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Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform

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MANUFACTURERS' LIABILITY FOR DEFECTIVE PRODUCT DESIGN: A PROPOSED STATUTORY REFORM

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Amid all the current discussion of an imminent products liability crisis and the growing concern over the diminishing availability of products liability insurance,[1] an important point is apt to be overlooked: there is more at stake than can be measured in dollars and cents. Indeed, the integrity of the judicial process may hang in the balance. The tendency toward more frequent and higher products liability claims has been accompanied (supported, some might insist) by a tendency toward vaguer rules of decision, especially in cases involving allegedly defective product design. That this tendency toward vagueness has presented courts with substantial difficulties has been chronicled elsewhere.[2] This article proposes a product design liability statute aimed at reducing the difficulties in these cases to manageable levels and rendering adjudicable the liability issue. In making such a proposal one runs the risk of displeasing almost everyone. Those favoring higher, more frequent plaintiffs' recoveries may resent what are viewed as unwarranted cutbacks in manufacturers' liability. Those who are alarmed at the mounting costs of liability insurance may conclude that the proposal does not go far enough. However, if it is borne in mind that this article is as much concerned with the problem of restoring principled decisionmaking as with the question of who recovers what, then the choices reflected in the statute may more readily be understood.

I. THE MISCHIEF REQUIRING REMEDY: CHAOS AT COMMON LAW

Behind every statute there presumably is a mischief requiring remedy.[3]

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1. *See, e.g.*, 5 PROD. SAFETY & LIAB. REP. (BNA) 227, 228 (1977) (remarks of participants in the first West Coast Product Liability Prevention Seminar, held March 16-18, 1977). *See also id.* at 267 (summary of testimony at "Hearings Before the House Small Business Subcommittee on Capital, Investment and Business Opportunities," March 4 and 6, 1977).

2. *See generally* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); Hoenig & Goetz, *A Rational Approach to "Crashworthy" Automobiles: The Need for Judicial Responsibility*, 6 SW. U.L. REV. 1 (1974); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425 (1974).

3. *See* Heydon's Case, 76 Eng. Rep. 637, 638 (Ex. 1584).

In this instance, the mischief may be described succinctly: the defect concept, upon which section 402A of the *Restatement (Second) of Torts*[4] is premised, is an inadequate tool with which to determine liability in cases involving harm alleged to have been tortiously caused by manufacturers' conscious design choices.[5] This inadequacy does not stem from the fact that the defect concept excludes important factors from consideration in design cases. Rather, the defect concept includes too many loosely interrelated factors, important and trivial, and renders impossible the essentially linear chains of logic upon which arguments in adjudication are of necessity based.[6] In cases involving manufacturing flaws, the product design provides a specific, built-in standard against which to measure the legal adequacy of the particular product that injured the plaintiff.[7] However, when the plaintiff attacks the product design itself, in the absence of any express promises or relevant statutory requirements regarding performance or design, no such specific, built-in standard is available. Instead, courts must rely upon the vague tort standard of "reasonableness under all the circumstances"[8] in determining whether or not product designs are defective.

The judicial tendency in recent years has been increasingly to rely upon conclusory expert testimony in sending design cases to the jury.[9] To be sure, the resulting general verdicts may serve to obscure the analytical difficulties inevitably encountered in reaching decisions. However, in relying upon them in this context the courts have impliedly countenanced decision-by-whim.[10] Manufacturers have been exposed to greater liability by virtue of these developments; but the exposure has been essentially random. Thus, the present system of handling design cases in most jurisdictions is analogous to a roulette game, in which the injured plaintiffs are steadily being allowed to cover more and more numbers on the wheel with larger and larger wagers. Were the courts to cover all the numbers on behalf of the plaintiffs—in other words, were they to embrace absolute manufacturers' liability for design-caused harm—the process would cease being a game of

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4. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

5. *See, e.g.*, Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 488-91 (1976); Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 SW. U.L. REV. 109 (1976).

6. *See* Henderson, *supra* note 2, at 1534-39.

7. *See id.* at 1544-46.

8. *See* RESTATEMENT (SECOND) OF TORTS § 402A & Comment i (1965). To be sure, some courts have purported to eliminate the requirement of "unreasonably dangerous" from the rule established in § 402A. *See, e.g.*, Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). However, in design cases the standard is reasonableness, despite judicial protestations to the contrary. *See* text accompanying notes 33-36 *infra*.

9. *See* Henderson, *supra* note 5, at 490. *See also* Weinstein, Twerski, Piehler & Donaher, *supra* note 2.

10. *See* Henderson, *supra* note 5, at 490-91.

chance. Yet courts have refused, and undoubtedly will continue to refuse, to go this far.[11] Therefore, the common law approach in design cases is, and without statutory intervention will almost surely remain, essentially a lottery. The statute that follows is proposed as a means of reducing the role played by chance in design cases and of returning consistency and rationality to this area of the law.

II. A PROPOSED STATUTORY REFORM

A. *General Reflections Upon Statutory Reform in Products Liability*

Proposals for statutory reform in the products liability area fall into three basic categories: (1) no-fault proposals;[12] (2) proposals for guaranteeing the continued availability to manufacturers of liability insurance;[13] and (3) proposals for substantive reform of the rules governing liability.[14] Given the drastic and, at present, politically unacceptable sweep of the first type of proposal,[15] and the relative superficiality of the second,[16] this article concentrates upon the third—upon the possibility of reforming the rules of liability to render them more specific and meaningful guides to decision. The next section proposes statutory language aimed at accomplishing this objective. The purpose of this section is to explore generally some of the difficulties likely to be encountered in attempting to draft a proposal of this sort. More specific comments upon choices among alternatives will be left for a later section.

A basic question with which to begin is: Should the statutory reform come at the state or federal level? Obviously, there is a sufficient federal interest involved to support substantial federal intrusion;[17] but equally obviously, one should hesitate to federalize, in a single, bold stroke, a body of

11. *See* Henderson, *supra* note 2, at 1554.

12. *See, e.g.*, J. O'CONNELL, ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES (1975).

13. At this writing, several proposals of this sort have been introduced into Congress: S. 527, 95th Cong., 1st Sess. (1977), sponsored by Senators John C. Culver (Iowa) and Gaylord Nelson (Wisconsin), which calls for the creation of a temporary federal reinsurance pool for small businesses; and S. 403, 95th Cong., 1st Sess. (1977), sponsored by Senator James B. Pearson (Kansas), which provides for reinsurance to products liability insurers and to qualifying captive insurance companies.

14. For a summary of recent reform proposals, see Henderson, *Products Liability: The Gathering Momentum Toward Statutory Reform*, 1 CORP. L. REV. 41, 42-46 (1977).

15. Certainly a comprehensive compulsory no-fault scheme could be expected to encounter considerable opposition. *See, e.g.*, J. O'CONNELL, *supra* note 12, at 70-88. Although Professor O'Connell offers an elective no-fault proposal, it is doubtful that even his scheme would be acceptable. *See* Henderson, Book Review, 56 B.U.L. REV. 830 (1976).

16. From the viewpoint of a manufacturer hard-pressed to meet its requirements for products liability insurance, this may seem a gratuitously casual statement. However, proposals of this sort are superficial because they merely treat the symptoms of the difficulty, and not the cause. *See* VII THE RESEARCH GROUP, INC., PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY 199-201 (Interagency Task Force on Product Liability Jan. 1977).

17. Clearly the activities subject to regulation by federal law under this proposal affect

law that has traditionally been part of the states' common law of torts. The uniformity that might be achieved by federal legislation would be desirable, to the extent that one views the problems caused by vagueness in rules to be exacerbated by the diversity in approaches among the states. However, to attempt to transform products liability into a comprehensive body of federal law would present a very difficult drafting task and would, assuming general federal question jurisdiction in the district courts, thrust an enormous potential burden upon a federal judiciary already hard-pressed to meet current demands for their attention.[18]

The statutory proposal that follows adopts a federal approach, but one carefully limited in its thrust to minimize difficulties of the sort just described. Thus, the proposal leaves untouched and substantially unaffected the vast bulk of state common law principles of products liability, intruding only to the extent necessary to render the rules of decision in design cases sufficiently specific to support principled decisionmaking. No new federal causes of action are created; no new bases for federal court jurisdiction are contemplated or required. Even if products liability reform were to be accomplished by legislation at the state level, this "minimum intrusion" approach would be the most sensible way to cure the deficiencies of the current common law products liability system. Whether at the federal or state level, reform is required only to the extent necessary to cure the existing mischief. Once the minimum necessary specificity is built back into the rules of decision, products liability may and should be left to develop by the traditional common law process.

This article is concerned with the area of products liability based upon manufacturers' product design choices. Should other areas of products liability be addressed statutorily? The answer here is almost certainly "yes," to the extent that areas other than liability for product design involve similar problems. One such area is that of manufacturers' liability for failure to warn. The obvious connections between defective design and failure to warn as conceptual bases of products liability have been written of elsewhere.[19] Admittedly, failure to warn does not present analytical difficulty of the same magnitude as does defective design.[20] However, since some

commerce among the states sufficiently to support congressional action under U.S. CONST. art. I, § 8.

18. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, IMPACT STUDY: THE EFFECT OF MAJOR STATUTES AND EVENTS ON CRIMINAL AND CIVIL CASELOAD IN THE U.S. DISTRICT COURTS DURING FISCAL YEARS 1960-1975 (1976), *cited in* Clark, *A Commentary on Congestion in the Federal Courts*, 8 SAINT MARY'S L.J. 407, 407 (1976); notes 30 & 31 and accompanying text *infra*.

19. *See* Henderson, *supra* note 2, at 1562-65.

20. *See* Henderson, *Design Defect Litigation Revisited*, 61 CORNELL L. REV. 541, 545-47 (1976).

courts appear to be tending in the direction of unprincipled decisions in connection with that theory of liability,[21] some statutory bolstering is probably called for.[22] It must be emphasized that the boundaries of legitimate statutory intrusion are relatively narrow. No massive code is required. Areas of products liability that appear to be functioning in a more or less principled fashion—for example, the large and important area of liability for manufacturing flaws, upon which the subject of products liability is historically based[23]—do not warrant being tampered with statutorily.[24]

Should the products liability statute attempt to apply the same basic requirements to all actions based upon allegedly defective design, or should distinctions be drawn based upon factors such as the types of products involved or the categories of plaintiffs and defendants? This question reflects one of the basic difficulties with which a draftsman must be concerned when attempting to alter the body of common law principles governing manufacturers' liability for their conscious design choices. The same vagueness in the common law principles that supports the need for reform at least permits application of the principles across an enormous range of cases. Can a statute aimed at injecting specificity into the rules of decision be expected to impose the same requirements across a broad range of cases involving many types of products and many categories of users? This question is far from academic. If distinctions must be introduced, their number and complexity could threaten the efficacy of the statutory enterprise. To keep the statute simple and manageable, the draftsman would prefer to speak in terms such as "all users" and "all products"; but enormous pressures are placed upon the draftsman by the broad range of circumstances embraced by such language.[25]

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21. The type of case envisioned is Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975), in which perfume was impulsively thrown on a lighted candle, under circumstances that made it fairly clear that the conduct would not have been affected by warnings of the perfume's flammability. Some courts have suggested that plaintiffs in warnings cases might rely upon a rebuttable presumption that a warning, if given, would have been read and acted upon. *See, e.g.*, Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 660 (Tex. 1972).

22. The statute proposed in this article is a version of a larger statutory package that contains a failure to warn section. *See* note 26 *infra*. Other proposals for substantive reform also contain provisions on the same topic. *See* Henderson, *supra* note 14, at 42-46.

23. Most of the classic products liability cases have involved flaws. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). *See generally* Henderson, *supra* note 2, at 1544-46.

24. Of course, general statutory provisions cutting across the entire products liability field, such as statutes of limitations provisions and provisions establishing defenses based upon product alteration and misuse, would presumably apply to flaw cases as well as to design cases. *See* note 26 *infra*.

25. This can best be understood by means of an example. Before turning momentarily to examine a suggested solution in the context of product design, consider here an example in connection with a statute aimed at failure to warn. If one imagines a housewife buying a

The proposal that follows imposes relatively specific requirements upon plaintiffs in actions based upon allegedly defective product designs. These requirements constitute necessary, but not sufficient, conditions for recovery. The statute does not purport to create causes of action; it merely imposes, via federal law, minimum requirements without which the plaintiff will not recover. In addition, certain limited defenses are made available upon proof by a defendant of specifically described circumstances. On its face, the statute purports to apply to all products liability claims based upon allegations of defective or otherwise inadequate product design.

B. The Statute[26]

LIABILITY FOR PRODUCT FORMULA OR DESIGN

(a) In any products liability action, a defendant shall not be liable for damage claimed to have resulted from the formulation or design of a product except on the basis of negligence, express warranty, implied warranty of fitness for particular purpose, or misrepresentation. A defendant shall not be liable for negligence in the formulation or design of a product unless the plaintiff proves by a preponderance of the evidence, in addition to other facts required to be proved under state or federal law, including other provisions of this Act, that an alternative formula or design was available at the time of manufacture.

(b) A formula or design shall not be an alternative for purposes of section (a) unless it:

(1) provides overall safety as good as or better than the overall safety of the formula or design in question; and

(2) provides better safety as to the particular hazard the result of which caused the injury or damage alleged.

(c) An alternative shall not be an available alternative for purposes of section (a) unless it:

(1) either

(A) was actually in substantial use by other manufacturers of similar products at the time of manufacture, or

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microwave oven for use in the home, one might find acceptable the statutory requirement that warnings must, to be sufficient, inform users of average intelligence of the risks associated with using the product. How sensible would such a requirement be when applied to the case of a housewife harmed by a prescription drug? Or a worker on an assembly line harmed by a punch press?

26. This statutory proposal is similar to a provision contained in a more comprehensive statutory package sponsored by the National Products Liability Council (NPLC), a national manufacturers' group based in Chicago. The NPLC package was drafted by a group that included, besides the author: Thomas M. Russell and Mary M. Hutchings, Chicago attorneys; Professor Dan B. Dobbs, of The University of North Carolina School of Law; and Professor Jerry J. Phillips of the University of Tennessee School of Law. The NPLC package is

(B) was actually known by the manufacturer of the product at the time of manufacture, or should have been known by the manufacturer with reasonable concern for safety; and

(2) could have been adopted by the manufacturer for use at the time the product in question was manufactured, without causing increases in the costs of production, distribution or use of the product, or decreases in the utility of the product, unless such increases and decreases when taken together are significantly outweighed by the added safety benefits of such alternative formula or design.

(d) A product formula or design which fails to comply with requirements imposed by federal statutes and regulations applicable to the products at the time of manufacture shall not be an available alternative for purposes of section (a).

(e) In any products liability action that includes a claim based upon alleged negligence in the formulation or design of a product, a defendant shall not be liable on such claim for that portion, including the whole, of the injury or damage complained of which could have been avoided by attachment to, inclusion in or use with the product of an additional safety or protective device or substance, if the defendant proves by a preponderance of the evidence that at the time of purchase:

(1) the product was suited to more than a single function or manner of use, and

(2) attachment, inclusion or use of such additional safety or protective device or substance would have been inappropriate to or

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scheduled to be introduced in the near future into Congress and, in a modified version, into the legislatures of several states. In addition to the section addressing the problem of liability for product designs, the package includes the following provisions: (1) an outside statute of limitations period of 10 years from the date of the first sale, lease or delivery of possession of the product, subject to an exception for subsequent duties imposed upon defendants under state law to take action with regard to the product; (2) a requirement, in failure to warn cases, that the hazards in question have been identifiable by the defendant at the time of sale, and that the plaintiff prove a definite causal connection between the alleged failure to warn and the injuries suffered; (3) a provision barring recovery when postsale modifications, other than those made in accordance with the instructions or with the express consent of the defendant, cause the injuries of which the plaintiff complains; and (4) a provision barring recovery for injuries caused by product misuse, accompanied by a definition of "misuse" that includes uses contrary to adequate instructions and uses other than those for which persons of ordinary skill and judgment would normally and reasonably expect the product to be suitable.

In proposing the statute contained in the text that follows this note, the author does so on his own account, and in no way whatsoever purports to speak or act for any of the other persons who have worked on, or who are sponsoring, the NPLC legislative package. In several important respects the proposal advanced in this article differs from the corresponding section in the NPLC draft, and the author assumes full and sole responsibility for the version offered here. He wishes to thank the colleagues from the NPLC project for their good ideas that are reflected in this proposal; but any blame for errors in judgment that may have found their weary way into the present draft should be directed at the author alone.

incompatible with a function or manner of use to which the product was suited and to which it might, given the circumstances surrounding its sale or delivery by defendant, foreseeably be put, and

(3) such additional safety or protective device or substance was offered by the defendant for purchase or use by the person injured or damaged or by such person's employer, and

(4) the person injured or damaged or such person's employer did not purchase or use such additional safety or protective device or substance, and

(5) use of such additional safety or protective device or substance would have avoided or reduced the injury or damage of which the plaintiff complains.

(f) In any products liability action, a defendant shall not be liable for negligence in the formulation or design of a product if the defendant proves by a preponderance of the evidence that the product formula or design complied with mandatory standards or regulations adopted by the federal government which were applicable to the product at the time of manufacture and which pertained directly to the formula or design-related hazard of which the plaintiff complains, unless the plaintiff proves by clear and convincing evidence, in addition to other facts required to be proved under state or federal law, including other provisions of this Act, that the mandatory federal standards or regulations applicable to the product were inadequate to protect the class of persons of which the plaintiff is a member from unreasonable risks of injury or damage.

(g) In any products liability action, a defendant shall not be liable for the formulation or design of a product unless the plaintiff proves by a preponderance of the evidence, in addition to other facts required to be proved under state or federal law, including other provisions of this Act, that:

(1) the product was the immediate, physical and producing cause of the injury or damage of which the plaintiff complains; and

(2) in actions to which sections (a), (b), (c), and (d) apply, the alternative formula or design upon which the plaintiff relies would have avoided or reduced the injury or damage of which the plaintiff complains.

C. Comments Upon the Proposal

1. General Comments

This statute would probably reduce manufacturers' exposure to liability for allegedly defective and unreasonable product designs. The word "prob-

ably" is used advisedly; it is not clear that the statute would affect outcomes in a large percentage of design cases, nor is it clear that the overall effect upon claims exposure would be great. As is explained in subsequent comments, much of the statute's content is derived from the underlying logic of traditional products liability principles. To be sure, in bringing this logic and these principles into formal rules of decision instead of leaving them to be weighed loosely as part of the range of considerations under vague "defect" or "unreasonableness" rubrics, courts can be expected to direct verdicts for defendants in a larger percentage of cases. Indeed, that is the express purpose in proposing the statute: to enable courts to separate the unworthy design-based claims from the worthy in a more principled fashion. However, the claims thus separated out would for the most part be those that under our present system take unfair advantage of the vagueness of the rules and the accompanying inability of judges to cope with the practical pressures favoring a "jury's whim" approach. To reject a proposal of this sort simply because it would prevent some plaintiffs from reaching juries would be inappropriate. By its very nature, formality implies sacrifice. A certain degree of formality in legal rules is necessary, however, for the system to maintain its integrity. On balance, the trade-offs in this proposal seem rational. A number of suggestions regarding different trade-offs might be made; but the suggestion that formal trade-offs are somehow in and of themselves improper should be rejected in principle.

Although the statute purports to apply broadly to "any products liability action," its substantive provisions are for the most part limited to claims based upon alleged negligence in product formulation and design. Thus, the plaintiff would have available, in appropriate cases, other doctrinal bases of recovery for inadequate design choices, including express warranty, implied warranty of fitness and misrepresentation.[27] Moreover, other factual bases of liability, such as failure to warn, would not be affected by the statute.[28] "Formulation" as well as "design" is included so that the statute may apply broadly to all types of products, including cosmetics and prescription drugs. However, because these latter categories of cases are more often decided on the basis of product marketing rather than design,[29] the practical impact of a design-oriented statute in these product areas should be minimal.

27. These doctrinal bases of liability are not affected by the proposal because they do not threaten the courts with nonadjudicable issues. Whenever one of these doctrines is applicable, the factual basis for the defendant's liability supplies a standard against which to measure the product. For example, whenever a seller expressly promises that a product will perform in a specifically described manner, the product will be judged against the promise rather than against the vague reasonableness standard.

28. This is not to imply that failure to warn does not deserve to be addressed statutorily. *See* notes 21 & 26 *supra*.

29. RESTATEMENT (SECOND) OF TORTS § 402A, Comment k (1965) appears to have set the

Can this proposal be implemented via federal legislation? The answer seems to depend upon the extent to which it could be expected to be self-executing in the state courts. Obviously, some burden of interpretation and review would be placed upon the United States Supreme Court were this proposal adopted. The provisions of this statute, however, should mesh sufficiently smoothly with existing state law to minimize that burden.[30] In considering the efficacy of implementing this proposal via federal statute, it should be borne in mind that no new federal causes of action are created. The statute should provide no basis for federal question jurisdiction[31] in the federal courts.

2. Elimination of Strict Liability

The first sentence in section (a), wherein strict liability is eliminated as a basis of liability, may strike some readers as the most singularly remarkable change worked by the statutory proposal. Actually, with respect to the liability of manufacturers, this provision would work little, if any, real change in state law. Of course, with respect to defendants other than manufacturers—retailers, wholesalers, and other nonmanufacturing distributors—the statute *would* have substantial impact inasmuch as these defendants are being held strictly liable under existing law.[32] Because the conceptual basis upon which manufacturers are presently being held liable for their conscious design choices (other than express warranty, implied warranty of fitness and misrepresentation, which are retained in the proposal[33]) is essentially indistinguishable from negligence,[34] section (a) would not impose a significant change regarding manufacturers' liability. Whenever a manufacturer's design choices are condemned as defective or unreasonable, in most cases the implication of negligence is unavoidable. Admittedly, some courts in recent years have insisted, perhaps foolishly, that manufac-

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tone for the judicial treatment of these cases. *See, e.g.*, Sterling Drug, Inc. v. Yarrow, 408 F.2d 978 (8th Cir. 1969); Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).

30. Returning design cases to a negligence footing should improve the chances of their being received with a minimum of disruption. *See* text accompanying notes 48-49 *infra*.

31. *See* 28 U.S.C. § 1331 (1970). Of course, Congress undoubtedly could withhold federal question jurisdiction in connection with a statute creating a new federal cause of action. Such a maneuver, however, would place upon the Supreme Court an enormous burden of review.

32. Manufacturers in design cases are basically being held for their negligent design choices. *See* text accompanying note 34 *infra*. Once the label "defective and unreasonably dangerous" is attached to a product, however, the subsequent sellers in the chain of distribution, though innocent of negligence, are held strictly liable. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

33. *See* note 27 and accompanying text *supra*.

34. The authorities supporting this conclusion are surveyed in Kiely, *The Art of the Neglected Obvious in Products Liability Cases: Some Thoughts on Llewellyn's The Common Law Tradition*, 24 DEPAUL L. REV. 914, 929-32 (1975).

turers are being held strictly liable for their design choices independently of whether those choices were unreasonable.[35] The proof required of plaintiffs in those cases, however, is basically the same as would be required in a negligence case.[36]

If the shift away from strict manufacturers' liability is not significant, why does the proposal insist upon negligence as the central basis of liability for design choices? Part of the answer concerns the impact, previously alluded to, upon defendants other than manufacturers. The proposal reflects the judgment that nonmanufacturing distributors should not be held strictly liable for the negligence of manufacturers. In flaw cases, all defendants are held strictly liable.[37] In design cases, however, notwithstanding the misapplication to manufacturers of "strict liability" rhetoric, the only defendants presently being held strictly liable are nonmanufacturing distributors.[38] By providing for the same legal bases of liability against all defendants, the statute accomplishes a certain evenhanded equity.[39] The justification for eliminating strict liability in design cases also rests on the anticipated impact upon claims against manufacturers. For one thing, eliminating further talk of "strict liability" in cases in which the concept is so clearly inapplicable should help to eliminate some of the confusion in judges' and lawyers' minds regarding a range of issues that recur in design cases. Imposing this conceptual discipline uniformly upon the states should accelerate the pace at which clarity of analysis is achieved and should reduce the difficulties of integrating the provisions of the federal statute with state law. Moreover, establishing once and for all that the basis of liability for design errors is negligence should assist in smoothing the transition to comparative fault for those jurisdictions that otherwise might stumble in attempting to apply a comparative negligence concept in "strict liability" cases.[40]

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35. *See, e.g.*, Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 123, 501 P.2d 1153, 1155, 104 Cal. Rptr. 433, 435 (1972); authorities cited in Kiely, *supra* note 34, at 931 n.68.

36. *See, e.g.*, Kiely, *supra* note 34, at 929-32; Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837 (1973). In fairness to Professor Wade, it should be pointed out that, in his view, the negligence concept should be modified in design cases to include, in effect, a conclusive presumption of defendants' knowledge of risks. *Id.* at 834-35. In most design cases, however, this will make very little difference.

37. Because a built-in standard is available in flaw cases, courts have little difficulty in holding manufacturers, as well as others, strictly liable. *See* text accompanying note 7 *supra*.

38. *See* note 32 and text accompanying notes 32-34 *supra*.

39. Lest anyone assume that nonmanufacturers are being let off the liability hook completely, it should be noted that middlemen's negligence will be easier to prove in design cases than in flaw cases. Moreover, nonmanufacturers remain exposed to liability in appropriate cases on the other bases of liability permitted by the statute—express warranty, implied warranty of fitness and misrepresentation.

40. *Cf.* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 195-96 (1974) (comparative negligence statutes that are limited to negligence claims should not prevent courts from adopting comparative negligence in strict liability cases).

3. The "Available Alternative" Concept

In most jurisdictions, a plaintiff relying upon a claim of inadequate product design must prove that a feasible alternative design was available to the manufacturer which, if adopted for use, would have prevented all or part of the plaintiff's harm.[41] What constitutes a feasible alternative is conceptually unclear, however, and courts in their confusion have allowed spurious claims to reach the jury.[42] Sections (b) and (c) attempt to introduce sufficient clarity and specificity into the rules to permit more principled patterns of decision. With respect to the issues addressed in section (b), for example, the focus in most cases has been upon the requirement, codified in subsection (2), that relates to the particular design hazard that materialized in harm.[43] The inclusion of the additional requirement in subsection (1) is not only consistent with basic products liability principles, but also may serve to draw attention to, and bolster judicial confidence in dealing firmly with, the elements of proof required of the plaintiff.

The emphasis in subsection (c)(1) upon actual use and knowledge is aimed at curbing tendencies to condone excessive speculation; the inclusion in (B) of the "should have been known" language is necessary to avoid unduly harsh results in appropriate cases. The requirements in subsection (c)(2) are consistent with traditional negligence principles.[44] If the modifier "significantly" tips the balance unfairly in favor of defendants, it can be eliminated. It is included in this draft to emphasize that the potential negative impacts of proposed design alternatives are to be weighed seriously in these cases.

4. The Multi-Functional Product Concept

On its face section (e) is aimed primarily at productive machinery

41. Concededly, proof of a feasible alternative is not often imposed explicitly as a formal requirement at common law. *But see* Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976) (feasible alternative is a factor to be considered in determining whether design is defective). As a practical matter, however, plaintiffs in most design cases find themselves forced by the circumstances to attack the defendants' designs by pointing to a safer, less unreasonably dangerous alternative. *See, e.g.*, McCormack v. Hankscraft Co., 278 Minn. 322, 335, 154 N.W.2d 488, 498 (1967). Certainly under a negligence approach, the feasible alternative requirement is implied in the necessity for the plaintiff to show that a reasonable person would have acted differently from (and more safely than) the defendant. That the feasible alternative concept is rooted deeply in existing product design liability case law is clear from a review of the decisions. *See generally* Henderson, *supra* note 2, at 1565-73; Wade, *supra* note 36, at 837-38.

42. *See, e.g.*, Moren v. Samuel M. Langston Co., 96 Ill. App. 2d 133, 237 N.E.2d 759 (1968); Jennings v. Tamaker Corp., 42 Mich. App. 319, 201 N.W.2d 654 (1972).

43. *See* Garst v. General Motors Corp., 207 Kan. 2, 484 P.2d 47 (1971) (example of a court requiring plaintiff to explain the broader implications of a specific proposal for an alternative design); authorities cited note 41 *supra*.

44. *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

cases. Although it might affect certain types of consumer product cases,[45] inclusion of the phrase "or such person's employer" suggests that it is mainly directed at cases involving injuries to factory and farm workers using heavy machinery. The issue here is whether and to what extent producers and distributors may effectively delegate to purchasers and users part of the responsibility for deciding whether to purchase and use safety devices. Section (e) insists that when inclusion by the manufacturer of a particular safety device would be inimical to one or more functions performed by the product, the defendant should not be forced by the rules governing liability for negligent design to include the device. Rather the defendant may defer to the purchaser's or user's judgment provided he offers the device for purchase or use.[46] In effect, the provision recognizes a legitimate excuse for such deferral when the person deferred to is in a better position than the defendant to make a choice of safety equipment suitable to the particular uses to which the product might be put. It should be observed that the provision would not bar bystanders, except when the purchaser or user is the plaintiff's employer. Thus, if a bystander were struck by a rock thrown by a piece of heavy mowing equipment being used without a safety screen, subsection (e)(4) would allow the plaintiff to proceed upon allegations of negligent design notwithstanding the defendant's having established the conditions described in subsections (e)(1), (2), (3) and (5).

This multi-functional product concept does not represent a radical departure from existing case law. Although it would change the law in some states,[47] in others it would merely codify in more formal terms positions already taken by courts in relevant cases.[48] In the final analysis, the acceptability of a provision of this sort depends upon one's attitude concerning the appropriate level of paternalism in a system of products liability. Section (e) does not go so far as to establish the position that purchasers and users should always be free to determine acceptable levels of design-related risks for themselves. When a product is suited, as many products are, to a single basic use, or to several uses that are all compatible with a single safety device, this provision does not purport to condone a manufacturer's decision not to incorporate an otherwise sensible safety device simply because the

45. The types of cases envisioned here might involve, for example, equipment adaptable for use by consumers in different types of home environments requiring different safety devices.

46. It must be remembered that the defendant is obligated to supply sufficient instructions and warnings in this context, and may be exposed to liability for any failure to warn. *See* text accompanying note 28 *supra*.

47. *See, e.g.*, Robinson v. International Harvester Co., 44 Ill. App. 3d 439, 358 N.E.2d 317 (1976).

48. *See, e.g.*, Leonard v. Albany Mach. & Supply Co., 339 So. 2d 458 (La. App. 1976).

risks were obvious to and accepted by the purchaser or user.[49] However, when a product is multi-functional, and a particular safety device is appropriate for some functions but not for others, this statute allows the choice regarding that safety device to be made by the person who is in a position to determine the function to which the product will be put. The proposal reflects the judgment that to force a collective decision upon all product purchasers and users in that circumstance would be to push paternalism beyond its proper bounds.

5. Compliance with Federal Product Safety Regulations

The provision made by section (f) probably comes the closest to being unmanageable via federal statute.[50] Two alternatives might be considered: either compliance with federal standards could constitute a conclusive bar to recovery upon the basis of negligent design;[51] or the weight to be attached to such compliance could be left entirely to existing state law.[52] Of these two alternatives, the latter seems preferable. Section (f), however, offers a compromise that, if workable, would be preferable to either alternative.

The utility of federal product safety regulations as standards for decision is their specificity. The question of whether or not a given product design at the time of manufacture complied with relevant safety regulations is patently more adjudicable than is the question of whether or not the design choices were reasonable under all the circumstances.[53] The chief drawback of using safety regulations as standards is their possible lack of reliability. Not all regulations sufficiently protect against risks to merit being employed as standards in products liability cases.[54] To accept without question all

49. Thus, § (e) presumably would not change the result in cases such as Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 474, 467 P.2d 229, 235, 85 Cal. Rptr. 629, 635 (1970), in which the California court concluded: "[E]ven if the obviousness of the peril is conceded, the modern approach does not preclude liability solely because a danger is obvious." The product in that case, a paydozer, would not have fallen into the category of multi-functional products established in § (e).

50. Problems are likely to arise concerning the type of proof required to meet plaintiffs' statutory burden of "clear and convincing evidence." The provision deliberately avoids using the word "presumption" to minimize difficulties due to variations among the states with regard to that concept.

51. The National Products Liability Council draft, *see* note 26 *supra*, at this writing, opts for this alternative.

52. The general rule at common law is that governmental standards are minimum standards, leaving open the question of whether defendants complying with them are nevertheless negligent. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 203-04 (4th ed. 1971). Cases in the products liability field have followed this general rule. *See, e.g.*, Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965). *But see* Banko v. Continental Motors Corp., 251 F. Supp. 229 (E.D. Va.), *aff'd per curiam*, 373 F.2d 314 (4th Cir. 1966).

53. *See* Henderson, *supra* note 2, at 1555-58.

54. *See* H. HEFFRON, FEDERAL CONSUMER SAFETY LEGISLATION (1970) (report prepared for the National Commission on Product Safety).

regulations would be to prejudice unfairly the rights of plaintiffs in some cases. However, to reject the use of such regulations as a standard, as many courts have done,[55] is to miss an important opportunity to render more consistent and rational the patterns of decisions in many product areas. In effect, section (f) invites courts to separate the reliable regulations from the unreliable, and to rely only upon the former. Toward that end, it creates what amounts to a presumption of reliability in favor of federal product safety regulations, allowing the presumption to be rebutted in appropriate cases.

Why is the plaintiff required to overcome the fact of the defendant's compliance by clear and convincing evidence of the regulation's inadequacy? In part, this requirement reflects a judgment that a majority of (though admittedly not all) federal product safety standards that pertain directly to design-related risks of which injured plaintiffs complain are reliable enough to serve as standards for measuring the reasonableness of the relevant design choices.[56] Thus, the presumption accompanying compliance should be relatively strong. Moreover, were the plaintiff able to circumvent the regulation by a mere preponderance, it is difficult to see what the statute would accomplish. In effect, the provision relating to compliance with safety regulations would impose the same burden upon the plaintiff as does the requirement under state law that the plaintiff prove negligence.[57]

How might a plaintiff prove that a regulation was inadequate? Two major avenues, which might respectively be characterized as substantive and procedural, are open to plaintiffs. Substantively, it might be demonstrated that the risks permitted by a particular regulation are substantially greater than should be acceptable to a reasonable person, and that the regulations therefore are clearly inappropriate as measures of reasonable care. Procedurally, it might be shown that the processes by which the regulatory standards were established, when compared with other governmental standards processes, were inadequate to protect the interests of product users and consumers. For example, processes in which consumers

55. *See* note 52 *supra*.

56. It is not claimed that the federal product safety programs, *as programs*, are necessarily adequate to protect the public interest. What is referred to here are the specific standards themselves. It should also be borne in mind that § (f) requires that the federal standards pertain directly to the hazard of which the plaintiff complains. The language is unavoidably ambiguous, to some extent, but clearly this requirement should prevent a defendant from arguing that its product choices were reasonable because they violated no federal safety regulations. Instead, § (f) contemplates a regulation that specifically addresses, and resolves, the very choices regarding a product design that the plaintiff claims were negligently made by the defendant.

57. Thus, if the plaintiff were required merely to show on a preponderance of the evidence that the regulation was inadequate, presumably this would be accomplished substantively in any event by proof on a preponderance that the defendant's design choices, which complied with the regulation, were unreasonable.

have no substantial voice and which, either in terms of their establishment or when viewed in historical perspective, clearly are intended only to establish minimal safety standards, would be more likely to be susceptible to arguments of inadequacy.[58] On the other hand, a plaintiff would, and should, have a more difficult time escaping the effects of a defendant manufacturer's compliance with a specific standard adopted after due consideration by an agency, such as the Consumer Product Safety Commission, which is recognized generally to weigh and to promote the interests of consumers.[59]

III. CONCLUSION

This proposal is offered by a draftsman attempting to put his money where his mouth is. Having complained loudly and bitterly over the drift away from principled decisions in the case law in recent years, it is only fitting to join the ranks of those attempting to restore principled decision-making. At least some of the potential difficulties in implementing a proposal of this sort are obvious. For example, it is certainly possible that these changes could not be accomplished efficiently by means of a federal statute. State courts bent upon frustrating its purposes might have a field day with some of the provisions. The "should have been known by the manufacturer with reasonable concern for safety" language in subsection (c)(1)(B), for example, would be particularly vulnerable to being construed and applied in a way that would always send the issue to the jury. Provisions of this sort must be included to keep the statute basically fair; yet their inclusion inevitably threatens the efficacy of the attempt to infuse greater rule formality, and hence integrity, into the system.

These last remarks reveal one of the basic tensions in this area of the law, indeed, in all of law—the basic tension between the simultaneous and conflicting needs for both fairness and formality in the rules of decision. Following the trends in design liability cases in recent years, the courts have gone too far in trying to be fair. That is, they have gone to the point of tacitly embracing lawlessness because they have tried to permit all relevant factors

58. The potential difficulties in inviting the parties to add an additional, tangential issue of this sort to a products liability case already complicated on its facts are apparent. One hopes that the savings in costs represented by the design cases disposed of by the court under § (f) would more than make up for the cases where the section merely added to the length and complexity of the trial. The sorts of standards envisioned as being likely to succumb to plaintiffs' arguments of inadequacy would be those traditionally established (perhaps until recently) under the Flammable Fabrics Act, 15 U.S.C.A. §§ 1191-1204 (West 1974 & Cum. Supp. 1977). *See generally* H. HEFFRON, *supra* note 54, at 107-161; Campbell & Vargo, *The Flammable Fabrics Act and Strict Liability in Tort*, 9 IND. L. REV. 395 (1976).

59. Again, no claim is made that the Commission has worked wonders in the field of product safety. However, it is submitted that the design (including performance) standards they have established would suffice as standards in negligence cases. Section 25(a) of the Consumer

to be taken into account in deciding every design case on its own special facts.[60] In attempting to tailor-make justice to fit each individual case, they have ceased to do justice.

Although courts in recent years may have gone too far in the direction of trying to do justice in every case on its own unique facts, it would be equally wrong to attempt to wrench the system around to the opposite extreme of a system of iron-clad rules, relentlessly applied. The proposal advanced here is intended to offer a middle ground between the extremes. Certainly, if a majority of our courts have deliberately opted in recent years for the "jury's whim" approach, then a proposal of this sort can be circumvented fairly easily. It is possible, that many judges have simply (and understandably) been intimidated and overwhelmed by the astounding growth of products liability in recent years, especially in the field of product design. The concept of "defect" has proven to be an inadequate basis for deciding these cases consistently and rationally, and the pressures from the plaintiffs' bar—and torts commentators— favoring expansion of recovery have been intense. Most judges would welcome the opportunity that a statute like this would provide to achieve order and consistency in their decisions.

Product Safety Act, 15 U.S.C. § 2074(a) (Supp. V 1975), expressly prohibits giving the standards that effect.

60. *See generally* Henderson, *supra* note 2.