken due to the faulty design should such evidence be required.

\( B \) will be required to establish that the door latch design was reasonably safe or not unreasonably dangerous. The burden of establishing a non-defect will rest entirely upon \( B \), whereas \( P \) will be permitted to make a \textit{prima facie} showing of defect by inference. In jurisdictions which do not permit proof of contributory negligence in strict liability actions, \( P \)'s failure to repair the latch will be admissible only on the difficult issue of assumption of risk. If the court accepts the proposition that \( P \)'s failure constituted only general negligence, his failure to repair despite warning may be totally precluded as to its effect upon \( B \)'s liability. This will give the jury the difficult task of applying this evidence only in regard to the action against \( A \). A verdict against both defendants is possible or even likely.

\( P \)'s case will reach the jury, who will be asked to consider, as to \( B \): (1) whether the door latch design was defective-unreasonably dangerous; (2) if so, whether that defect was a proximate cause of injury; and (3) whether the failure to have the door latch repaired was a foreseeable misuse. The question as to the unchanged design may be decided as a matter of law or fact, and the jury may be permitted to find a defect through inference premised on the facts of the accident.

In other jurisdictions, \( P \)'s burden of proof will be more extensive, and expert testimony will be required to establish a manufacturing or design defect which was proximately related to the ejection and which existed at the time the subject vehicle was manufactured and sold. This modicum of proof is the defective door latch and apportion this cost separately. The possibilities for inconsistent special verdicts are considerably enhanced in such a case. See \textit{Caizzo v. Volkswagenwerk A.G.}, 468 F. Supp. 593 (E.D.N.Y. 1979), \textit{aff'd in part, rev'd in part}, 647 F.2d 241 (2d Cir. 1981). The court observed the inconsistency within the jury's verdict and stated: "We need not rule on the trial court's valiant attempt to rationalize these inconsistencies in the jury verdict (which it acknowledged was 'inscrutable'), since we are granting a new trial on other grounds." \textit{Id.} at 249.

204. See supra note 89 and accompanying text.

clearly more responsive to the needs of justice than permitting a jury to infer the existence of a defect, ignore rebuttal evidence, and thereby render what it believes to be a nominal (five percent, $125,000) judgment against B, the manufacturer. The jury would not know and could not be told that the $125,000 could become $2,375,000 if A is judgment proof.

If there are two solvent defendants, P will simply recover ninety percent of the $2.5 million from A and the balance, five percent, from B. Thus P recovers $2,250,000 and $125,000 respectively. The remaining $125,000 is not recoverable as it is attributable to P's own conduct. This result is consistent with the equitable principles of comparative negligence and places primary responsibility for the harm upon the primary tortfeasor.

If A is only partially insured and lacks personal assets, P can actually recover only the insurance proceeds. A somewhat above average liability policy will provide for $300,000 liability coverage. In this situation P, a paraplegic, will recover a total of $425,000 if principles of joint and several liability are not applied. This sum may be inadequate to compensate for the injuries sustained. Nevertheless, a proper interpretation of both law and policy requires this result once the concept of automatic full compensation is rightfully rejected. In numerous cases a plaintiff is denied virtually all recovery due to the solvency, or lack thereof, of the only defendant available to him. In this case, P at least recovers a significant amount.

If joint and several liability concepts are applied, B, the manufacturer, may be required to provide P with the unpaid portion of the judgment against A. B is now obligated to pay $2,075,000—eighty-three percent of the loss though found to be only five percent at fault. P, who is equally culpable, has, in effect, been required to pay only $125,000. Looked at in this perspective, P has paid five percent of the loss he sustained; A, though ninety percent at fault, has paid for twelve percent of the loss sustained; and B has paid approximately eighty-three percent of the loss sustained. This result, in which B pays an additional $1,950,000 is intolerable, unfair and diametrically opposed to the equitable principles of comparative fault. It is, nonetheless, a likely result.

It must also be observed that in some jurisdictions the comparative fault of P will not be considered in a strict liability action. This would result in a potential increase of $125,000 in the amount to be paid by B.

Under a modified comparative fault statute,206 P may be unable to recover against the adverse driver. In a state such as Ohio, if P was found to be fifty-one percent negligent, he could not recover against the driver on his negligence action, but could recover against B on the strict liability theory.207 Under Ohio law this would be a limited recovery of five percent or $125,000 as joint and several liability is abolished in comparative fault cases. The paradox is evident—the primary tortfeasor, A, is totally free of liability, and the minimal tortfeasor, B, is required to pay according to its relative fault.

206. See supra text accompanying note 89.

207. OHIO REV. CODE ANN. § 2315.19(B) (Page Supp. 1981), applies only to actions in negligence in which defendant has asserted contributory negligence. An action in strict liability, as against defendant B, is outside the scope of the statute as Ohio does not permit the defense of contributory negligence in strict liability actions. See Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981); Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).
No attempt has been made in the above examples to fully explore all of the presumptions and computations of the abuses the current system promotes and the excessive liability that it fosters. Rather, the above illustrations provide a modicum of understanding of the pervasiveness and scope of the problem. In the next section some legislation will be reviewed and suggestions offered as to how the best result—consistent with fairness to all parties—can be attained.

VII. LEGISLATIVE ALTERNATIVES

Meaningful legislation bearing upon a manufacturer’s obligations and liability falls into three primary categories: (1) product safety regulation at both federal and state levels—in the automotive field the primary legislation is national; and has resulted in the passage of numerous and thorough Federal

Motor Vehicle Safety Standards; (2) comparative negligence or comparative fault statutes at the state level; and (3) product liability reform acts which have been adopted by a significant number of states.

Specific changes in current laws in each of these categories would benefit all parties and meet the expectation of fairness of the American judicial and legislative systems. In view of the broad scope of existing federal legislation and the minimal likelihood of further congressional action, the suggestions made below are directed toward state action. Nothing, however, precludes similar national legislation.

210. See supra notes 119-44 and accompanying text.
211. See generally collation of product liability statutes in PROD. LIAB. REP. (CCH) ¶ 90,000 (Oct. 1981).
212. The author's pessimistic view of the likelihood of federal action may be exaggerated. Serious congressional efforts are presently taking place. A consumer subcommittee of the Senate Committee on Commerce, Science and Technology has announced the release of a Second Staff Draft of a bill that would create uniform product liability law throughout the United States. S. REP. 153, 97th Cong., 2d Sess. 1 (Mar. 1, 1982). The release quotes Senator Kasten in regard to the need for such legislation: "[F]ederal legislation is needed to bring uniformity and certainty to the law and to stabilize what has become a serious burden on interstate commerce." Id. (remarks of Sen. Kasten).

Of major significance in the proposed Product Liability Act are several provisions which reflect this acute need. Among the most important provisions is one that provides for the federal law to supersede state law to the extent that the Act addresses an issue regardless of the underlying compensation theory applicable in any state. S. REP. 153, 97th Cong., 2d Sess., § 3(c) (Mar. 1, 1982) (Staff Working Draft No. 2). Other important provisions provide the parameters of manufacturer liability in regard to "unreasonably unsafe" products and limit the liability of non-manufacturer sellers (id. §§ 4 & 5); create presumptions of safety or nonsafety contingent upon compliance with applicable federal regulations (id. § 6); establish a concept of "comparative responsibility" to reduce compensatory damages in accord with a claimant's responsibility for the harm (id. § 7); address questions of misuse and alteration as impacting upon damages (id. § 8); provide for a two-year statute of limitations and 25-year statute of repose for capital goods unless specific exceptions apply (id. § 10); and permit punitive damages only when compensatory damages are awarded and there is clear and convincing evidence that the harm suffered resulted from a "reckless disregard" for the safety of product users. Id. § 11.
A. Present Legislative Alternatives

A digression is required before addressing legislative responses to the various problems raised. At this time, there are many statutory provisions and suggestions for reform dealing with subjects which are not previously discussed in this Article. The following provisions and suggestions are directed toward clarifying the legal morass created by the judiciary, establishing new legal standards and possibly seeking to restrain some of the more revolutionary actions of the courts.

1. Statutes of Repose

Statutes of repose can place a proper limit on the time during which a product can provide a basis for a cause of action predicated on injury arising from the use of that product. The usual approach simply bars actions, or creates presumptions of non-defect, after a specified number of years have elapsed since the product was manufactured or sold. Many states have adopted such statutes.213

Without such provisions, manufacturers of high quality durable products are penalized. A motor vehicle consigned to the junk heap five years after it was originally sold is far less likely to be involved in an injury causing occurrence than a vehicle designed and built to function for ten or more years. The potential penalty is exacerbated if the subsequent action is predicated on hindsight theories of liability and evidence of current technological standards. This penalty is obviated by use of reasonable statutes of repose. Such statutes aid in making it possible to try cases with the physical evidence still intact, including the defendant's records, and with the testimonial evidence relatively fresh in the minds of witnesses rather than blurred by the passage of time. Finally, a statute of repose will permit persons or businesses to order their business affairs and to plan them with a reasonable degree of certainty.

On the other hand, such statutes may not adequately take into account the fact that some product-related injuries are not discoverable at the time of harm.214 It also appears that such statutes are subject to constitutional attack.215 Despite these drawbacks, good drafting can result in a balanced stat-


214. An illness can develop through long term exposure to dangerous substances. In some situations, the symptoms may be masked or may not appear for a substantial number of years after exposure. Commercial artists and art hobbyists have suffered a variety of respiratory and other illnesses which have frequently been misdiagnosed in light of emerging evidence relating such illnesses to exposure to chemicals contained in paint pigments. See generally M. MCCANN, ARTIST BEWARE (1979).

ute of repose immune from constitutional attack. Such statutes should be re-
tained where they are currently in effect and should be widely adopted.
Statutes of repose should apply to all product actions regardless of underlying
theory.

2. Useful Life Legislation

Another effective means to limit the time in which a product can give rise
to a cause of action is embodied in the concept of useful safe life or useful life. Such provisions can apply only to products of a largely mechanical and dura-
ble nature as distinct from those which are literally used up in a short period
of time. A useful safe life statute is an excellent liability limitation means for
products such as farm and industrial machinery, automobiles and aircraft,
household tools and other similar products. These statutes recognize that any
product will eventually reach a point at which it is not safe and should be
removed from circulation. In essence, this is a recognition that even the best
technology cannot produce a product that can be safely used indefinitely. A
small number of states are in the vanguard of what may and should become a
trend toward useful safe life legislation.216

3. Built-in Safety Devices

With increased awareness of the need for safety, manufacturers are pro-
ducing a variety of products with built-in safety devices. Occasionally such
devices require an affirmative step by the user to activate the safety feature. A
well known example is the automobile seat belt. When a user's actions do not
cause the injury causing occurrence, but do contribute to the seriousness of the
injury sustained, a problem is presented. Courts have shown considerable re-
luctance to permit such evidence into the record even if limited to the issue to
mitigation of damages. It is essential that such evidence be admitted, and it
now appears that a trend in this direction is emerging, even though such a
result is traditionally viewed as being outside the parameters of available de-
fenses.217 A legislative response could readily resolve the issue by permitting
such evidence on the issue of mitigation of damages. Such a step would pro-
mite an equitable sharing of the loss occasioned by injury and would en-
courage the use of safety devices. Such use could, for example, dramatically
reduce the number of serious injuries and deaths arising from automobile

216. See, e.g., IDAHO CODE § 6-1403(a) (Supp. 1982); KAN. STAT. ANN. Prod. Liab. Law, as
added by 1981 KAN. Sess. LAWS S.B. 185, § 3, PROD. LIAB. REP. (CCH) ¶ 91,713 (May 1982);
MINN. STAT. ANN. § 604.03 (West Supp. 1982); WASH. REV. CODE ANN. § 7.72.060 (West
Supp. 1982), PROD. LIAB. REP. (CCH) ¶ 94,924 (May 1982).

Ohio App. 2d 50, 269 N.E.2d 53 (1971). See generally Annot., 15 A.L.R.3d 1428 (1967); Kleist,

218. If even 70% of front seat vehicle occupants used seat belts, 10,000 lives could be saved
annually. U.S. DEP'T OF TRANSP., SECRETARY'S DECISION CONCERNING MOTOR VEHICLE OCCU-
PANT CRASH PROTECTION 29 (1976). Numerous studies have suggested and proven that increased
seat belt use would save thousands of lives and prevent tens of thousands of serious injuries every
4. Punitive Damages

The topic of punitive damages has been widely publicized since the decision in Grimshaw v. Ford Motor Co.218 This decision may represent one of the rare examples of a product liability action in which punitive damages should have been available. Strong arguments against the imposition of punitive damages in product liability litigation220 are not negated by the Grimshaw decision or facts. It is evident that juries can overreact and impose unrealistic punitive damages. Numerous courts, including the Grimshaw court, have reduced or set aside punitive damage awards.221 Perhaps the best argument against imposition of punitive damages is found in the fact that a recent decision upheld such an award even though the product complied with applicable government safety standards.222

Assuming that punitive damages are proper in product liability litigation—a dubious assumption—steps must be taken to limit the subsequent potential for economic catastrophe. Various methods of dealing with punitive damages, short of complete abolition, are now in effect. For example, an Oregon statute provides that the evidence to support an award of punitive damages must be clear and convincing.223 This higher standard of proof, as compared to the normal preponderance standard, would reduce the number of punitive damage awards while permitting awards in cases of truly egregious behavior meriting punishment. The same statute provides that no evidence of the defendant's ability to pay is admissible until a prima facie case for imposition of punitive damages has been established. This is a sagacious provision as it will limit any tendency to increase compensatory damages on the improper basis of financial capacity. A different approach has been taken in Connecticut.

year. See authorities collected in Werber, supra note 104, at 222-25.


Despite this willingness to limit such damages in a single action, courts have been unable to preclude awards of punitive damages seriatim. A defendant is often compelled to pay punitive damages for the same defect or tort in actions pending before courts in many jurisdictions. Principles of collateral estoppel and of an equivalent to double jeopardy have been inapplicable. This Article does not treat this issue and proposes no legislative response although such a response is perhaps the only means to resolve the problem in a manner consistent with the stated policies and objectives of punitive damages. For a recent case which awarded punitive damages, see generally Moran v. Johns-Manville Sales Corp., 51 U.S.L.W. 2289 (6th Cir. Oct. 26, 1982).


cut, where punitive damages are awarded by the court after a jury determination that such an award should be made.\textsuperscript{224} The court’s award cannot exceed a sum equal to twice the compensatory damages awarded.\textsuperscript{225}

B. Proposals for Reform Legislation

1. Crashworthiness—Design Defect Litigation

Design defect litigation is unquestionably the most complex form of product liability litigation. A design engineer is required to consider and balance a multitude of factors including safety to economy as well as form through function. In determining the existence of an alleged design defect the question becomes: How much design safety is enough? The response to this question can be found only in the reasonableness of the manufacturer’s conscious design choice. This standard is the core of negligence theory. Its application to design defect cases would permit the fact finder to consider all relevant factors which governed the final design selected as well as the factors which led to the injury producing occurrence regardless of their source. Application of a negligence standard would permit recovery based on fault without detrimentally affecting the public policy rationales of risk spreading or deterrence. Utilization of a negligence standard would also promote the principles of comparative fault without necessitating the redrafting or reinterpreting of existing comparative fault statutes. Only a negligence theory provides all of these benefits without the detriments inherent in warranty or strict liability theory. This is the sole theory readily understood by jurors and which avoids the most difficult problems created by the polycentricity of design defect litigation. A statutory model could be premised upon the following:

In any product liability action in which the claimant seeks recovery for damages arising from a design defect which either, (1) caused the injury producing occurrence, or (2) enhanced the injuries sustained due to such occurrence, the claimant must prove that the defect in the design proximately caused the injuries complained of and that the design defect was the direct result of one or more negligent acts of the manufacturer.

In the automotive field, the NHTSA has promulgated extensive safety standards. These Federal Motor Vehicle Safety Standards are continuously reviewed and provide a meaningful standard of care. The cost of compliance with these mandatory standards is high and should be accorded value to the manufacturer as well as to the consumer. The standards govern safety glass, door strength and latch design, fuel system integrity, occupant protection and numerous other areas. They also prescribe test compliance procedures. More-
over, the standards balance energy and air pollution requirements, cost factors and feasibility, and the effects upon other vehicles in accident circumstances. Thus, the standards reflect a solution to the interrelated problems of overall design. Mere opinion evidence provided by a retained expert witness who is focusing on a single design element should not be permitted to overcome the meticulous, broad and careful considerations which are the foundation of the Federal Motor Vehicle Safety Standards. A statutory model could be premised upon the following:

Compliance by a manufacturer of a motor vehicle with any federal motor vehicle safety standard existing at the time of manufacture, or enacted subsequent to such manufacture, in regard to design, inspection, testing, or manufacture of the vehicle is conclusive evidence that the vehicle is not defective or unreasonably dangerous and was not negligently designed, provided that the standard complied with is directly related to the defect in design alleged to be the proximate cause of the claimant’s injury or the occurrence which led to such injury.

2. Strict Liability—A Unified Cause of Action

The most practical resolution of the problems arising from application of strict liability in product liability actions would be to simply abolish the doctrine. Such a result is unattainable and, even if possible, perhaps unwise. With the exception of design defect litigation, however, strict liability can be useful in product liability litigation and is a recognized means to achieve accepted public policy goals. Rather than permit an action to proceed on alternative theories of liability with the resultant complexities relating to admissibility of evidence and jury charges, a unified cause of action premised upon strict

226. Such functional variables could not possibly be considered adequately in the trial of a specific crash design case, and no court or jury could ever adequately scrutinize all the relevant design considerations. The jury would simply focus upon the injuries sustained in the case, and claimant’s counsel would only invite the jury to consider that this particular car should have been “built up” and made stronger. The effect upon the other occupants of other vehicles in other accidents would be minimized. Only legislatures and administrative agencies are equipped to properly weigh these interrelated problems.

Hoenig, supra note 113, at 247.

227. 15 U.S.C. § 1392 (1976 & Supp. IV 1980); 49 C.F.R. § 571 (1981). At least one court was fully aware of this when considering expert testimony which contradicted a drug approval made by the Food and Drug Administration (FDA). Although unwilling to make the FDA approval conclusive, the court stated:

[ITs [FDA] determinations, based upon the opinions and judgment of its own experts, should not be subject to challenge in a product liability case simply because some other experts may differ in their opinions as to whether a particular drug is reasonably safe, unless there is some proof of fraud or nondisclosure of relevant information by the manufacturer at the time of obtaining or retaining such federal approval.


228. For example, proof of contributory negligence would be admissible in regard to the negligence claim and could be a defense to that claim. The same facts would not be admissible as
liability is appropriate. Restriction to a single claim for relief will simplify and shorten trials, ease evidentiary burdens, and allow for comprehensible jury instructions. A unified approach, suggested by many commentators, is part of the law in several jurisdictions and is codified in the Model Uniform Product Liability Act.\textsuperscript{229}

Provided that strict liability retains distinct obligations of proof to establish the existence of a defect and that that defect made the product unreasonably dangerous and, further, that contributory negligence be permitted as a defense in mitigation of damages or as part of a comparative fault program, the doctrine can be the basis of a unified cause of action. This cause of action could apply to all product liability actions except those involving design defect allegations. A statutory model could be premised upon the following:

(1) A product liability action shall include all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product.

(2) In any product liability action the burden of proof is upon the claimant to establish that the product was:
   a. defective, and
   b. unreasonably dangerous.

(3) The claimant must also establish that the defective and unreasonably dangerous condition complained of was the proximate cause of the injury producing occurrence for which relief is sought.

(4) All common law defenses, including contributory negligence, are available in a product liability action. Such defenses are not absolute, but are to be applied by the fact finder in accordance with [reference to comparative fault statute].

(5) The provisions of this section do not apply to any product liability action premised upon any allegation of design defect. Such actions are governed by [reference to design defect statute].\textsuperscript{230}

3. Definitions and Burden of Proof

The difficulties presented by judicial efforts to define defect and unreasonable
ably dangerous product have been detailed at length and require no further amplification.\textsuperscript{231} The best and most practical definition of defect must depend upon risk utility analysis. To be fair to all parties this definition must preclude any reference to a hindsight standard, i.e., whether a prudent manufacturer would have produced the product had knowledge of the occurrence or injury been available at the time of manufacture. The consumer expectancy test is consistent with a risk utility analysis definition of defect and this standard is generally accepted for purposes of determining whether a product is unreasonably dangerous.

Directly related to questions of definition is the role of state of the art standards and compliance with governmental regulation.\textsuperscript{232} A proper role for such factors is a necessary complement to any definition of defect or unreasonably dangerous product. Unless a viable defense can be predicated upon such factors, a strict liability standard of liability would prove overly unfair to defendant manufacturers and would escalate the product liability crisis which currently prevails. A manufacturer whose product meets or exceeds state of the art standards or complies with applicable government regulations should receive the benefit of a presumption that its product is not defective or unreasonably dangerous. This presumption should not be rebutted absent clear and convincing evidence to establish the existence of a defect and unreasonably dangerous condition despite compliance. The burden of proof to show compliance must rest with the manufacturer and the burden of rebuttal must rest with the claimant. Only a clear and convincing standard for the rebuttal will assure that the rebuttal evidence will be of sufficiently high quality as to permit a fact question to arise. Statutory models could be premised on the following:

*Defective Product*

A product is defective if it:

1. Fails to meet the design specifications governing its manufacture; or
2. Fails to comply with any applicable state of the art standard or regulation of this state or the United States in effect at the time of manufacture; or
3. The fact finder determines that the product should not have been marketed as manufactured after considering and balancing each of the following elements:
   a. the utility of the product to the claimant and the public as a whole;
   b. the reasonably foreseeable likelihood that the product would cause injury and the probable seriousness of that injury;
   c. the availability of a substitute product which would meet the same need and not be unsafe without an undue increase in cost;
   d. the manufacturer's ability to eliminate the unsafe

\textsuperscript{231} See *supra* note 50-81 and accompanying text.
\textsuperscript{232} See *supra* note 99-118 and accompanying text.
character of the product without impairing its usefulness or making it too expensive to maintain its utility;
   e. the ability of a reasonably prudent user to avoid the danger by exercising care in the use of the product;
   f. the reasonably prudent user’s anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or the existence of suitable instructions or warnings which are reasonably calculated to provide the information necessary to understand and appreciate the risk of use.  

(4) No inference of defect may be drawn from the fact that an injury occurred during a proper use or reasonably foreseeable misuse of the product.

Unreasonably Dangerous Product
An unreasonably dangerous product is a product that is dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer, or user who acquires or uses such product, assuming the ordinary knowledge of the community, or of similar buyers, users or consumers, as to its characteristics, propensities, risks, dangers, proper and improper uses, as well as any special knowledge, training or experience possessed by the particular buyer, user or consumer or special knowledge which he or she was required to possess. However, as to a minor, “unreasonably dangerous” means that a product is dangerous to an extent beyond that which would be contemplated by an ordinary and reasonably careful minor considering his age and intelligence.  

State of the Art—Government Regulation
(1) In any product liability action it shall be rebuttably presumed that the product which caused the injury, death, or property damage was not defective and that the manufacturer or seller thereof was not negligent if the product:
   a. prior to sale by the manufacturer, conformed to the state of the art or industry standards applicable to such product in existence at the time of the sale; or
   b. complied with, at the time of sale by the manufacturer, any applicable code, standard, or regulation adopted or promulgated by the United States or by this state, or by any agency of the United States or of this state.

(2) In like manner, noncompliance with any government code, standard, or regulation existing and in effect at the time of sale of

233. The six elements are premised upon the considerations proposed by Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 837-38 (1973). Substantive changes have been made in places and the seventh element suggested by Wade, loss spreading capacity, has been omitted.

the product by the manufacturer which contributed to the claim or injury shall create a rebuttable presumption that the product was defective or negligently manufactured. 238

(3) The rebuttable presumptions specified in sections (1) a. and (1) b. may be rebutted only by clear and convincing evidence. If the party bearing the burden of proof to rebut fails to submit admissible evidence of sufficiently high quality to meet this standard, the court shall order an appropriate directed verdict.

(4) Evidence of advancement or changes in the state of art or industry standards made subsequent to the time the product was first sold by any defendant is not admissible to prove any issue related to liability.

(5) Evidence of any applicable code, standard or regulation adopted or promulgated by the United States or by this state, or by any agency of the United States or this state subsequent to the time the product was first sold by any defendant, is not admissible for any purpose except to establish that the product complied with such subsequent code, standard or regulation. 236

(6) The provisions above notwithstanding, evidence of compliance with any federal motor vehicle safety standard, in accordance with section ___ of this Act, shall be conclusive proof that the motor vehicle is not defective or unreasonably dangerous and was not negligently designed.

4. Apportionment of Liability

As discussed above,237 the primary problems in present apportionment systems revolve around (1) the failure of some courts to apply comparative negligence statutes to product liability actions which are not founded on negligence principles; and (2) retention of joint and several liability.

Comparative fault principles have unique benefits in product liability actions. 238 Because such actions can be distinguished from more traditional negligence actions, it is possible to provide for comparative fault in product liability actions even if the legislature does not believe such a step to be generally appropriate. Various versions of comparative fault statutes have previously been cited. 239 Some states have enacted comparative fault statutes specifically directed toward product liability actions. 240 Alternatively, rather than using

235. Parts (1) and (2) are modeled on COLO. REV. STAT. § 13-21-403 (Supp. 1981). A substantive change has been made in that the proposal includes industry standards whereas the Colorado statute excludes such standards.

236. Parts (4) and (5) are partially based upon and adopt language from: ARK. STAT. ANN. §§ 34-2804 & 34-2085 (Supp. 1981); COLO. REV. STAT. § 13-21-403 (Supp. 1981); MICH. COMP. LAWS ANN. 600.2946(3) (West Supp. 1981). Note, however, that the proposed provisions are significantly different from any of the sample statutes proposed.

237. See supra notes 118-94 and accompanying text.

238. For example, in a crashworthiness action when defendant A is an adverse driver and defendant B is the manufacturer of the claimant's motor vehicle.

239. Supra notes 146-49.

such a specific approach, a legislature could rely on any existing statute which is broad enough to encompass product liability actions regardless of underlying theory.\footnote{441}

As indicated earlier, some states have abolished joint and several liability in comparative negligence situations.\footnote{442} Despite legislation to this effect in some states and some judicial determinations, it does not appear that a marked trend toward abolishing joint and several liability presently exists. The belief that an injured claimant is entitled to a substantial recovery is simply too well entrenched to permit total abolition of joint and several liability on a broad scale. An alternative to complete abolition must, therefore, be considered. The conduct of the claimant is an arbitrary and unfair basis for apportionment because claimant’s actions have already been considered and would, therefore, be accorded disproportionate emphasis. Despite assertions that a system predicated on the conduct of the plaintiff can serve to limit the more onerous burdens imposed by joint and several liability, such a system is inherently unfair and arbitrary in application. Accordingly, some other means to limit ultimate liability must be established.

An alternative which will increase the amount of recovery by a claimant yet limit the amount to be paid by any single defendant is available. A compromise can be reached through which the injured party will be partially protected against the uncollectible defendant, but which will often keep this gain within acceptable levels. The punitive damage approach of Connecticut\footnote{443} can be used to limit defendants’ responsibility under joint and several liability.

Such a provision would be adequate in most product liability actions. It is inadequate, however, where the nature of the fault attributed to various defendants is disparate. The most prevalent of such situations is the crashworthiness action. In this area, it is unfair to add any additional liability to that of a defendant whose only actual liability is premised upon enhanced injury or whose actions would have resulted in limited injuries but for the design problem. This inequity can be avoided through specific statutory language.

Statutes to meet the goals suggested above could be premised upon the following:

(1) In any product liability action in which more than one defendant is found at fault and a defendant’s proportion of fault is

\begin{itemize}
\item Such statutes can serve as models. For example, the Colorado statute provides:
\item In any product liability action, the fault of the person suffering the harm, as well as the fault of all others who are parties to the action for causing the harm, shall be compared by the trier of fact in accordance with this section. The fault of the person suffering the harm shall not bar such person, or a party bringing an action on behalf of such a person, or his estate, or his heirs from recovering damages, but the award of damages to such person or the party bringing the action shall be diminished in proportion to the amount of causal fault attributed to the person suffering the harm. If any party is claiming damages for a decedent’s wrongful death, the fault of the decedent, if any, shall be imputed to such party.
\end{itemize}


241. \textit{E.g.}, Ark. \textbf{St}at. \textbf{A}nn. §§ 27-1764 \& 27-1765 (Supp. 1979); Minn. \textbf{St}at. § 604.01 (Supp. 1981).

242. See \textit{V. SchwArzt}, \textit{supra} note 146, at § 16.4.

243. \textbf{CoNN.} \textbf{G}en. \textbf{St}at. \textbf{A}nn. § 52-240(b) (West 1979).
determined by the jury, that defendant's total liability cannot exceed an amount equal to twice the value of its proportionate fault.

(2) Where a claim for relief is directed against multiple defendants in an action premised upon a product liability claim as to one or more defendants and a different claim against one or more other defendants, joint and several liability, as limited by part (1) of this section, is available only as between members of each group of defendants. No additional liability may be imposed upon the product defendants for that portion of the harm attributable to the non-product defendants.

CONCLUSION

This Article illustrates that the product liability revolution has caused disturbing modifications in both procedural and substantive law. These changes have contributed to the crisis now facing all parties within the chain of product manufacture and distribution. Left unrestrained, the ramifications of judicial action upon both business and consumer will remain unacceptable. Without meaningful limitation, decisions now perceived as aberrational will become the norm for imposition of absolute liability.

The proposals for legislative reform can become the basis for discussion and ultimate decision making. If states adopt legislation premised along the lines suggested, protection will be afforded to product defendants while preserving the consumer's right to recover for harm caused by improper actions of such defendants. At the same time, such legislation would prevent any further judicial imposition of insurer liability upon product manufacturers, most notably automobile manufacturers. Adoption of legislation premised upon the proffered proposals will also assist product sellers and manufacturers to plan their affairs. Perhaps the most important result of such legislation, however, is that manufacturers would be encouraged to focus their technological and financial resources upon product safety rather than product litigation.