The Products Liability Crisis: Modest Proposals For Legislative Reform

William P. Bivins Jr.
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I. INTRODUCTION

IN RECENT MONTHS, it has become commonplace to speak of products liability litigation in terms of a "crisis" situation.1 Whether that characterization of the situation is too strong may be a matter of debate, but there is little doubt that products liability litigation is creating formidable problems for manufacturers;2 and there is considerable evidence to substantiate the problems which manufacturers and sellers are encountering.

Perhaps the most extensive and wide-ranging study of the products liability crisis has been undertaken by the Interagency Task Force under the direction of the U.S. Department of Commerce.3 The Task Force was established to conduct a study of the impact of products liability claims on the economy. Independent contractor surveys were commissioned and completed prior to the final report to provide source material and data upon which the final recommendations of the Task Force were ultimately based. One such independent survey was the Industry Study, which was completed

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1 See Hoenig, Products Liability Problems and Proposed Reforms, 1977 INS. L.J., 214, n.3. Mr. Hoenig recognizes a possible semantic problem in the term "crisis" but notes that whatever "label" is applied, the problems remain. Other authors speak in terms of "crisis." E.g., Irving, Our National Product Liability Crisis and Why You Are a Part of It, IRON AGE, August 1, 1977, at 81. See also, DEFENSE RESEARCH INSTITUTE, PRODUCTS LIABILITY POSITION PAPER (1976); MACHINERY & ALLIED PRODUCTS INSTITUTE, PRODUCTS LIABILITY: A MAPI SURVEY (1976); NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NFIB SURVEY REPORT ON PRODUCT LIABILITY (1977).

2 Numerous surveys have been undertaken by such diverse groups as the Society of Plastics Industry, the Woodworking Machinery Manufacturers, the Industrial and Heating Equipment Manufacturers, and the Railway Progress Institute. See 1 INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEPT. OF COMMERCE, PRODUCT LIABILITY: FINAL REPORT OF THE INDUSTRY STUDY, IV-62 to 106 (1977) [hereinafter cited as INDUSTRY STUDY].

3 INTERAGENCY TASK FORCE ON PRODUCT LIABILITY U.S. DEPT. OF COMMERCE, FINAL REPORT (1977) [hereinafter cited as FINAL REPORT]. On the basis of the Final Report, the Office of Management and Budget and the Domestic Policy Staff of the White House requested the Department of Commerce to prepare an "options paper" to review alternative actions the federal government might undertake in response to the products liability situation. A paper was prepared, focusing on the three principal areas identified in the Final Report as the cause of the products liability problem: insurance ratemaking practices, uncertainties in the tort-litigation system, and the manufacture of unsafe products. See Department of Commerce Options Paper on Product Liability and Accident Compensation Issues, 43 Fed. Reg. 14,612 (1978).
in April, 1977. In the Industry Study, 337 manufacturers were surveyed by telephone, products liability surveys by twenty national trade associations were reviewed, federal and state accident data were analyzed, and discussions were held with twenty selected firms in "high risk categories," in order to compile data and make recommendations relative to the system under which manufacturers are held liable for the manufacture of defective products. The findings document the increasing burden which products liability litigation has placed upon the manufacturer.

The Industry Study showed that the average number of pending claims per firm surveyed had increased six fold from 1971 to 1976. Further, the cost of products liability insurance coverage had doubled in this same period from 1971 to 1976. The average amount of damages sought by new claims increased from $476,000 in 1971 to $1.7 million in 1976; and average settlements likewise increased for this same period from $12,000 to $28,800.

The Industry Study is a compilation of extensive data, with tentative analyses leading to several broad conclusions and recommendations for further study. But perhaps the most significant part of the report is the finding of "no apparent trend in either the relative frequency or severity of injuries among product categories selected by the Task Force for analysis that would explain the increase in claims and litigation against manufacturers." Thus the increasing costs of products liability litigation can be attributed neither to a higher incidence of defective products nor to increasingly severe en-

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4 INDUSTRY STUDY, supra note 2. A legal study and an insurance study were also commissioned. See FINAL REPORT, supra note 3, at I-11 to 17.

6 See INDUSTRY STUDY, supra note 2, at I-1, I-2, II-1 to 6.

6 Id. at I-8. Among consumer goods, power mowers and automotive components were the subject of the largest number of pending claims; grinding wheels and industrial machinery were the subject of the largest number of lawsuits in the product category of "workplace product group."

7 Id. at I-6. According to trade association surveys, the increase in cost of coverage for the years 1974-1976 had increased from two to as much as six times over the cost during the years 1970-1974.

8 Id. at I-9.

9 Id.

10 Id. at I-12. Regrettably, although the Industry Study concludes that the frequency or severity of injuries occurring through use of a product has not increased, two of the four "potential remedies" analyzed in the study would have significance only as to reducing frequency of product related injuries; i.e., safety certification of industrial and consumer products, id. at I-15, and implementation of mandatory provision for preventative program services by insurers and insureds (liability prevention program inspections and audits), id. at I-16. Of the other two remedies, only one would reduce the amount of litigation, or limit recovery, i.e., the recommendation that workers' compensation become an exclusive source of recovery for workplace accidents. Id. at I-14. The final recommendation would permit certain financial advantages to manufacturers by means of write-off of contingent liabilities. Id. at I-17.
counters with defective products. Rather, the data shows that increasing numbers of cases are filed each year, with increasingly costly settlements or verdicts. The product alone cannot be held accountable for the increased costs of litigation, nor would safer products solve the problem. In seeking solutions to the products liability crisis, it is therefore not unreasonable to look beyond the product, to look to the system by which that product is determined to be defective.

In its final report, the Interagency Task Force indeed looked at the system by which a product is determined to be defective and determined that the system of products liability litigation is one of the three major causes of the present products liability problem. Uncertainties in the tort litigation system were noted by the Task Force as a basis for the problem: "It is almost impossible to predict when courts will change product liability rules and broaden the exposure of insureds. The instability in product liability law appears to have increased defense and investigation costs."  

While it is clear that the system of products liability litigation must be reformed, it is also clear that measures of reform must be chosen carefully. The consequences of any change must be well understood before the change is implemented; there is no gain in exchanging one inequity for another. But the impetus for reform should not come from the manufacturers alone. The burden of continuing under the present system is borne not only by the manufacturers and sellers whose rates of insurance or costs of self insurance have drastically increased, but also by the consumer, whose choices may become more limited, and surely more costly. Furthermore, uncertainty in the law of products liability fosters unnecessary litigation which puts an additional strain on an already overworked judicial system. Relief from this social cost would be a gain to everyone, not only manufacturers and sellers.

This article will attempt to identify some of the sources of the problems which are adversely affecting the system of products liability litigation and will offer proposals for reform within the framework of the law of products liability.

11 Final Report, supra note 3, at xxxix.
12 Id. at xliii.
13 Twenty-three firms (seven percent of those contacted) reported decisions to discontinue products in the last two years; twenty-six firms decided to postpone the introduction of new products. Industry Study, supra note 2, at I-10.
14 Average cost of product liability coverage under comprehensive general liability plans increased from $0.74 per thousand dollars of total sales in 1971 to $2.81 per thousand dollars of total sales in 1977. Presumably, the increased cost to the manufacturer would be passed on to the consumer. Id. at IV-33.
II. SOURCES OF THE PROBLEM

The impetus for reform in the area of products liability may be seen as a continuation of conflict and controversy in an area of law that has been volatile for many years. The late Dean Prosser spoke of developing trends in the law of products liability in terms of a military "assault," more in the nature of a battle than of a systematic, logical development. Most controversial was the advent of strict liability, which was strongly resisted by manufacturers and sellers who were depicted by Prosser as defending the "citadel" of privity. But the development of the law of strict liability has become only one of the factors which has precipitated the present products liability crisis. Other factors involve the application of the law in the context of products liability litigation, particularly the "deep pocket" rationale so often applied by judges and juries and the application of needlessly restrictive rules of evidence as to relevant factors such as use of seat belts, consumption of alcohol, or collateral sources of compensation for injuries sustained. Furthermore, the burden of proving the existence of a defect has often been reduced to a mere recitation of the circumstances surrounding the occurrence of the accident, with the implication that a defect was present in the product in issue. Taken together, these trends have caused excessive verdicts and marked uncertainty in the outcome of trials, reducing products liability litigation to something of a grand lottery.

A. Development of the Law of Strict Liability

The realization of a long developing trend toward strict liability was finally accomplished in Greenman v. Yuba Power Products, which held

Prosser's battlefield phraseology is rather fanciful:

One major bastion, that of negligence liability, has been carried long since, and its guns turned inward upon the defenders. Another, that of the strict liability of the seller of food and drink, is hard pressed and sore beset, and may even now be tottering to its fall. Elsewhere along the battlements there have been minor breaches made, but the defense is yet stout, war correspondents with the beleaguering army are issuing daily bulletins, proclaiming the siege is all but over. From within the walls comes the cry, not so; we have but begun to fight. Watchman, what of the night?


Many would believe that the battle objective was never limited to taking the "citadel of privity," but extended to a number of other defenses which, although arguably more legitimate, have nevertheless fallen away.

The development of the law of strict liability has been discussed in a number of writings over the past years. E.g., Noel, Manufacturers of Products—The Drift Toward Strict Liability, 24 TENN. L. REV. 963 (1957); Prosser, The Fall of the Citadel, 50 MINN. L. REV. 791 (1966); Prosser, supra note 12; Traynor, The Ways and Means of Defective Products and Strict Liability, 32 TENN. L. REV. 363 (1965); Wade, On the Nature of Strict Tort Liability for Products, 44 MISS. L.J. 825 (1973); Wade, Strict Tort Liability of Manufacturers, 19 SW. L.J. 5 (1965).

59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). Section 402A of the Second Restatement of Torts was published by the American Law Institute as a valid statement of the law of 1965. Judge Traynor, author of the Greenman decision, was an advisor to the Institute at the time; Prosser was the reporter for the Restatement. In 1965, there were few
that "[a] manufacturer is strictly liable in tort where an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." The realization was inevitable, even if strongly resisted. The process had started with the early case of Thomas v. Winchester, proceeded apace in 1916 with Justice Cardozo's holding in MacPherson v. Buick Motor Company, and was brought to the point of fruition in 1960 in Henningsen v. Bloomfield Motors.

In its broadest terms, the evolution toward strict liability had as its impetus the restrictive nature of the then-available actions for recovery of damages occasioned by use of a defective product. The tort-contract dichotomy so evident in the early cases was an unnecessary burden. The once tortious nature of an action for breach of warranty, whose essence was deceit or misrepresentation, had by the nineteenth century evolved to a contractual action. The codification of the law of warranty into the Uniform Sales Act of 1906 insured that it would remain contractual. This categorization subjected the breach of warranty action to the requirements of privity and also permitted contractual limitations of warranty, which could defeat an otherwise valid claim.

With MacPherson the negligence of the manufacturer became actionable, but with attendant problems of proving a duty on the part of a manufacturer and a breach of that duty which resulted in injuries or property damage. The burden upon the plaintiff to show where the manufacturer had been negligent was clearly a heavy one; and there could be no recovery where the manufacturer could not have discovered the defect by reasonable inspection. The cases decided in the intervening years between MacPherson cases, apart from Greenman, to substantiate the Restatement formulation of section 402A. Since 1965, the Restatement concept of strict liability has been adopted in all but a few states. For a review of the current status of acceptance of the doctrine of strict liability see 1 Prod. Liab. Rep. (CCH) ¶ 4070 (1977).


6 N.Y. 397 (1852).

217 N.Y. 382, 111 N.E. 1050 (1916).


24 A major factor prompting the decision in Henningsen was surely the fact that plaintiff could not prove negligence on the part of defendant on the sole ground that the subject automobile had been badly damaged, and there was no evidence other than the testimony of the injured party. Accordingly, the alternative route of breach of warranty was chosen, and the presence of a defect was inferred from the circumstantial evidence regarding the occurrence of the accident. In MacPherson, a negligence theory was utilized because it was shown that a reasonable inspection by the manufacturer would have disclosed the presence of defective wood in one of the spokes of a wheel on the subject vehicle. MacPherson v. Buick Motors Co., 217 N.Y. at 385, 111 N.E at 1051.
and Henningsen attest to the ingenuity of the courts in attempting to resolve the disparate nature of actions in negligence and breach of contract by fashioning an equitable result for the parties involved.25

Thus, the widespread adoption of strict liability, as enunciated in section 402A of the Second Restatement of Torts, was inevitable in that it promised a simple solution to the tort-contract dichotomy by joining aspects of negligence and warranty law together in one action, thereby expanding allowable recovery under warranty aspects and reducing the formidable burden of proof in negligence. It was an innocent development in itself; there was no good reason why modern courts should continue to labor under restrictive forms of action, much as fourteenth century English courts had done, when a solution was readily apparent.

Unfortunately, the advent of strict liability was accompanied by public policy statements which spoke of deflecting the risk of harm from defective products to those best able to pay. This "risk-spreading" argument maintained that "manufacturers, as a group and an industry, should absorb the inevitable losses which must result in a complex civilization from the use of their products, because they are in the better position to do so, and through their prices to pass such losses on to the community at large."26

While not unreasonable on its face, this argument has become the basis for application of the "deep pocket rationale." This rationale has affected the proceedings and, ultimately, the outcome of products liability litigation in that the quantum of proof requisite to show the existence of a defect has diminished; contributory negligence is not considered a defense in strict liability; and certain evidentiary rules work to exclude relevant evidence which would aid the jury in an overall understanding of a case. These developments have simplified the plaintiff's preparation and presentation of his case, but have left defendants virtually in the position of proving that the product was not defective.

25 "As the decisions continued, there was an extended period during which courts proceeded to invent a remarkable variety of highly ingenious, and equally unconvincing, theories of fictitious agency, third-party beneficiary contract, and the like, to get around the lack of privity between the plaintiff and defendant." Prosser, supra note 15, at 1124. Twenty-nine judicial techniques which were utilized by the courts are noted in Gillam, Products Liability in a Nutshell, 37 ORE. L. REV. 119, 153-55 (1958).

26 Prosser, supra note 15, at 1120. His other arguments for adopting strict liability of manufacturers are (a) that the plaintiff may have problems proving negligence against sellers of the product other than the manufacturer; (b) that the doctrine of strict liability merely enforces a standard of care which the "best companies" already maintain; and (c) that proof of negligence is more uncertain and adversely affects trial preparation, settlement negotiation, and verdict amounts, in a way that strict liability does not. Id. at 1116-19.
B. Proof of Defect

It has been said that the advent of strict liability has occasioned no change in the burden of proof which rests with the plaintiff in negligence actions. There seems to be an academic consensus that issues of negligence, aided by the doctrine of res ipsa locquitur, are no more difficult to prove than issues of defect in strict liability. If this were true, it would be difficult to understand the impetus behind the development of strict liability. If a theory of negligence coupled with the doctrine of res ipsa locquitur were equivalent to proving a defect under strict liability, prior cases surely would have seized upon this approach rather than distorting legal theories to reach the desired results. But in point of fact, the strict liability theory has changed the burden of proof; defects may be proved by circumstantial evidence, with no showing of negligence, and liability is not defeated by a showing of due care or by counterclaims of contributory negligence which are available under a negligence theory.

A number of authors have dealt with proof of defect in a strict liability context. It is interesting to note that mere evidence of a damaging event, which occurs in the use of a product, is considered in some instances to be sufficient evidence of the existence of a defect, particularly where the

27 "Where the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not." Id. at 1114. "Theories of strict liability have not materially expanded the liability of the maker of a defective product, although the same may not be true as to resellers and retailers." Keeton, Manufacturers' Liability: The Meaning of "Defect" in the Manufacture & Design of Products, 20 SYRACUSE L. REV. 599, 562 (1969).

28 Prosser has posited the impetus toward strict liability on considerations of trial preparation, negotiations for settlement, and verdict amounts which are more speculative under a theory of negligence. Prosser, supra note 15, at 1114. But when one considers the wide ranging theories on the kind and quantum of evidence needed to prove a defect, Prosser's arguments seem illusory, at best. See Keeton, supra note 27, at 563; Rheingold, Proof of Defect in Product Liability Cases, 38 TENN. L. REV. 325 (1971).

29 See note 25 supra, and accompanying text as to the legal theories.

30 See Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 VAND. L. REV. 93 (1972). Most courts would follow the view of the Restatement which, under strict liability, distinguishes between contributory negligence and assumption of the risk and holds that only assumption of the risk (willful encounter of a known danger) would be a defense. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n at 356 (1965). However, if plaintiff's negligence is the sole proximate cause of the accident, this would be a bar to recovery, not because the defendant has asserted a partial or complete defense to its liability, but because causation has not been shown. See notes 38-56 infra and accompanying text.

probable causes of the event are held to be a matter of common knowledge. Some cases have gone even further, finding liability based on minimal proofs, unsubstantiated by or even contradicted by expert testimony. For example, it has been held that plaintiff's testimony that a dry-cell battery exploded was sufficient to prove the defective condition of the product, despite expert evidence to the contrary that the chemical substances contained in the battery could not and did not react in an explosive manner; that testimony concerning "vibrations" was sufficient evidence of a defect in the subject automobile to account for plaintiff's loss of control of the vehicle, with subsequent injury; and that plaintiff's testimony, with no corroborating witnesses, that an automobile had "veered uncontrollably" and that the application of brakes had caused the vehicle to "jump or jerk" was sufficient to show a defect in the vehicle which caused plaintiff's injuries. Other cases have fostered the notion, through dicta, that plaintiffs

32 Keeton, supra note 27, at 564 and cases cited therein; Rheingold, supra note 28, at 328. Both Keeton and Rheingold categorize types of evidence which plaintiff may utilize in proving a defect. Keeton includes 1) expert evidence, based upon examination, 2) new evidence of the occurrence of a damaging event, 3) a combination of expert evidence and evidence as to the occurrence of the incident, 4) the user's testimony as to the malfunction of a component part, and 5) evidence negating the existence of possible causes not attributable to the manufacturer. Keeton, supra note 27, at 564-65. Rheingold indicates broader areas of proof as to 1) the nature of the product, 2) the pattern of the accident, 3) the "life history" of the product, 4) similar products and uses, 5) elimination of alternative causes, and 6) the occurrence of the accident. Rheingold, supra note 28, at 326-37. Keeton's analysis seems to assume that expert testimony becomes direct evidence of an "identifiable defect," when in reality expert testimony is often only speculation as to a defect, speculation which relies primarily upon tentative conclusions about the occurrence of the event itself. Such opinions are rarely of greater probative value than evidence as to the mere occurrence of the event, particularly where the "expert" has no experience in the area with which his opinions deal.

33 Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965) (adopting a theory of strict liability as enunciated in Greenman).

34 Bollmeier v. Ford Motor Co., 130 Ill. App. 2d 844, 265 N.E.2d 212 (1970). In reaching its decision, the court was apparently preoccupied with evidence that the subject vehicle had experienced some vibration problems prior to the incident and that extensive repair work had been undertaken to solve the problem. The incident in issue occurred when the owner's son was driving by himself and failed to negotiate a curve properly. There were no other witnesses to the incident. The court noted "circumstantial evidence...such as proof of a malfunction which tends to exclude other extrinsic causes, is sufficient to make a prima facie case on this issue." Id. at 851, 265 N.E.2d at 217. The court failed to clarify to what extent "other extrinsic causes" must be excluded. This case therefore upholds broad guidelines for circumstantial proofs, suggesting that any evidence will be sufficient to get the case to the jury. It is interesting to note the court's remarks that, based on the evidence, a negligence theory could not be shown, but that plaintiff could prevail under a theory of strict liability. This very clearly indicates that the doctrine of strict liability, despite what Prosser and others may have said, does permit a far more simplistic approach to proofs, just short of a theory of absolute liability. See note 27 supra and accompanying text.

35 Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970). In this case, the court had nothing more to rely on than plaintiff's testimony that the event occurred. Not even plaintiff's expert could reach a conclusion as to defect because the car had been so badly damaged in the accident. There were no other witnesses to the incident which occurred when plaintiff was driving alone.
may prove their cases by mere evidence of the incident.  

The effect of proving a defect by mere proof of the occurrence of the event is especially prejudicial to defendants in those instances where the total product or relevant component parts have been destroyed in the subject accident, and where there is no competent eyewitness testimony. In these situations, defendants frequently have no means to defend the product effectively, so that mere submission of the case to a jury often determines the issue of liability. Since only the plaintiff is capable of presenting evidence, the jury has little choice but to reach a verdict for the plaintiff. What has been lost in this process is the realization that evidence is suggestive of a number of inferences, only one of which may lead to the conclusion that the product was defective. And where witnesses to the incident are unavailable or nonexistent, or where the action has come to trial years after the occurrence of the incident, production of controverting evidence is extraordinarily difficult for the defendant.

The result of the trend toward circumstantial proof of defect has been to render impossible any prediction of the outcome of litigation for defendants in those cases where plaintiff's proofs are extremely weak. Previous standards of proofs virtually insured that plaintiff would lose if he had no reasonable proof of defect or negligence. Now, however, almost any evidence presented by the plaintiff may be sufficient to support a verdict awarding him extensive damages. The unpredictability of outcome always works against the defendant: in electing to defend a seemingly unmeritorious case at trial, a defendant takes a significant risk despite weaknesses in plaintiff's proofs. This risk has often forced parties to have recourse to settlement of claims which are otherwise unmeritorious; and the availability of settlement money from reluctant defendants, of course, stimulates the filing of additional claims.

C. Contributory Negligence

The problems arising out of the permissible proof of defect by circumstantial evidence have been exacerbated by the development of the law of strict liability and its treatment of the defense of contributory negligence.


38 See generally, Brewster, Comparative Negligence in Strict Liability Cases, 42 J. Air L. & Com. 107 (1976); Noel, supra note 30; Schwarz, Strict Liability and Comparative Negligence, 42 Tenn. L. Rev. 171 (1974); Annot. 46 A.L.R. 3d 240 (1972).
It is often said that contributory negligence is no defense to an action in
strict liability. Indeed, comments to section 402A of the Second Restate-
ment of Torts suggest that because strict liability is not based upon the
negligence of the seller, the consumer's own contributory negligence is
therefore not at issue.39 The "logic" of this reasoning, however engaging, is
an academic fabrication that ignores reality. While strict liability may have
removed much of the plaintiff's burden of proving specific acts of negligence
by the defendant, liability always depends on the conduct of the parties: the
defendant's placing of the allegedly defective article in the stream of com-
merce and the plaintiff's conduct in using that article.

Much confusion has resulted from semantic problems attendant upon
use of the terminology "contributory negligence." Problems begin with the
illusory distinction which the Restatement draws between contributory negli-
gence and assumption of the risk. According to the Restatement, contribu-
tory negligence of the plaintiff is not a defense when such negligence consists
of plaintiff's failure to discover a defect or to guard against its existence.40
The issue of plaintiff's failure to discover a defect is a narrow one, however,
and is irrelevant where there is no duty on the plaintiff's part to discover or
to inspect for defects. It therefore seems unreasonable that the Restatement
would totally discard the defense of contributory negligence on the sole
premise which few would dispute, that a duty to inspect or discover defects
in a product should not be imputed to the plaintiff. In fact, the defense of
contributory negligence reappears under other labels. The most obvious
defense that has been retained by the Restatement is that of assumption of
the risk: "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."41 The distinction which
the Restatement draws between contributory negligence and assumption of
the risk is regrettable. Inasmuch as assumption of the risk is really one aspect
of the larger concept of contributory negligence, it seems improper to dis-
card the larger concept in strict liability, while retaining subcategories of
contributory negligence in the form of assumption of the risk.

In addition to assumption of the risk, there are other aspects of con-
tributory negligence which the Restatement would recognize as valid de-
fenses, even though it presents the general position that contributory negli-
gence is no defense. For example, plaintiff's "contributory negligence" may

40 Id.
41 Id.
be the proximate cause of the injuring event, as where a plaintiff is driving under the influence of drugs or alcohol and is injured in a collision with another automobile, yet claims that the accident occurred because of a defect in the automobile. In such situations, the plaintiff’s negligence should be a defense to the lawsuit, whether as a contributory negligence defense or as a proximate cause defense. This approach is perhaps implicit in section 402A, but much confusion has resulted from language that appears to restate the law as proscribing any defense of contributory negligence except that which constitutes assumption of the risk.

Another aspect of contributory negligence is the mishandling of the product by the plaintiff after it has left the hands of the seller. The seller is not liable when subsequent mishandling of an otherwise safe product results in the product becoming harmful, ultimately causing injury. As in the case of contributory negligence which proximately causes the injury, mishandling of a product becomes another aspect of contributory negligence, but is not considered in the Comment n treatment of contributory negligence.

Finally, the comments to section 402A allude to a defense of misuse, though that exact terminology is not found in the comments. Comment h, for example, recognizes the law that a product “is not in a defective condition when it is safe for normal handling and consumption.” Other references to abnormal use, or misuse, are made in Comments i and j. These references suggest that evidence of plaintiff’s misuse should be admissible.

Clearly, the defense of contributory negligence may take on several forms, not all of which are proscribed by the Restatement, even though Comment n purports to dispose of the contributory negligence defense in strict liability. By taking the general position that the defense of contributory negligence no longer has validity in strict liability, the Restatement has

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42 The mere presence of a defect is theoretically insufficient to impose liability. Section 402A retains the requirement that the injury result from the defect, not from the plaintiff’s conduct: “One who sells any product in a defective condition . . . is subject to liability for physical harm thereby caused to the ultimate user . . . .” Id. at 347 (emphasis added).

43 Id. Comment n.

44 The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Id. Comment g, at 351.

45 Id. Comment h, at 351 (emphasis added). Examples indicated in this comment include knocking a bottled beverage against a radiator to remove the cap (abnormal handling), adding too much salt to food (a rather absurd example of abnormal preparation), and a child’s eating too much candy (abnormal consumption).
fostered inaccurate assumptions about the law of strict liability. Although this may seem to be a problem of semantics, the results are serious. Consider the unacceptable results which have followed from a refusal to consider contributory negligence as a defense in cases where plaintiff was driving at excessive speeds or under the influence of intoxicants, or failed to take proper safety measures when using the product. The public policy argument that defendant sellers and manufacturers must bear the risk of accidents arising out of the use of defective products should not be followed to the point where an equally important argument, that the public must become more mindful of safety, and bear the risk when safety is disregarded, is excluded from consideration. To this extent the conduct of a user of a product is important, whether it be called contributory negligence, assumption of the risk, misuse, mishandling, or contributory fault.

One case which has recognized the validity of applying comparative negligence in a strict liability context is Butand v. Suburban Marine & Sporting Goods. In reaching its decision, the Supreme Court of Alaska expressed its awareness of "theoretical arguments" that the plaintiff's contributory negligence was difficult to compare with the defendant's strict liability, in that there would be little or no evidence of the seller's conduct to compare

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46 See Williams v. Ford Motor Co., 454 S.W.2d 611 (Mo. App. 1970). The court explained why it preferred the terminology "contributory fault" to "contributory negligence" or "assumption of the risk":

Some confusion can arise when it appears that contributory fault is of the nature of assumption of risk when at the same time it is known that assumption of the risk can sometimes be contributory negligence. The permeation of this area of the law, with semantic problems, has been noted. For purposes of clarity and simplicity reference should be made to the defense under its proper term [contributory fault] even though it is in the nature of "assumption of the risk."

_id. at 618.


49 555 P.2d 42 (Alaska 1976). Plaintiff was injured while operating a snow machine, equipped with an allegedly defective pulley guard which had shattered, causing blindness in plaintiff's left eye. Proofs were adduced that plaintiff had disregarded operating instructions in the owner's manual, thereby failing to maintain the machine properly. Plaintiff appealed from a verdict for defendant seller; the first reported appellate decision dealt, inter alia, with the issue of contributory negligence and seemed to adopt the Restatement theory that there can only be a defense of contributory negligence where plaintiff had willfully encountered a known danger. 543 P.2d 209 (Alaska 1975). However, in reversing and remanding the case for retrial because of the jury instructions as to plaintiff's burden of proof, the court requested additional briefing on the important question of comparative negligence as a defense in strict liability, an issue which the court felt should be resolved for this and future cases. After further briefing and consideration the second appellate decision was rendered, resolving the issue of comparative negligence. Note, however, that the Butand case did not present the question of the validity of the defense of the type of contributory negligence encountered in the drunk driving cases, where the plaintiff's conduct is unrelated to the existence of a defect.
with the evidence of plaintiff's conduct. Nevertheless, the court reasoned that the theoretical difficulty of comparing plaintiff's and defendant's conduct is more apparent than real. The system of comparative negligence has not been difficult for courts or juries to administer in cases that have been decided on a theory of negligence. Comparative negligence would be utilized in the same manner in cases litigated on a strict liability theory, except that in strict liability "it would not be necessary to prove that a defect was caused by negligence."

In considering the public policy reasons behind strict liability, the court said that those policies would not be hindered by application of a theory of comparative negligence, inasmuch as "[t]he manufacturer is still accountable for all the harm from a defective product, except that part caused by the consumer's own conduct." In addition, comparative negligence would serve the purpose of "[ameliorating] the harshness of contributory negligence while balancing the seller's responsibility to the public with the user's conduct in contributing to his injury."

The court's reasoning in the Butand decision is not inconsistent with a remarkable recent decision from the Supreme Court of California which may well assume landmark status. In Daly v. General Motors Corp., the California Supreme Court extended a system of comparative fault to actions founded on strict products liability and abolished concepts of contributory negligence and assumption of the risk. Daly involved a thirty-six year old attorney who lost control of his automobile while driving at fifty to seventy miles an hour on a Los Angeles freeway; the vehicle struck a metal divider fence. At the point of impact the driver was thrown out of the vehicle through the door which had opened on the driver's side, and sustained fatal head injuries. It was alleged that the door latch had been defectively designed, causing the door to open during impact.

Defendant General Motors sought to show at trial that the Opel automobile was equipped with a seat belt-shoulder harness restraint system and a door lock which, if used, would have prevented the injuries claimed. At issue also was evidence that decedent had been intoxicated at the time of

50 555 P.2d at 43.
51 Id. at 46 (emphasis added).
52 Id.
53 Id.
54 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). The decision is also noteworthy for its holding with regard to proof of defective design. The court decided that the issue of defective design must be considered with respect to the product as a whole. "Product designs do not evolve in a vacuum, but must reflect the realities of the market place, kitchen, highway, and shop. Similarly, a product's components are not developed in isolation, but as part of an integrated and interrelated whole." Id. at 1175, 144 Cal. Rptr. at 393.
the accident. Defendants claimed that this evidence was properly admissible because it showed that the decedent's own conduct caused his death. The court rejected these contentions since admission of such evidence, without instructions limiting its effect to the issues of proximate cause and mitigation of damages, might lead the jury to believe that recovery could be completely barred. However, the court did adopt a theory of pure comparative negligence whereby a manufacturer or distributor would continue to be strictly liable for injuries caused by defective products, but the plaintiff's recovery would be reduced "to the extent that his own lack of reasonable care contributed to his injury." Recovery would be computed by having the jury determine the amount of the plaintiff's damages and the extent to which the plaintiff's conduct contributed to his injuries; the court would then reduce the assessed damages by the percentage-of-fault figure supplied by the jury.

The reasoning behind the court's decision to adopt comparative fault is compelling: the goals of strict liability (elimination of problems of proof of defect, protection of defenseless consumers) are not at all frustrated by adopting comparative fault concepts, since the plaintiff's recovery will be only reduced, not completely barred. Nor will substantial impairment of incentives to produce safe products result, for defendants will still be responsible in strict liability for defective products to the extent that the defect caused the injury. The Supreme Court of California, in dismissing semantic arguments in Daly in much the same way that the Supreme Court of Alaska had done in Butand, said that "[w]hile fully recognizing the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence, we think they can be blended or accommodated." Most importantly, the court believed that fundamental fairness is more important than doctrinal purity and that it is unfair to cast "upon one party the entire burden of a loss for which two are, by hypothesis, responsible."

The Butand and Daly decisions are worthy of consideration because they squarely confront the issues of strict liability and contributory negligence and evaluate both legal theory and practical results. The courts resolved the conflicting issues in a way that is practical, and most importantly, equitable to both sides. In light of these recent decisions, the Restatement comments on contributory negligence seem curiously pedantic and out of place in the context of the courtroom.

55 Id. at 1174, 144 Cal. Rptr. at 392.
56 Id at 1168, 144 Cal. Rptr. at 386.
57 Id. at 1173, 144 Cal. Rptr. at 391.
58 Id. at 1167, 144 Cal. Rptr. at 385.
59 Id. at 1172, 144 Cal. Rptr. at 390 (quoting W. PROSSER, LAW OF TORTS § 67 (4th ed. 1971)).
D. State of the Art Defense

Another aspect of the deep pocket rationale has been the general disregard for the age of the product at issue in products liability litigation and for the state of the art as to design and technology at the time the article was manufactured. Not infrequently, actions are brought alleging defects in products that may have been manufactured a number of years prior to the occurrence of the incident in issue. Trial of the action may not be reached until still several years later. Yet, often the jury is permitted to determine the defectiveness of the article based on the technology available many years after the article has been produced.60 The results are absurd in those cases which have held manufacturers liable for not utilizing design and production technology which was nevertheless unavailable or infeasible at the time of manufacture of the product in issue. As with other manifestations of the deep pocket rationale, the outcome of litigation becomes unpredictable; the scope of the manufacturer's responsibility becomes confused.

E. Evidence as to Collateral Sources of Compensation

One area of products liability litigation which has abetted the deep pocket rationale has been the collateral source rule,61 both a rule of evidence and a rule of damage. As an evidentiary rule, it prevents adducing evidence at trial as to other sources of recovery and compensation for the plaintiff's injuries. For example, a jury is not permitted to hear evidence that a plaintiff has received workmen's compensation for his injury and, accordingly, has suffered neither a total wage loss nor out-of-pocket expenses for medical care. The plaintiff's presentation of the case at trial will include proofs as to all manner of damages without considering those recoveries from insurance or other payments which would mitigate damages. In insurance subrogation claims, the jury may never know that the plaintiff has been reimbursed for wages and medical costs by his insurer or the insurer of a negligent driver; out of ignorance and sympathy, the jury may thus award damages to plaintiff as though there had been no other recovery, clearly a windfall. The problem is particularly acute in those jurisdictions where a defendant has no right of action against a joint tortfeasor and so cannot interplead a proper defendant who may have previously settled with the plaintiff.

As a rule of damages, the collateral source rule maintains that there


can be no reduction of plaintiff's allowable damages by taking into account benefits received from other sources which have partially or wholly compensated plaintiff for his losses. The rule is an old one in American law, and derives from a period of time prior to extensive insurance coverage and welfare provisions such as workmen's compensation and medicare. The obsolescence of the rule is evident in its presumption that tort recovery is the primary form of recovery when, in reality, tort recovery today is more often a windfall to the plaintiff.

Public policy arguments in favor of the collateral source rule are that a reduction in recovery in accordance with other collateral benefits would affect the deterrent aspect of tort actions and that a defendant should not be permitted to profit from the planning or good fortune of a plaintiff who has purchased insurance or received gratuitous benefits. Yet, when it is considered that the cost is borne by the public as consumers and as direct or indirect contributors to workers' compensation, social security, and employee benefit plans, it can be seen that public policy is not best served when a plaintiff recovers without regard to prior compensation. And, in line with the "risk-spreading" justification for strict liability, there is no public policy to be served in spreading the risk to a manufacturer when it has already been spread to the insurance company or employer. Moreover, application of the collateral source rule is inequitable in that it gives a false impression to the jury of financial destitution and hardship, which will unquestionably be reflected in the final verdict.

F. Effects

The deep pocket rationale with all of its manifestations, some of which have been considered here, has resulted in creating a tort liability system which guarantees uncertainty and confusion as to the adjudication of a defect in a product which is alleged to have caused injury or property damage. There is uncertainty because it is not known by what standards a product will be adjudged to be defective, to what extent a plaintiff's conduct in using the article will be considered by the trier of fact, or, most importantly, the quantum of damages that will be recoverable. Where there is uncertainty, almost any claim, however unmeritorious, will have some chance of success in the system. "Spreading the risk" in this manner increases the expenses of manufacturers and sellers, which are eventually passed on to the consumers.


63 Fleming, supra note 61, at 1547.
without any benefit to them or to the public. The starting point for legislative reform must therefore be the elimination of uncertainty coupled with a concern for the fair adjudication of claims. Statutes of limitations must be enacted, defenses defined with clarity, and user’s conduct placed in issue.

III. PROPOSED REFORMS IN THE LAW OF PRODUCTS LIABILITY
A number of proposals for reform in the law of products liability have emanated from varied sources, including manufacturers, insurers, law professors, and defense counsel. The proposals range from the extremes of a radical overhaul of the system, represented by Professor O’Connell’s advocacy of an elective no-fault system, to less novel solutions which advocate reinforcement and clarification of presently existing defenses. In between these extremes there is a long list of proposals which would seek primarily to retain the present tort system of liability while modifying certain aspects of the law in order to reestablish equilibrium in the dynamic struggle between the opposing parties—manufacturers and sellers on the one side, and buyers and consumers on the other. Many states have considered such proposals and are attempting legislative reform. At least six states have already enacted legislation in the area of products liability.

64 E.g., DEFENSE RESEARCH INSTITUTE, supra note 1.
65 E.g., AMERICAN INS. ASS’N, PRODUCTS LIABILITY LEGISLATIVE PACKAGE: STATUTES DESIGNED TO IMPROVE THE FAIRNESS AND ADMINISTRATION OF PRODUCT LIABILITY LAW (1977).
68 Since 1977, proposed statutes have been introduced into the legislatures of eighteen states, seeking reform in the area of products liability, including the states of California, Delaware, Florida, Kansas, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Rhode Island, Pennsylvania, and Washington. Most of the statutes have sought implementation of statutes of limitation or repose; some have gone further to legislate additional defenses to products liability litigation; comparative fault provisions were considered in a few.

The Nebraska provisions are probably least effective among this group: actions in strict liability are limited to manufacturers, only, unless the manufacturer is also a seller or lessee. L.B. 665, 85th Legislature, 2d Sess., § 3 (1978). The definition of state of the art (“best technology reasonably available”) is weak. § 4. Extensive reports are required of insurance companies which are of dubious value, but costly to prepare. § 8.
While it would not be possible to review in detail each of the many proposals for reform, it is useful to consider areas where there has been consistent impetus for reform. Typically, those advocating reform have called for statutes of limitation or repose which would limit or bar certain claims regarding older products; alteration of rules of evidence which presently proscribe evidence of contributory negligence or collateral sources of compensation; definition or strengthening of certain defenses, including the state of the art defense, product modification and alteration, and defenses of compliance with governmental regulations; limitation or elimination of damages for pain and suffering or punitive damages; and institution of a comprehensive comparative fault system. Other reforms which have been pursued with less vigor because of their complexity or uncertain effects include Professor O'Connell's proposals\(^{70}\) for mandatory arbitration of product liability claims and for an elective no-fault system. Elimination of contingency fees in products liability litigation has also been suggested.

A. Statutes of Limitation or Repose

Impetus for reform in this area has come most frequently out of those situations where defendants have been forced to litigate cases alleging defects in products which were many years old at the time of injury. For example, in *Green v. Volkswagen of America*,\(^{71}\) a sixteen year old Volkswagen van was claimed to be defective; in *Wittkamp v. U.S.*,\(^{72}\) a fifty year old rifle was the

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\(^{70}\) Professor O'Connell proposed in one article that workmen's compensation rates should be raised across the board in return for workers' giving up the right to sue third parties, *e.g.*, manufacturers of equipment in the workplace. The employer, however, would retain the right to sue third parties, the idea being that such litigation between the employer and the third party could be handled more expeditiously, probably without trial. O'Connell, *Bargaining for Waivers of Third Party Tort Claims*, supra note 63. Professor O'Connell's proposals are based on an estimate that 52 percent of all products liability verdicts involve personal injury already covered by workers' disability compensation benefits. But his proposal seems to ignore the higher costs of workers' compensation, as required by this proposal, which might well exceed any benefits to be obtained from these changes. Litigation, or the threat of litigation, would continue undiminished; there might even result a higher incidence of claims by employers against manufacturers for reimbursement of compensation benefits paid.

Quite apart from Professor O'Connell's proposals regarding workers' compensation and products liability is his proposal for an elective no-fault system where manufacturers could contract with purchasers to pay benefits, probably limited to out-of-pocket expenses, to consumers who are harmed by the product. See O'Connell, *Alternatives to Abandoning Tort Liability*, supra note 66. For a criticism of his approach see Schwartz, *supra* note 66. Neither of O'Connell's proposals are considered here for the reason that their effects are speculative, at best and because the implementation of these proposals would be a long-range proposition with limited application until results could be analyzed, therefore promising no immediate solutions to an immediate problem.

\(^{71}\) 485 F.2d 430 (6th Cir. 1973). Plaintiff, an 11 year old girl, was playing in the vicinity of the parked vehicle when she caught her finger on the side air vent. The case was remanded for determination of the issue of whether the child's use of the vehicle was forseeable.

\(^{72}\) 343 F. Supp. 1075 (E.D. Mich. 1972). After plaintiff purchased the gun, manufactured in 1917, he shortened the barrel, put on a new stock, welded on a new handle and rechambered the barrel. The court found the plaintiff had not sustained his burden of proof as to warranty or negligence and that he had been contributorily negligent.
subject of litigation. Even if such cases are successfully defended, the cost to the defendant may be great; the outside chances of losing may prompt defendants to attempt some type of settlement.

It is important to distinguish between the two situations which are sought to be eliminated by these proposals: statutes of limitation attempt to bar a plaintiff's claim after some passage of time from the occurrence of the injuring event, whereas statutes of repose attempt to limit or bar a plaintiff's claim after some passage of time from the date of manufacture or sale of the product. Statutes of limitation present little controversy for it is well settled that a plaintiff should be required to bring his cause of action within a reasonable time after the occurrence of the injuring event. The only question is how long this time period should be. Some states permit up to six years within which to file a claim, but a maximum of two years seems to be more reasonable. That period of time gives an injured person ample time to initiate an action, but does not permit proofs to become so stale as to create almost insurmountable problems for the defense.

Statutes of repose present a more difficult problem. Implicit in the argument that a plaintiff should not be permitted to bring a cause of action on an old product is the notion that a product cannot be made to last forever, that the passage of time, with continued use of a product, will result in deterioration for which, at some point, the manufacturer should not be held liable. However, it is difficult to enact a statute which would fairly designate a period of "repose" for actions on all types of products, for the reason that products will, of course, differ as to their expected life. The difficulties of choosing an equitable period of repose have been mitigated by changing the purpose of the statute from completely barring an action on an old product to the purpose of simply creating a rebuttable presumption that a product which is older than the period prescribed by statute is not defective.

Some states have already enacted variations of these proposals. Connecticut law contains a statute of limitations which requires actions to be brought within three years of injury, but no more than eight years from the date of sale of the product. In March, 1977, the Utah Legislature approved products liability reform legislation containing, among other provisions, a

73 The Supreme Court of Oregon has noted two reasons which justify statutes of repose: (1) evidence regarding the product diminishes as time goes by, which renders defense of the product difficult; (2) public policy requires that affairs be conducted with a degree of certainty, "free from the disruptive burden of protracted and unknown potential liability." Johnson v. Star Machinery Co., 270 Or. 694, 530 P.2d 53 (1974).

74 CONN. GEN. STAT. § 52-577a (Supp. 1978). Compare OR. REV. STAT. § 30.905(1) ("product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption").

75 Utah Products Liability Act, S.B. 158, 1977 Utah Laws ch. 149 (to be codified at UTAH CODE ANN. §§ 78-15-3 to -6).
statute of limitations restricting actions to those brought within six years after date of initial purchase or ten years after date of manufacture of an allegedly defective product. It provides that:

No action shall be brought for the recovery of damages for personal injury, death or damage to property more than six years after the date of initial purchase for use or consumption, or ten years after the date of manufacture, of a product, where that action is based upon, or arises out of, any of the following:

(a) Breach of any implied warranties;
(b) Defects in design, inspection, testing or manufacture;
(c) Failure to warn;
(d) Failure to properly instruct in the use of a product; or
(e) Any other alleged defect or failure of whatsoever kind or nature in relation to a product.  

In contrast, legislation in Colorado has recently been enacted which mandates only a rebuttable presumption, rather than a complete bar of a cause of action, in those situations in which an article older than ten years is claimed to be defective. The statute provides that “[t]en years after a product is first sold for use or consumption, it shall be rebuttably presumed that the product was not defective and that the manufacturer or seller thereof was not negligent and that all warnings and instructions were proper and adequate.”

This latter approach is preferable because it avoids the inequity of absolutely proscribing any litigation on a product merely because it is old. How much a rebuttable presumption will aid a defendant in actual litigation may be doubtful, but it will at least give added emphasis to the problems of plaintiff’s proof and may have the general effect of deterring litigation.

B. Strengthened Defenses

Many proposals have quite properly considered the importance of obvious defenses which courts have sometimes ignored. These include the state of the art defense and the defense that a product has been altered or modified. Courts must be encouraged to accept and give full effect to these defenses; in this regard legislation may have a positive effect.

76 Id. § 3 (to be codified at UTAH CODE ANN. § 78-15-3(1) ). Tennessee provisions limit product liability actions to those brought within ten years from the date of first sale, or within one year after the expiration of the anticipated life of the product, whichever is shorter. Tennessee Products Liability Act of 1978, § 3, 1978 Tenn. Pub. Acts ch. 703.

77 Act of June 10, 1977, H.B. 1536, 1977 Colo. Sess. Laws ch. 199, § 2 (to be codified at COLO. REV. STAT. § 13-21-403(3)). Kentucky establishes a rebuttable presumption of no defect if the injury, death or property damage occurs more than five years after the date of first sale, or more than eight years after the date of manufacture. Product Liability Act of Kentucky, S.B. 119, 1978 Ky. Acts ch. 91, § 3 (1) (to be codified at KY. REV. STAT. § 411.350).
1. State of the Art Defense

With regard to the state of the art defense,\(^7\) it has been proposed that legislation require that courts take into account the state of design and technology at the time the product was manufactured. Several states have considered such provisions. Typically, this is accomplished by creating a rebuttable presumption that a product is not defective if it conforms to the state of the art at the time of manufacture. For example, recently enacted Colorado legislation provides a rebuttable presumption that a product was not defective, or that the manufacturer or seller was not negligent, if the product “[p]rior to the sale by the manufacturer, conformed to the state of the art, as distinguished from industry standards, applicable to such product in existence at the time of sale.”\(^9\) The effect of the presumption will be to reinforce the probative value of evidence of conformance with the state of the art in existence at the time of manufacture and will provide a basis in law for appeal should the evidence regarding compliance with the state of the art technology have been ignored.

2. Defense of Product Modification

Statutes delineating the defense of product modification or alteration will likewise have the effect of reinforcing an important defense, permitting a basis for appeal if evidence as to product modification has been ignored. As with the state of the art defense provisions, some states have enacted provisions to give full legal effect to this defense; others will doubtless follow. Along with other products liability reform measures, the Utah Legislature has recently enacted a provision which protects a manufacturer or seller of a product from liability in the situation where injury has resulted from use of a product that has been altered or modified. The Utah statute provides that:

No manufacturer or seller of a product shall be held liable for any injury, death or damage to property sustained as a result of an alleged defect, failure to warn or protect or failure to properly instruct in the use or misuse of that product, where a substantial contributing cause of the injury, death or damage to property was an alteration or modification of the product, which occurred subsequent to the sale by the manufacturer or seller to the initial user or consumer, and which changed the purpose, use, function, design, or intended use or manner of use of the product from that for which the product was originally designed, tested or intended.\(^8\)

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\(^7\) See note 60 supra, and accompanying text.


\(^8\) Utah Products Liability Act, S.B. 158, 1977 Utah Laws ch. 149, § 5 (to be codified at
Recently enacted Oregon legislation also provides a defense to a product liability action where alteration or modification of the product has occurred. The alteration or modification becomes the basis for a defense if it was a "substantial contributing factor," which is similar to the requirements of the Utah provision, but Oregon adds the provision that if the alteration or modification was reasonably foreseeable, the manufacturer or seller must have given adequate warnings in order for the defense to be valid.\(^1\) Although the courts in Utah and Oregon will need to develop reasonable definitions of "substantial contributing factor," the very terminology suggests comparison of acts or omission of parties on both sides, so that comparative fault provisions would best facilitate the implementation of the defense.

The importance of legislation which provides a product modification defense cannot be doubted in light of such unfortunate decisions as *Hopkins v. General Motors Corp.*\(^2\) There the jury found that the lock-out system on the carburetor of a pickup truck manufactured by the defendant had failed to operate properly. This malfunction caused plaintiff's vehicle to go out of control and overturn, and the plaintiff was gravely injured in the accident. The jury returned a verdict, left undisturbed on appeal, for $1,760,000. What is disturbing about this case is that the carburetor was found to be defective, despite proof showing that the carburetor had been removed by the plaintiff for about one week, then reinstalled on the subject vehicle prior to the incident. In reinstalling the original carburetor on the truck, plaintiff made some eleven alterations to the original installation, including failure to connect the choke rod, burring the end of the lock-out pin, using a nail instead of a cotter pin in the main accelerator rod linkage, and using other improper parts for the installation. The outcome in *Hopkins* might well have been different had there been legislation giving effect to the defense of product modification. In *Hopkins*, the modification was clearly a substantial contributing factor which should not have been ignored.

\(^{1}\) *OR. REV. STAT.* § 30.915 (3) (1977).

\(^{2}\) 535 S.W.2d 880 (Tex. Ct. App. 1976), aff'd, 548 S.W.2d 344 (Tex. 1977). See *Note, The Defense of Misuse and Comparative Causation in Products Liability*, 14 HOUS. L. REV. 1115 (1977), which discusses the *Hopkins* court's comparison of plaintiff's misuse or alteration and defendant's defective product, both of which contributed to the injuring event. It would seem, however, that the court was not applying a comparative causation theory, but rather had rejected the evidence that the modifications were the proximate cause of the injury. That the jury and the appellate courts would disregard the modification is incredible. The case is noteworthy as an example of how a jury, overcome with sympathy for the plaintiff, will often disregard substantial evidence in reaching a verdict. An appellate court has difficulty overturning such a verdict if there is any reasonable evidence to support the jury's finding.
3. Compliance with Governmental Standards

Finally, there have been proposals to establish compliance with governmental standards as a defense to a product liability action. The Kansas Supreme Court recognized this defense in *Jones v. Hittle Service, Inc.*, holding that:

We think the same rule should apply to standards set by the legislature (or by regulations having the effect of law) as to those set by an industry. Compliance is evidence of due care and that the conforming product is not defective, and may be conclusive in the absence of a showing of special circumstances. Certainly a manufacturer should be able to rely on such standards in the absence of actual or constructive notice that they are inadequate.

The *Restatement* approaches the problem from the opposite direction, taking the position that compliance with legislative or administrative regulations "does not prevent a finding of negligence where a reasonable man would take additional precautions." However, the comments indicate that, in the absence of "special circumstances," legislative standards may be sufficient to meet requisite standards of care. Thus, the *Restatement* and the *Jones* case are consistent in their assessment of a proper defense of compliance.

Legislative enactments which would provide for the defense of compliance with governmental standards, consistent with the *Restatement* approach, could be effective provisions in products liability litigation. The effect would be to legislate a rebuttable presumption that a product was not defective which complied with governmental standards relating to the part or component of the product which is alleged to be defective. Proof of compliance would require the opposing party to prove that the standard was not sufficient. As with defenses previously considered, a legislative enactment assuring a defense of compliance with governmental standards would, at the least, provide a good basis for appeal if evidence of compliance were disregarded at the trial level.

The Utah Legislature has enacted provisions establishing a rebuttable presumption that a product made in conformance with governmental stand-

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83 219 Kan. 627, 549 P.2d 1383 (1976). In *Jones*, plaintiffs sought damages for injuries as a result of a propane gas explosion. At issue was the level of the odorization of the gas, which could have provided warning of a gas leak. The Supreme Court of Kansas held that the manufacturer's compliance with state standards was evidence of due care, although negligence could be proved by showing that a reasonable person would have taken additional precautions.

84 *Id.* at 632, 549 P.2d at 1390.

85 *RESTATEMENT (SECOND) OF TORTS* § 288C (1965).

86 *Id.* Comment a.
ards is free from defect. The defense is applied when it is shown that the allegedly defective aspect of the subject product (whether design, testing, warning or manufacture) in fact conformed to governmental standards regulating that particular aspect of the product. The Colorado Legislature has enacted similar provisions which create a rebuttable presumption that the product was not defective if the product "[c]omplied 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." Both provisions are examples of legislation which can be effective in reinforcing defendants' position in litigation in which the plaintiff claims that a product is defective, even though it conformed to governmental standards. This defense is particularly important in the situation where the defendant manufacturer has been required to conform its designs and production to government standards of questionable merit.

C. Comparative Fault Systems

For products liability reform to become truly effective, the presently limited areas of inquiry within products liability litigation must be expanded to include all relevant evidence of plaintiff's behavior and defendant's acts or omissions which may have combined to produce the injuring event and evidence of the nature and extent of injuries suffered, so that the trier of fact can reasonably determine liability and damages. One approach to these ends would be the implementation of comparative fault provisions.

Comparative fault provisions have been proposed to remedy the unacceptable situation in strict liability which does not permit evidence of plaintiff's contributory negligence to be considered at trial. Such provisions attempt to place plaintiff's conduct in issue as well as defendant's, so that all aspects of the injuring event may be properly weighed by the trier-of-fact. Because of the semantic problems with contributory negligence as it relates to strict liability, these proposals have been termed contributory fault or comparative responsibility systems. For those jurisdictions which have already

87 Utah Products Liability Act, S.B. 158, 1977 Utah Laws ch. 149, § 6 (to be codified at Utah Code Ann. § 78-15-6 (3)).
89 An example of this type of regulation is federally mandated standards from the National Highway Traffic Safety Administration, with which all manufacturers of motor vehicles must comply. A manufacturer should not be liable if it has been required to comply with standards which are later determined to be defective.
90 See notes 38-48 supra and accompanying text.
91 See note 46 supra.
adopted theories of comparative negligence, the transition to comparative fault will not be difficult. For those states which have no form of comparative negligence, the impetus for reform is strong, not only for actions in negligence, but also in strict liability.

One form of a comparative fault statute is contained among a group of products liability reform proposals recently before the General Assembly of Pennsylvania. The effect of the comparative fault statute would be limited to actions in strict liability. The proposed statute provides that:

(a) In any product liability action in which recovery is sought on the basis of strict liability in tort, the responsibility of the person suffering the harm shall not bar recovery for the harm sustained unless it was as great as the responsibility of the party against whom recovery is sought. However, any damages allowed shall be diminished in proportion to the amount of responsibility attributable to the person recovering.

(b) The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and percentages of responsibility attributable to each


93 Presumably, the previously enacted Pennsylvania comparative negligence statute, PA. STAT. ANN. tit. 17, § 2101 (Purdon Supp. 1977), would not be affected by this legislation.
The Pennsylvania proposal is a modified comparative fault provision in that the plaintiff is barred from recovery in those situations where plaintiff's own fault exceeds that of the one from whom recovery is sought. A pure comparative fault system would permit recovery, but would diminish the damages by the percentage of fault attributable to the plaintiff even if plaintiff's fault exceeded defendant's (thus permitting a situation where, for example, a plaintiff 90 percent at fault could still recover ten percent from the opposing parties). The modified approach seems preferable, inasmuch as a situation where plaintiff recovers something, even though he is more at fault, seems anomalous. In such a case, it is really the plaintiff's conduct that caused the injury, and the manufacturer should be relieved of liability on causation grounds.

The importance of comparative fault proposals is underscored in recent work by the National Conference of Commissioners on Uniform State Laws to draft a Uniform Comparative Fault Act. The Commissioners on Uniform State Laws have drafted a proposed Uniform Comparative Fault Act which utilizes a form of pure comparative fault. The draft merits consideration in the context of products liability reform.

In furtherance of the policy in favor of having the jury consider all relevant factors contributing to an injury, including the plaintiff's role in the incident, statutes should also permit or require submission of special questions to the jury to clarify their findings on the ultimate issues of liability and damages. This procedure would enable the court to determine whether the jurors have understood the limitations placed on the plaintiff's recovery.


95 See Wade, A Uniform Comparative Fault Act—What Should It Provide? 10 J.L. Ref. 220 (1977). Professor Wade indicates that one basis for choosing a "pure" comparative fault system over a "modified" system is that "the pure form always divides the total loss according to the established fault percentage, while the modified form fluctuates wildly and very unfairly." Id. at 225. Examples are utilized to show the arithmetic of pure versus modified systems; however, the examples used assume two individuals who seek recovery from each other, both of whom are injured by each other's negligence. The "wildly" fluctuating comparison results from Wade's comparison of the recovery of each relative to total damages sustained, rather than the percentage of recovery of each relative to the damages suffered only by that individual. The examples are further unrealistic in that they do not consider the situation which actually exists in a products liability case, where the plaintiff encounters only a product rather than another individual who, though negligent, may also have been injured by the plaintiff's contributory negligence. Because products liability cases do not involve counter-claims of injury by the defendant manufacturer, the chances for "wild fluctuation" of results under comparative fault are minimized.
D. Bifurcation of Jury Trials

Proposed legislation in a few states has sought to guarantee the right of a party to product liability litigation to have separate trials on the issues of liability and damages. Such proposals recognize the inherent tendency of juries to be swept away with sympathy when issues of extent of damages, often entailing proof of tragic facts, are mixed with complicated issues of causation and defect. Bifurcation of jury trials is a simple, but effective, approach to insure a careful evaluation of relevant facts as to liability without the emotion of damage proofs.

The procedure of separate trial of separate issues is not, of course, a new one. The Federal Rules of Civil Procedure recognize the procedure of separate trials "in furtherance of convenience or to avoid prejudice," but Rule 42(b) is permissive, not mandatory. A judge is not required to grant separate trials of separate issues upon motion of either party. In contrast, proposed reforms concerning products liability litigation would insure that either party has the right to separate trials on the issues of liability and damages. One statute that has been proposed in Pennsylvania provides that:

The jury before whom any product liability action is tried shall ascertain their verdict as to liability. After such verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received at the trial as may be relevant and admissible on the question of damages and shall permit such argument by counsel, and deliver such charge as may be just and proper in the circumstances. The jury shall then retire and consider what damages shall be awarded and render such verdict accordingly.

A modification of the approach taken in Pennsylvania might permit separate trials upon motion of either party, rather than mandating it in all products liability cases. Whatever the form, it is clear that this procedural guarantee will eliminate much of the prejudicial evidence as to liability which is occasioned by proof of damages.

96 Fed. R. Civ. P. 42 (b) provides that

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.


E. Other Reforms: Damages for Pain and Suffering; Punitive Damages

In addition to the foregoing proposals, there are other measures of reform which should be considered which would be effective in bringing about a more equitable and stable system of determining liability for defective products. High on this list would be reform in the area of damages for pain and suffering and punitive damages. Both of these types of damages are major factors in the unpredictability of the outcome of products liability litigation because these damages bear little, if any, relationship to compensatory damages such as medical expenses or loss of wages. However, legislating changes in these areas will be difficult. The issues are complex, both as to methods by which damages are determined, and as to the rationale or need for such damages.

In terms of unpredictability of outcome in products liability litigation, it is clear that punitive damages pose by far the greater problems. Punitive damages promise a huge recovery to the plaintiff if necessary proofs can be adduced at trial. And payment of a verdict that may be as high as multiple millions of dollars99 is not the only cost suffered by the defendant. The lure of such a high recovery has prompted plaintiffs' counsel to engage in extensive discovery proceedings on the chance of acquiring damaging documents or other information which will support an award of punitive damages in addition to general and specific damages. Accordingly, costs of litigation are vastly increased. Insurance rates for defendants must then be increased to cover both higher litigation expenses and a potential award of punitive damages. Because the amount of punitive damages that might be assessed can only be guesswork, insurance rates reflect the uncertainty by anticipating larger verdicts.

99 Perhaps the most startling example of the multi-million dollar verdict in a product liability case occurred recently in Grimshaw v. Ford Motor Co., Nos. 197761, 199397 (Orange Cty. Sup. Ct., Cal., filed Feb. 6, 1978), awarding compensatory damages of $2,841,000 and punitive damages of $125,000,000 (thirteen year old sustained severe burns when a 1972 Pinto was struck from the rear, bursting into flames), noted in 21 ATLA L. REP. 136 (1978). On a motion to amend judgment nunc pro tunc or to vacate judgment, plaintiffs were required to accept a punitive damage award reduced to $3,500,000 or a new trial on all issues. They elected to accept the reduced award. The case is now on appeal to the California Court of Appeals. Id., order dated Mar. 30, 1978. Other examples include Maxey v. Freightliner Corp., No. CA-3-76-1204-G N.D. Texas, filed Apr. 21, 1978 (actual damages of $150,000 and punitive damages of $10,000,000 for wrongful death of driver and passenger; fuel tank of large diesel truck found defective; motion to deny punitive damages upheld); Day v. Sturm Ruger & Co., No. 72-669 (Alaska Super. Ct., filed May 27, 1976) (twenty-eight year old suffered partial disability of leg following gunshot wound when he dropped defective gun, causing it to go off; $100,000 general and special damages, $2,900,000 punitive damages), noted in 19 ATLA NEWS LETTER 359 (1976); Runnels v. Astra Pharmaceutical Prods., Nos. 218450, 224532, (Sacramento Cty. Super. Ct., Cal., filed May 25, 1976) ($510,000 compensatory and $511,000 punitive damages awarded to doctor who suffered loss in his medical practice and other damages following malpractice action by patient whom doctor had treated with drug manufactured by defendant company), noted in 19 ATLA NEWS LETTER 310 (1976).
Punitive damages have been discussed in a number of writings, most of which have justified such damages on several grounds: that they permit civil punishment of conduct which is rarely or never punished under criminal law, or of conduct which is not criminally punishable; that they are a means to recover costs of litigation and attorneys' fees, a recovery otherwise proscribed by American civil procedure; and finally, that punitive damages act as an incentive for plaintiffs to bring "petty cases of outrage and oppression" into court for redress which otherwise might not be worth the time and trouble to litigate.

The punishment theory may be well applicable in a case involving a tort, such as malicious prosecution, which suggests some sort of specific intent on the part of the defendant. However, liability for harm resulting from a defective product is generally conceded to result without a showing of fault, and in such a context civil punishment is inappropriate. Given the lower standard of proof required for plaintiff to prevail, imposition of punitive damages is inequitable. If quasi-criminal conduct is truly at issue, defendants should have the protection of standards of proof required in criminal cases. Nor should defendants be forced to litigate criminal issues concurrently with issues of products liability, or be subject to recurring verdicts of punitive damages in different cases involving the same product—a form of double jeopardy not permitted under criminal law. And finally, if criminal conduct is evident, there is no reason why plaintiff should profit from this if he has already been adequately compensated. Rather, such awards should be paid to society as a criminal fine.

If punitive damages are only a recovery of attorneys' fees not otherwise recoverable under typical rules of civil procedure, those rules should be changed, and punitive damages should be labeled "attorney fees." There is no need to foster the deceit that punitive damages are assessed to punish criminal or near-criminal conduct of the defendant. This approach might be embarrassing to plaintiffs' counsel, but it would be a more honest way to handle these damages.


102 W. Prosser, supra note 100, at 11; Lambert, supra note 100, at 169.

103 W. Prosser, supra note 100, at 11.
Finally, surely few would argue that the potential plaintiff needs any incentive to bring his grievance with the offending product to the courts. The high verdicts now rendered in even the smallest cases would be ample inducement to the reluctant plaintiff.

Legislation which would limit recovery of punitive damages to a specified multiple of the total of general and special damages might be a temporary solution to the problem of punitive damages, but ultimately decisions will have to be made as to the need for punitive damages in products liability litigation. As governmental agencies increasingly assume the role of protecting the consumer by assessing fines and penalties against the manufacturers and sellers and by requiring adherence to agency regulations, the role of punitive damages would appear to be diminishing.

Damages for pain and suffering are unquestionably justified, yet they cause problems in products liability litigation because of the uncertainty which they engender. How can one logically assess such damages in terms of a monetary figure? The jury's award is based largely on sympathy for the plaintiff and may bear no relationship to other, more easily calculated damages proven at trial. As with punitive damages, a solution might be to limit recovery for pain and suffering to a specified multiple of the total of other damages assessed.

Much of the lottery aspect of products liability litigation derives from the assessment of punitive damages and damages for pain and suffering—an assessment made in the charged atmosphere of courtroom tensions, which have little relationship to defective products or monetary damages. The assessment of punitive damages and damages for pain and suffering in products liability litigation is an area ripe for careful study and reform; there are no easy answers, but solutions must be worked out which will be equitable to plaintiff and defendant alike.

IV. CONCLUSION

Developments in the law of products liability have become the source for a number of problems which now challenge the system by which products are determined to be defective. The "risk-spreading" argument which originally formed the justification for strict liability has now become the basis for a pervasive "deep-pocket" rationale which has mechanistically resolved complex legal issues in favor of the consumer or buyer. This trend is noted in several areas: the ease with which a defect may be proven, the refusal to consider plaintiff's conduct in using a product, the diminishing bases of defense for the manufacturer or seller, and the consequent high, unpredictable verdicts which result from the uncertainties in the law.
There would seem to be little question, based on the experiences of manufacturers and sellers as documented by the recent *Task Force Report*, that reform measures are necessary to return predictability and equity to the system. Those who see proposed reform as benefiting only the manufacturer or seller are mistaken. The ultimate costs for an unworkable products liability system will be borne by the consumer in the form of higher prices resulting from increasingly higher and more frequent adverse verdicts and in the form of diminished competition, as businesses unable to bear the cost of products liability litigation are forced to close their doors.

But it is also clear that the reforms should be chosen with care and that results should be carefully reviewed. Reasonable reform will be effective without abrogating the remedies available to one who claims to have been harmed by a defective product. These reforms would include adoption of concepts of comparative fault in strict liability; limitation of time within which product liability actions may be brought, both with respect to the date of manufacture of the product and date of the occurrence of the injuring event; strengthening of defenses when defendant proves that it has complied with governmental regulation or with state of the art at the time of manufacture, or that the product has been modified or misused by the plaintiff; elimination of restrictive rules of evidence as to collateral sources of recovery; and reformulation of concepts of damages for pain and suffering and punitive damages.

A number of states have already begun the task of reform; other states will doubtless follow. The results will unquestionably increase the effectiveness of the system of products liability litigation. Reformation in the system of products liability litigation is proceeding apace.