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# PRODUCTS LIABILITY: THE SEARCH FOR THE MIDDLE GROUND

RICHARD A. EPSTEIN†

There is a quiet irony about the recent revolution in the law of products liability. Since 1960, doctrinal changes have taken place everywhere on the face of the law. Courts, freed from the shackles of the past, have been forthright in their adoption of progressive and innovative positions. The watchwords are consumer protection, loss spreading and economic efficiency. The changes introduced under these banners have worked uniformly to extend liability beyond its previous boundaries and, with but a few exceptions,<sup>1</sup> the modern trends have been strongly endorsed by the academic literature in the law reviews. Viewed from inside the legal profession the growth of the modern products liability law is a triumph of the common law.

There is, however, another side of the matter that requires the tempering of elation with caution. The changes that have met with such approval within the legal community have been the source of much concern to many individuals who have been governed by them. The doctrinal changes within the law of tort were once dry and technical matters that fell within the exclusive province of lawyers and law reviews; yet within the last two or three years the issues of products liability law have spilled over into the public arena. The most vivid illustration of the public policy aspects of products liability law has been the confusion and uncertainty that followed the introduction, suspension and eventual abandonment of the swine flu program in 1976,<sup>2</sup> for it is now the federal government that stands to pay untold millions of dollars in judgments and litigation expenses. But the concerns have deeper roots than even this dramatic incident suggests. Special commissions for the review of products liability law have reported at

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A more general article, also drawing on that same speech, has already been published. Epstein, *Products Liability: The Gathering Storm*, 1 REGULATION, Sept.-Oct. 1977, at 15.

1. For one notable exception, see Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

2. See, for one account, U.S. COMPTROLLER GENERAL, REPORT TO THE CONGRESS, THE SWINE FLU PROGRAM: AN UNPRECEDENTED VENTURE IN PREVENTIVE MEDICINE (HRD-77-115, June 27, 1977) (and apparently a very costly one).

both the state<sup>3</sup> and federal<sup>4</sup> level. The entire matter of products liability reform has, for the first time, become an important item on many legislative agendas. The triumph of the common law has generated a mounting social dissatisfaction, coupled with the sense that there has been a major, if unarticulated, shift in the premises of the tort system.

The coexistence of enthusiasm and concern is not mere coincidence, for doctrinal changes have brought in their wake economic and social dislocations. It is, however, one thing to note that the tort system seems out of joint, but quite another to isolate the reasons for the discontent and to pinpoint sensible reforms that prune away excesses while preserving the tort system intact. That task is formidable. The law of products liability is highly complex and needs to be studied both as a self-contained system and as part of a larger system of tort law. Its points of connection with the rest of the tort law are evidenced by a core of common terminology—that of strict liability, negligence, causation, assumption of risk and the like. Its uniqueness rests both on the special rules that it has fashioned and the rationales that have been used to defend and explain them. It is necessary, then, to begin with fundamentals, then move to applications.

### I. TORT OR COMPENSATION

Much of the intellectual confusion in tort law can be traced to the failure to identify its central purpose. It is fashionable today to say that one major function of the law of torts is to provide compensation to make injured persons whole, to the extent that money can do it.<sup>5</sup> Whatever the intuitive

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3. *E.g.*, CALIFORNIA CITIZEN'S COMMISSION ON TORT REFORM, RIGHTING THE LIABILITY BALANCE (Sept. 1977) (which does much to document the rising unrest and concern). At least nine other states have established commissions to study all aspects of the products liability problem, and Utah and Oregon have recently passed legislation directed towards products liability issues. Law of —, 1977, ch. 843, §§ 1-4, 1977 Or. Laws — (codified at OR. REV. STAT. §§ 30.900 - .915 (1977)); Law of Mar. 12, 1977, ch. 149, 1977 Utah Laws 643 (codified at UTAH CODE ANN. §§ 78-15-1 to -6 (1977)).

4. See the extensive efforts recently completed by the Interagency Task Force on Product Liability under the aegis of the United States Department of Commerce. *See, e.g.*, GORDON ASSOCIATES, INC., PRODUCT LIABILITY: FINAL REPORT OF THE INDUSTRY STUDY (Interagency Task Force on Product Liability, Apr. 1977); THE RESEARCH GROUP, INC., PRODUCT LIABILITY FINAL REPORT OF THE LEGAL STUDY (Interagency Task Force on Product Liability, Jan. 1977).

5. It is often stated that the principal objective of tort law, and of any automobile claims system, is to compensate for loss. More precisely, however, the objective is to determine whether to compensate, and if so, how. Tort law prescribes the negative of compensation—the circumstances under which compensation will not be awarded—as well as the affirmative. Underlying the whole body of tort law is an awareness that the need for compensation, alone, is not a sufficient basis for an award . . . .

From a recognition of this truth emerges a basic principle underlying both tort law generally and that segment of tort law concerned with automobile cases: An award is not to be made unless there exists some reason other than the mere need of the victim for compensation. Otherwise, the award will be an arbitrary shifting of loss from one

appeal of this proposition, it becomes clear on close examination that it sets the wrong framework for evaluating particular rules of tort law. The clue to the error lies in the original meaning of the word "tort" itself. Derived from the Anglo-Norman, the word means *wrong*. The identification of the defendant's wrongful conduct that results in harm to the person or property of the plaintiff lies at the foundation of tortious liability.

Compensation may well be needed for self-inflicted harms, or for harms caused by earthquakes or floods, but these are not within the province of the tort law no matter how grievous the injuries. The need for compensation is relevant only in the event that the plaintiff's cause of action is established as a matter of legal principle. The fact of harm itself, however, carries no weight whatsoever in determining whether the tort has been committed. There is no presumptive injustice in the tort law solely because the plaintiff is denied compensation, just as there is no presumptive injustice in the tort law because compensation is provided. The problem is not the fact of compensation, but its legitimization.

What principles, then, operate to determine whether compensation is deserved in any particular case? And where has products liability law gone wrong? To answer these two questions, if only in approximate terms, one must note that the responsibility for any particular injury must be attributable to one, or more, of the following four types of causes: (1) the conduct of the defendant; (2) the conduct of the plaintiff; (3) the conduct of any third party; or (4) some natural force or event, often called an act of God.

In the traditional view, the defendant could not be held liable for the acts of God or the conduct of third parties. When the defendant's own conduct was causally responsible for the plaintiff's injuries, however, the defendant could not escape liability because some third party conduct or some natural event was a concurrent cause of the plaintiff's harm. The plaintiff's conduct, too, was taken into account. When such was the sole cause of injury, the plaintiff had no one to blame but himself. Furthermore, when his own conduct and the defendant's combined to cause his harm, the traditional view denied him recovery except under limited circumstances. The more recent rule, now rapidly gaining ground, does not deny the plaintiff his cause of action, but permits him to recover only for some portion of his losses.<sup>6</sup>

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person to another at a net loss to society due to the economic and sociological costs of adjudication.

R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 242 (1965).

6. See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); N.Y. CIV. PRAC. LAW §§ 1411-1413 (McKinney 1976).

## II. THE TRADITIONAL LAW OF PRODUCTS LIABILITY

Until recently these basic principles of tort liability were used with little modification to determine liability in products cases. The defendant manufacturer could be held responsible for harm caused by the ordinary use of his product when some product defect created or brought about the harm; consider the obvious case of the exploding bottle that was the subject of the plaintiff's action in *Escola v. Coca Cola Bottling Co.*<sup>7</sup> Yet that cause of action would have been barred if some third party had shaken or mishandled the bottle so as to make it dangerous or unsafe or, more importantly, if plaintiff herself had misused the product. To quote Justice Traynor in *Escola*: "The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market."<sup>8</sup> Likewise, assumption of risk remained a defense of especial importance in products cases, particularly when the plaintiff confronted a product that, whether or not defective, presented him with an "open and obvious risk of danger."<sup>9</sup> The inputs of both plaintiffs and defendants were thus taken fairly into account so that, roughly speaking, the defendant was held liable only when his own conduct was causally dominant in the case.

The sketch of the last paragraph is quickly drawn, and it by no means rejects all the modern innovations in products liability law. Thus it assumes that rejection of the privity limitation was a welcome improvement of the system.<sup>10</sup> True, the injured product user typically has not purchased the offending product directly from its manufacturer. But the shift in title from party to party as the product proceeds down the chain of distribution is of no particular consequence. The defect was incorporated into the product when it was in the hands of the manufacturer, and the intermediate parties only

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7. 24 Cal. 2d 453, 150 P.2d 436 (1944).

8. *Id.* at 468, 150 P.2d at 444 (Traynor, J., concurring).

9. See *Morris v. Toy Box*, 204 Cal. App. 2d 468, 22 Cal. Rptr. 572 (1962); *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), *overruled in* *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

10. The privity limitation had its inception in the famous case of *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842). Many exceptions were created during the course of the nineteenth century in negligence cases and the limitation was overthrown in Cardozo's famous opinion in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). The first rejection of privity in the context of strict liability was in *Henningesen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). For the history of the privity doctrine, see Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). In the products liability context the privity doctrine received official notice of its demise in RESTATEMENT (SECOND) OF TORTS § 402A(2) (1965): "The rule stated in Subsection (1) applies although . . . (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

served as conduits to pass it on, unchanged, to the plaintiff. The privity limitation was elegant in its insistence that only immediate purchasers could sue immediate sellers. It was also unjust.

Likewise, the courts have chosen the proper course in following the lead of *Greenman v. Yuba Power Products, Inc.*<sup>11</sup> and section 402A of the *Restatement (Second) of Torts*<sup>12</sup> in their adoption of strict liability principles. The general principles of negligence—misguided in many contexts<sup>13</sup>—only add interminable confusion to the law as judges, juries and litigants attempt without rudder or compass to decide “how much” care suffices. The previous judicial insistence on a very high standard of care for manufacturers and the liberal use of *res ipsa loquitur* already had reduced the differences between negligence and strict liability to the vanishing point. The explicit recognition of strict liability principles marked a welcome step in the direction of candor and good sense.

A third judicial change is also deserving of approval. Beginning in the late sixties, courts began to apply strict liability principles on behalf of casual bystanders as well as product users.<sup>14</sup> At one point the move was the source of some legal doubt. The bystander was outside the chain of product distribution and use; he therefore could not claim, as a party to a web of contracts, the benefit of many of the implied warranties upon which the law of products liability ostensibly rested. Yet the objection was more formal than persuasive. Negligence actions for the benefit of injured bystanders had long been allowed in this country.<sup>15</sup> Given the minimal differences between negligence and strict liability, the extension of strict liability to bystanders was surely of minimal effect. Absent his own misconduct, the bystander's case for recovery is in truth even stronger than that of a user, as there is no possibility that the bystander assumed, even by implication, the risk of latent defects in a product that others had chosen to use.

In sum, the liability rules of the *Restatement (Second) of Torts* are not the source of any legitimate dissatisfaction. The changes introduced by the innovations of the sixties had marginal but beneficial effects upon

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11. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

12. RESTATEMENT (SECOND) OF TORTS § 402A (1965). For the author's views on the proper roles of negligence and intentional harms, see Epstein, *Crime and Tort: Old Wine in Old Bottles*, in *ASSESSING THE CRIMINAL* (J. Hagel & R. Barnett eds. 1978); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. B. FOUNDATION RESEARCH J. 87 (1976).

13. For the sentiments in one jurisdiction, see *Sears, Roebuck & Co. v. Morris*, 273 Ala. 218, 136 So. 2d 883 (1961); *Greyhound Corp. v. Brown*, 269 Ala. 520, 113 So. 2d 916 (1959).

14. See, e.g., *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

15. E.g., *Flies v. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N.W. 885 (1928).

institutional structures. Indeed, the overall stability of the system in the face of these changes is demonstrated by the constant level of products liability insurance until the crunch of 1975 and 1976. If the law of the 1960's governed products liability actions of today, there is little reason to believe that there would be any widespread social discontent or any call for legislative reform.

### III. BEYOND THE RESTATEMENT

What then are the changes that are the source of the modern concern? In essence the rules of liability have changed along two separate lines. First, there has been an *expansion* of the concept of defect as it is used in products liability actions. Second, there has been a *restriction* of defenses based upon plaintiff's conduct that are available in those actions. Both of these changes work to increase liability, so that the impact of each is reinforced by the other. A closer look at these two separate points is needed.

#### A. *Product Defect*

Some concept of product defect is of course central to products liability law. Without it, *any* product related injury could be attributable to the manufacturer or retailer. All automobile accidents could be the responsibility of the automaker and all murders the responsibility of the gunmaker. The question therefore is how to define defect. If any confusion exists here, the *Restatement (Second) of Torts* should be faulted because of its failure to give a clear account of the defect concept.<sup>16</sup> Yet in fairness, the absence of an adequate definition of product defect should not be allowed to conceal the fact that the *Restatement* recognized three classes of basic product defects, all of which were narrowly construed. First there were what have become known in post-*Restatement* terminology as manufacturing or construction defects. These defects include the contamination of food with toxins or the manufacture of machines that do not match their own specifications. With almost no exceptions these cases raise few problems of principle. The theory is one of estoppel. The only issue is whether the product squares with its own plans. Next there were design defects. In its traditional guise, a design defect issue was raised when a product did not perform in accordance with

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16. See RESTATEMENT (SECOND) OF TORTS § 402A, Comments g, h & i (1965). Note that the definition of defect given in comment g treats a product as defective "only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." The faithful application of that comment would, of course, preclude the expansion of design defect cases, *discussed at text* accompanying note 18 *infra*, and the rejection of the "open and obvious condition" rule, as in both cases the product, whether or not "unreasonably dangerous," was in fact in the very condition "contemplated by the ultimate user."

its own performance standards when put to its ordinary use. Indeed, the defect found in *Greenman* was itself of this sort, as plaintiff complained that the set screws on defendant's Shopsmith were of insufficient strength to hold wood in place during ordinary operation.<sup>17</sup> Here too there are no effective challenges to the soundness of the legal rule. Last, there were labeling defects, of which improper warnings about appropriate drug dosage levels are a good example.

The true transformation in the products area began about 1968 or 1970 when the concept of product defect was first expanded beyond these traditional contours. *Pike v. Frank G. Hough Co.*,<sup>18</sup> even though a negligence action, is a 1970 case that well marks the shift in judicial attitudes towards all products liability actions. The decedent, a worker on a dam site, was crushed and killed by a "paydozer" of defendant's manufacture. The paydozer was going in reverse at the time of the accident. Plaintiff claimed that the machine was defective for two separate reasons. First, it was not equipped with special rearview mirrors that might have enabled the operator to see decedent standing in the operator's "blind-spot"; second, it was not equipped with special bells to warn decedent of the danger.<sup>19</sup> The trial court, much in accordance with the traditional practice, nonsuited plaintiff. The Supreme Court of California reversed and held that the case was sufficient to go to the jury.<sup>20</sup>

The case is a marked departure from previous practice for several reasons. First, it is one of the earliest cases in which a product was claimed defective even though it was in the condition contemplated by its ultimate user.<sup>21</sup> Second, the defect consisted solely of the failure to incorporate additional safety devices of uncertain worth into the basic design of the machine.<sup>22</sup> Third, the court decided that the question of design was, in effect, one that had to be settled once and for all at the factory, even though the customization of the product for its particular use could have been better done at the site level.<sup>23</sup> Fourth, the suitability of the product was evaluated in isolation from all other on-site safety practices. And last, there was no specific guide, in either statute or common practice, that limited the extent to which arguments of defective design could be made on cost-benefit grounds. That the case sounded in negligence seems in retrospect almost a

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17. 59 Cal. 2d at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.

18. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

19. *Id.* at 469-70, 467 P.2d at 231-32, 85 Cal. Rptr. at 631-32.

20. *Id.* at 477, 467 P.2d at 237, 85 Cal. Rptr. at 637.

21. For the *Restatement* definition of defect, see RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965) (defining defect as an unreasonably dangerous condition *not* contemplated by the user). One of the ironies of *Pike v. Hough* is that it shows how common law negligence can be more favorable to plaintiffs than *Restatement* strict liability.

22. See 2 Cal. 3d at 470, 467 P.2d at 232, 85 Cal. Rptr. at 632.

23. See *id.* at 473, 467 P.2d at 234, 85 Cal. Rptr. at 634.

detail. The important point was that the case went far beyond the traditional reach of products liability law in its account of product defect. After *Pike v. Hough* the question was no longer whether liability should attach when soft drink bottles explode under normal use; instead, it was whether liability should attach to machine tools that are dangerous because some additional guard or safety device could have been installed<sup>24</sup> or to automobiles whose gas tanks could have been safely positioned to resist explosion when the defendant's car was struck by another car at a speed between sixty-five and eighty-five miles per hour.<sup>25</sup>

These new design defect cases raise very special problems. The defendant may be able to persuade the jury of all the delicate trade-offs it made in designing a "safe" product, but the problems involved are severe. To recover, the plaintiff need only "redesign" the product to prevent the particular injury that he suffered, even though the defendant originally had to design it to deal with all possible types of accidents and may have succeeded in preventing many of them with the chosen design. Within this framework it seems only fair that the plaintiff should bear a heavy burden before he can take a case of unsafe design to the jury. Today, however, it appears to take little more than the suggestion of an alternative design from plaintiff's expert for a jury issue to arise.<sup>26</sup>

This last proposition may, if anything, be understated in light of the two-pronged test for product defect just adopted by the California Supreme Court in its decision in *Barker v. Lull Engineering Co.*<sup>27</sup> There the court, in the culmination of a tradition that had its genesis, not in *Greenman*, but in *Pike*, wrote as follows:

[I]n design defect cases a court may properly instruct a jury that a product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of all the relevant factors, on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.<sup>28</sup>

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24. See, e.g., *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

25. See, e.g., *Self v. General Motors Corp.*, 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974).

26. For an example of how casual the suggestion of redesign can be, see, e.g., *Dimond v. Caterpillar Tractor Co.*, 65 Cal. App. 3d 173, 134 Cal. Rptr. 895 (1976). There the court allowed the casual suggestion that a pointed roof would be safer than a flat one to allow a case to go to the jury when the issue of design safety concerned not those who stayed under the roof for protection but those who (it appeared) abandoned the protection of the roof in a moment of panic. *Id.* at 183-86, 134 Cal. Rptr. at 902-03.

27. — Cal. 3d —, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

28. *Id.* at —, 573 P.2d. at 452, 143 Cal. Rptr. at 237 (emphasis omitted).

As ever, there are no clear guides on cost and benefits as the jury is allowed to use

the gravity of the danger posed by the challenged design, the likelihood that such danger could occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.<sup>29</sup>

Passing by the generous statement of the first prong of the test and its implicit adoption of the foreseeable misuse doctrine, the second prong shows just how fragmentary the *prima facie* showing of product defect can be. The careful division of burdens in the second portion of the court's test says that plaintiff need only show design *features* that might be implicated in the accident, leaving it to the defendant, at great expense, *routinely* to justify each feature as best he can. With this distribution of burden, the plaintiff can always show some way in which the product might have been changed in order to avert the accident, as it is always possible to generate some improvement at some price. The stock example of a dangerous but nondefective product used to be a knife with a sharp blade. To apply this description to a knife is consistent with treating consumer expectations as the sole measure of product defect in cases that do not involve statutory standards.<sup>30</sup> Today one cannot be sure that such is the case, at least if *Barker* gains adherents in other states. Complicated products create the greatest concern, as multiple defects can easily be invented by a skillful lawyer. All product related accidents have become presumptively actionable.

*Barker* represents all that is unwise in design defect litigation. What design defect cases need are sharp limitations, not new grounds of liability. When the legislature is persuaded after comprehensive study that certain design standards are appropriate, it can make them mandatory by statute. Such statutes can also give injured parties private causes of action. Beyond that, however, a defendant should be protected by the adoption of any design of substantial use in its own or related trades or businesses. In some cases this standard will lend itself to abuse, but in truth none other is workable. An unbounded determination of costs and benefits places the jury in a position where it can, and must, make the very type of calculations that proved so troublesome under negligence law. It is always difficult to identify the relative costs and benefits in any particular product design.<sup>31</sup>

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29. *Id.* at —, 573 P.2d at 455, 143 Cal. Rptr. at 237. Not all jurisdictions follow such an approach. See *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 241 N.W.2d 822 (1976).

30. The California Supreme Court recently explicitly rejected such an approach. *Barker v. Lull Eng'g Co.*, — Cal. 3d at —, 573 P.2d at 454, 143 Cal. Rptr. at 236; see note 34 *infra*.

31. The point has a direct parallel in the treatment of custom under medical malpractice

And that task is made more, not less, difficult because the reciprocal interactions of plaintiffs and defendants will be troublesome to analyze. Design suitability must be measured in terms of both intended and foreseeable uses and abuses by many different users whose behavior in turn depends upon the suitability of the design. No member of the economics profession could do the math required by the standard design defect formula.<sup>32</sup> It is idle to pretend that any judge or jury could do any better. The modern design litigation case may be welcomed by some,<sup>33</sup> but it is an invitation to the kind of standardless adjudication that reduces a lawsuit to a glorious, if expensive, game of chance. There was substantial progress in every area of product development long before the advent of modern design defect litigation, and there is no reason to think that the parties who buy and sell products will remain so uninformed of their economic interests that they cannot make intelligent trade-offs between costs and benefits if unaided by the wisdom of a jury.<sup>34</sup> Modern design defect litigation may have been born of the best intentions, but there is no evidence that it has produced rational or beneficial results.

The judicial caution and restraint so much needed in design defect cases should be matched by a similar caution in "duty to warn" cases. The general function of warnings and instructions should be to supply information to individual consumers that is better provided by the manufacturer than obtained from independent sources. It should be assumed in deciding

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law. While the modern view tends to treat custom as one piece of evidence to be taken into account in setting the standard of care, the traditional view of medical malpractice treated it as dispositive on the standard of care. See, e.g., Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147 (1942) in which the exclusive use of the customary standard was explained as follows: "The rationale is: no other standard is practical." *Id.* at 1164. Professor Morris then added:

The law may be academically deficient in countenancing an excuse that may occasionally be based on the negligence of other doctors. But the grossly incompetent practitioner will find little comfort in the tests of malpractice. A few negligent doctors may escape, but the quack will not. The reasonably prudent man "test" would enable the ambulance chaser to make a lawsuit out of any protracted illness.

*Id.* at 1165. The same arguments apply to design defect cases.

32. See, e.g., Diamond, *Single Activity Accidents*, 3 J. LEGAL STUD. 107 (1974) (for a hint of the complications that are involved, even on the assumption that all participants share the same preferences and engage in the same activities. With products liability, of course, the issues are much more complicated. The roles of user and producer (not to mention employer and retailer) are never symmetrical, and the extensive differences within the class of product users make any generalization impossible.

33. See, e.g., Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Product Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976).

34. A further indication that Barker has given one additional turn to the screw is that it makes hindsight and not reasonable foresight its test of product defectiveness. Thus, "a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger' . . . ." — Cal. 3d at —, 573 P.2d at 454, 143 Cal. Rptr. at 236.

whether a warning is needed that consumers can take steps on their own behalf whenever they have *notice* that possible perils are associated with product use. By this test it becomes imperative to label poisons as such, to warn of the latent dangers in the operation of complicated machinery and to give special instructions that are needed for the handling and preparation of toxic chemicals or inflammable substances. No sensible system of products liability could ever dispense with some duty to warn.

The problem, of course, is how the lines should be drawn. Here the clear trend in the case law is to make the requirements for warnings and instructions ever more stringent. These stricter standards are imposed upon the false assumption that the individual product user (or in many industrial contexts, his employer) does not have and cannot obtain or act upon information from sources other than the manufacturer.<sup>35</sup> The difficulty of complying with the modern requirements is illustrated in an instructive manner by the consent forms that were prepared by the Department of Health, Education and Welfare for the swine flu program. The government sought to comply with the standards set by the courts in cases of this sort, and yet, despite extensive efforts, it failed in many particulars. It misstated the possible risks for pregnant women of taking the vaccine; it failed to state the probabilities of catching swine flu if the vaccine was not taken; it failed to state any of the possible neurological complications that might result from taking the vaccine; and, in particular, it failed to mention the complications associated with the Guillain-Barre syndrome.<sup>36</sup> There was doubtless room for improvement in the warnings given by the government, but the implications of finding the results of such efforts insufficient are disturbing. Do all firms have the means to issue adequate warnings—adequate by current standards—in the literally hundreds of situations where they may be required? What, for example, must be said to persuade an impatient employee not to remove a safety guard from a machine? Or a student not to sniff glue?

Lest these questions be dismissed as remote and hypothetical, a guide to this problem can be found in the instantly classic *Moran v. Fabergé, Inc.*<sup>37</sup> There plaintiff reached the jury on a duty to warn theory because defendant did not place upon its cologne warnings of the inflammable nature of its contents. To the court it was of no moment that a restless teenager had

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35. See, e.g., *Barnes v. Litton Indus. Prods., Inc.*, 555 F.2d 1184 (4th Cir. 1977).

36. These are set out in great detail in the study of the swine flu program prepared by the federal government, U.S. COMPTROLLER GENERAL, *supra* note 2, at 23-25. For statements of the current law, see, e.g., *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968), and *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir. 1974).

37. 273 Md. 538, 332 A.2d 11 (1975).

poured the cologne on a lighted Christmas tree candle in order to see that it was scented. Instead the jury was allowed to find that the warning might have been useful to deter a woman from flicking a cigarette ash into a cologne bottle that lay open on her vanity table.<sup>38</sup>

The capacity for plaintiffs to invent duty to warn theories far exceeds the capacity of manufacturers to provide warnings to counter them. While some warnings should be given, efforts must be taken to prevent warnings and instructions from taking on a ritualistic purpose, immaterial in their influence on individual behavior but decisive in the way they shape liability.<sup>39</sup>

### B. Plaintiff's Conduct

Hand in hand with the expansion of the concept of product defect has come the contraction of the available defenses based upon plaintiff's conduct. In *Escola v. Coca Cola Bottling Co.*,<sup>40</sup> Justice Traynor was careful to limit recovery in products liability cases to situations in which the product had been put to its "normal and proper use."<sup>41</sup> This restriction captures the shared expectations of users and producers, even in the absence of privity. It also ensures that manufacturers of products are required to take into account the full costs generated by their own errors, but not those generated by the improper use of their products. The recent cases, however, have shown a tendency to permit recovery even when there has been improper product use. The concern here, it must be stressed, is *not* with those cases in which the plaintiff makes what might be termed a secondary, but permissible use of the defendant's product.<sup>42</sup> Under certain circumstances it is appropriate to stand on chairs, and it is appropriate to open paint cans with some screwdrivers. But the recent cases of "foreseeable misuse" have gone far beyond this point.<sup>43</sup> It may be quite foreseeable that individuals will drive while

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38. See *id.* at 553, 332 A.2d at 20. Perhaps the best indication of the deep pocket mentality that dominated the entire case is that the Maryland Supreme Court left undisturbed the jury's finding that the 15-year-old girl who poured the cologne on the candle was not negligent. *Id.* at 540 n.2, 332 A.2d at 132 n.2.

39. Such was in fact the situation in the cases in which the duty to warn issue was first brought to the attention of the courts. Thus in *Thomas v. Winchester*, 6 N.Y. 397 (1852), defendant substituted poisonous belladonna for harmless dandelion extract, and in *Osborne v. McMasters*, 40 Minn. 103, 41 N.W. 543 (1889), plaintiff sold a poisonous drug that had not been labelled as required by statute. The court in *Osborne* did not reach the question whether the failure to label would be actionable under common law principles, though the point seemed as clear in principle then as it does now.

40. 24 Cal. 2d 453, 150 P.2d 436 (1944).

41. *Id.* at 468, 150 P.2d at 444 (Traynor, J., concurring).

42. See RESTATEMENT (SECOND) OF TORTS § 395, Comment k (1965). It is worthy of note that parallel limitations on the intended use requirement are not found in the comments to § 402A, even though there is nothing in the shift from negligence to strict liability that warrants relaxation of the defenses based upon the plaintiff's conduct.

43. See, e.g., *Green v. Volkswagen of Am., Inc.*, 485 F.2d 430 (6th Cir. 1973) (summary

drunk,<sup>44</sup> not use their safety belts, or run red lights.<sup>45</sup> It does not follow that they should be able to escape the consequences of their own neglect.

A party who runs a red light is barred from recovery against the driver of another automobile.<sup>46</sup> There is nothing special or unique about the rules of products liability that makes it appropriate for that same driver to recover for those same injuries against the manufacturer of his own car. The appropriate class of affirmative defenses should be the same in the two types of situations.<sup>47</sup> Comment n to section 402A<sup>48</sup> contains a prohibition against the utilization of a contributory negligence defense based on the plaintiff's failure to discover or guard against the existence of defects. This prohibition stemmed from a proper concern to allow recovery for the consumer of a tin of salmon who did not first examine the fish for the small bits of metal that cut her mouth.<sup>49</sup> That concern should have been reflected in a rule saying contributory negligence, although available in principle, does not apply when social expectations recognize *no duty* of inspection. Yet with the driving of cars or the use of complicated machinery the plaintiff should not be treated as the passive receptacle of another's product. There are obligations to drive in accordance with the law and to use a machine in accordance with its function and limitation. With the expansion of the basic products liability case to include both design and construction defects, the basic structure of the comment n defense must be expanded. The widespread failure of products liability law to demand ordinary care of the injured party when social expectations so require is one of the major mistakes that, like the expansion of the basic defect concept, postdates the *Restatement (Second) of Torts*.

What is true of contributory negligence and foreseeable misuse is also true of assumption of risk. As a matter of traditional tort theory, assumption of risk applies when the plaintiff has knowledge of a dangerous situation and decides for his own benefit to encounter that danger.<sup>50</sup> The defense as stated

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judgment improper in favor of defendant truck manufacturer in suit for injuries sustained by child who stuck finger in body vent of truck).

44. *Fields v. Volkswagen of Am., Inc.*, 555 P.2d 48 (Okla. 1976).

45. *Nelia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976).

46. *E.g.*, *Melia v. Svoboda*, 191 Neb. 150, 214 N.W.2d 476 (1974).

47. Such is the position adopted in New York, *see Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), but not in California, *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).

48. *RESTATEMENT (SECOND) OF TORTS* § 402A, Comment n (1965).

49. *Cf.*, *e.g.*, *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961) (fact that infant's father purchased tin of salmon does not bar her recovery).

50. *See Bohlen, Voluntary Assumption of Risk* (pts. 1 & 2), 20 HARV. L. REV. 14, 91 (1906). For the author's views, *see Epstein, Defenses and Subsequent Pleas in a System of Strict Liability*, *supra* note 12, at 185-201.

is distinct from contributory negligence because it involves a conscious choice to assume a particular risk. Accordingly, that choice should govern, whether or not prudent. The basic difficulty with assumption of risk is the difficulty of proving the subjective element of individual choice even when it seems probable from the extrinsic evidence in the case. The great strength of the associated "open and obvious" rule, which applies assumption of risk to publicly observable and knowable conditions, is that it identifies a set of circumstances in which it is highly likely that certain risks are known. The recent case law has tended to undermine this defense, not only in marginal cases in which the open and obvious condition is a doubtful surrogate for assumption of risk,<sup>51</sup> but also in those cases in which the old rule functioned well.

In this connection, consider the recent New York case of *Micallef v. Miehle Co.*<sup>52</sup> There the court of appeals allowed plaintiff to reach the jury after his hand had been caught between the plate cylinder and ink-form roller of a high speed photo-offset press.<sup>53</sup> The accident occurred only after plaintiff had, with the approval of his foreman, attempted to "chase a hickie"—that is, to remove a foreign object from the moving press—without first shutting it down.<sup>54</sup> Both plaintiff and his foreman wanted to avoid the loss of production time, and both knew of the absence of any special guard at the junction of the cylinder and the roller. What is more, plaintiff chose to chase the hickie from a position in which it was impossible for him to operate the safety switch that could stop the press and did so without asking anyone else to man the switch for him. Here is a case in which full knowledge was available to the plaintiff, who then made a choice to encounter the risk. The question of duress and coercion is foreign to the

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51. See, e.g., *Luque v. McLean*, 8 Cal. 3d 136, 501 P.2d 1153, 104 Cal. Rptr. 443 (1972). In that case the California Supreme Court announced its rejection of the open and obvious hazard defense. The facts, however, did not lend themselves to such broad pronouncements. Plaintiff's hand was caught in an unguarded hole in a power lawnmower after he stepped in front of it to remove an object from his path and slipped. Even though the risk was obvious to one who might happen to look for it, it was not obvious to one whose attention was on other matters. Cases like *Luque* should be distinguished from the machine tool that has no guard, a point that must be obvious to a person who uses it day in and day out. The error in *Luque* was that it used a poor example to discredit a rule that, if subject to sensible limitations, has an important function to play in the tort law.

One might add that even if the open and obvious defense did not apply to *Luque*, there should surely have been a jury question on the contributory negligence issue. Ordinary care seems to require the user to shut off the mower or at least to watch his footing.

52. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

53. Despite problems with the court's substantive treatment of the assumption of risk defense, it should be noted that defendant failed to plead the defense and therefore waived it. *Id.* at 382, 348 N.E.2d at 575, 384 N.Y.S.2d at 118-19 (citing N.Y. CIV. PRAC. LAW § 1412 (McKinney 1976); *id.* § 3018 (McKinney 1974)).

54. *Id.* at 379-80, 348 N.E.2d at 573, 384 N.Y.S.2d at 117.

case unless those terms are construed so broadly that they apply whenever assumption of risk itself is present. Assumption of risk, even in its most subjective form, is clearly shown. The reasonableness of plaintiff's choice is quite irrelevant, for the defense of assumption of risk, properly understood, is not a variant of contributory negligence. For plaintiff to have a colorable case, let alone to recover, is simply incomprehensible.

### C. Recapitulation—The Products Liability Two-Step

The transformations in products liability law have thus come from both directions. The heedless expansion of the defect concept means that the defendant can be required by a jury's hindsight either to warn or protect the plaintiff against any product related accident that might befall him. The unwarranted contraction of the defenses based upon the plaintiff's conduct too often permits the plaintiff to escape the consequences of his own actions; the plaintiff can, it seems, do no wrong, no matter what he does. A dual standard has crept into the law. The very conduct sufficient to expose a defendant to both actual and punitive damages is ignored altogether when performed by the plaintiff.

The effect of this double transformation upon the most ordinary of cases is enormous. Consider for example the products liability two-step in the recent California decision, *Buccery v. General Motors Corp.*<sup>55</sup> There, plaintiff was driving a pickup truck manufactured by defendant when it was struck in the rear by an automobile. The difference in the speed of the two vehicles at the time of impact was about five miles per hour. Upon impact plaintiff's head was thrown back into the window in the back of the cab and plaintiff sustained injuries. The truck was not equipped with a headrest and none was required by statute, although such headrests were required in new automobiles.<sup>56</sup> The appellate court reversed the directed verdict for defendant entered in the trial court.

First, of course, plaintiff had to surmount the defect hurdle. This was done on the theory that compliance with the statutory standard did not preclude the jury from finding that the product was defective under all the circumstances of the case.<sup>57</sup> Clearly, that finding could not rest upon the latent nature of the defect or upon consumer expectations; it had to rest upon a general estimate of the relative costs and benefits of possible alternative designs. Next there was the question of assumption of risk. Here the court said that the jury could find for plaintiff on this issue as well on the grounds

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55. 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976).

56. *Id.* at 537, 132 Cal. Rptr. at 607.

57. *Id.* at 540-41, 132 Cal. Rptr. at 609.

that he did not behave “voluntarily and unreasonably.”<sup>58</sup> Plaintiff testified that he did not perceive the “magnitude”<sup>59</sup> of the risk in being hit by a car going five miles per hour faster than his own: could his conduct be voluntary? He testified he had made several independent efforts to purchase a headrest on his own:<sup>60</sup> could his conduct be unreasonable? Again assumption of risk was nullified by the limitations engrafted upon it. It was not enough to drive with knowledge of the danger of whiplash in a rear-end collision. In *Buccery*, a routine rear-end collision case was transformed into a major products liability suit. With one decision thousands of vehicles were branded “defective.” The power of products liability doctrines must never be underestimated.

#### IV. WHY IS IT ALL DONE?

Thus far attention has been focused on the inner workings of the products liability system. In closing, it is instructive to examine the standard rationales used to support the expansion of plaintiffs’ rights under a products liability theory. First, it is said that “the purpose of [strict] liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”<sup>61</sup> That point is quite sensible with respect to latent product defects; it works well with Coke bottle and construction defect cases. But the rationale contains its own limitations. Plaintiffs have the “power” to lock doors, man safety switches, read instructions and fasten seatbelts. And all cases of product misuse and modification involve conduct that a manufacturer may well be “powerless to protect against,” though users and others in the chain of distribution can protect against it with little difficulty. *Greenman* itself recognized the importance of post-sale conduct in its now forgotten limitation of strict liability to cases “when an article [the manufacturer] 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.”<sup>62</sup>

In a closely related rationale, it is often said that the growth of products liability is necessary to place the proper incentives for the development of safe products upon their producers.<sup>63</sup> Here too the rationale contains its own

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58. *Id.* at 542, 132 Cal. Rptr. at 614 (quoting *Luque v. McLean*, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1170, 104 Cal. Rptr. 443, 450 (1972)) (emphasis added by *Buccery* court).

59. *Id.* at 550, 132 Cal. Rptr. at 616.

60. *Id.* at 538, 132 Cal. Rptr. at 608.

61. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

62. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700 (emphasis added).

63. *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d at 462, 150 P.2d at 140-41 (Traynor, J., concurring).

implicit limitations. In many situations incentives are better placed upon others in the chain of distribution than upon the manufacturer. A manufacturer of machine tools cannot compel its purchasers to keep them in proper maintenance and repair; it cannot compel individual workers to observe all the required safety precautions. Those who hire employees to work with dangerous chemicals are often in a better position than the original manufacturer to give those employees warnings and instructions about a product's hazards and its proper use in their work environment. The large corporations that manufacture motor vehicles cannot prevent drunks from speeding or incompetents from rebuilding the engines.<sup>64</sup>

Consideration of incentive effects does not irresistibly lead to a liability rule (be it called negligence or strict liability) that ignores the inputs of plaintiffs and third parties. To the contrary, this consideration demands that their behavior be taken into account. For even if product users and consumers do not respond to legal incentives—itself a doubtful assumption—it could be overhasty to endorse any contraction of the available products defenses. At the very least, the destruction of important defenses places perverse incentives upon the defendant whose conduct the law seeks to regulate. Elimination of defenses invites the possibility that the good and sensible firm will be dealt with as harshly as the backward and incompetent one, although the very purpose of the law should be to distinguish between the two.

Finally, it is said that the expansion of products liability works to "[spread] throughout society . . . the cost of compensating [accident victims]"<sup>65</sup> and thereby helps to cushion the blow that injury places on a single aggrieved person. This "spreading" argument is so powerful that it can explain away not only negligence and affirmative defenses, but all of tort law. If redistribution is desired there is no reason why the law should retain the requirements of causation and product defect; to the extent that any defendant can rely upon those requirements to defeat a plaintiff's cause of action, this "policy" of tort law will be defeated.

The causation point needs further stress. The strict liability rule in *Greenman* presupposed that proof of causation had been established in the usual manner. The more recent trend has been to manipulate the inferences of causation to allow the policy to prove the fact. Thus, it is said that "[t]o deny the plaintiff the benefit of the inference of proximate cause would frustrate that [loss spreading] policy."<sup>66</sup> One might as well say that any

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64. See, e.g., *General Motors Corp. v. Hopkins*, 548 S.W.2d. 344 (Tex. 1977).

65. *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 251, 466 P.2d 722, 726, 85 Cal. Rptr. 178, 182 (1970).

66. *Dimond v. Caterpillar Tractor Co.*, 65 Cal. App. 3d 173, 183, 134 Cal. Rptr. 895, 902 (1976).

judgment for the defendant frustrates that policy.

There are yet other difficulties, for the implications of the loss spreading arguments are rarely, if ever, articulated or evaluated. One question raised is why there need be any tort system at all, with its cumbersome and expensive individual litigation. If the needs of the plaintiff are decisive then the most appropriate response is a comprehensive system of first party insurance that compensates each person in accordance with the severity of his injury. The benefits of that compensation system, moreover, should not be limited to those who are "lucky" enough to be injured by some chance contact with a defective product manufactured by a wealthy corporation. The victims of crime, illness, earthquakes and self-inflicted harms are entitled to precisely the same level of protection because they have precisely the same level of needs.

A second issue concerns the level of benefits that should be paid under the plan. The courts have implicitly assumed that each individual claimant should receive the generous damages awarded under the tort system. Yet other systems that have individual compensation as their primary objective have moved sharply away from such high benefit levels. There are thus real limits upon recovery for pain and suffering in workmen's compensation and no-fault automobile insurance. The various medical and disability programs provide restricted forms of coverage. These schemes, moreover, require detailed legislative and administrative implementation utterly unsuited to the judicial forum.

A third issue concerns the patterns of contributions to the general compensation scheme. If the end of the legal system is to provide a sufficient cushion (however defined) protecting each citizen against major disaster, it is necessary to consider questions not of corrective justice, but of basic taxing policy. The taxing questions should be addressed by the legislature so that the interdependence and coordination of multiple benefit schemes can receive comprehensive scrutiny and review. And if the question of funding a plan for compensating injuries is seen as a taxing question it is no longer clear why corporate defendants, large and small, should be required to contribute the bulk of the funds for programs of which they are at best indirect beneficiaries.

The basic point needs re-emphasis. The problem is not that such schemes of social insurance are necessarily unsound in principle or beyond the power of the legislature to enact. It is simply that they require a direct legislative analysis of the problem with a measured weighing of the costs and benefits that any particular scheme should provide. The issues are too

complex to be analyzed as asides in judicial opinions. The types of decisions that must be made, particularly with regard to eligibility requirements and benefit levels, represent the very sort of political compromises that cannot be captured in principled judicial decisions. The judicial system works best when it resolves individual cases without trying to solve the distributional and administrative questions necessary to set up major compensation systems.

The late Karl Llewellyn said that "[c]overt tools are bad tools" and the products liability problems only demonstrate the truth of this proposition. To allow loss spreading issues covertly to dominate the structure of the tort law will only produce unsound results and bad general principles; it will only bring the law into disrepute as the courts say one thing and do yet another; it will only call into question the solid achievements of traditional tort law, as they are overshadowed by current excesses in judicial doctrine; and it will so overburden the tort system that it will destroy its effectiveness in the situations in which it has worked well in the past.

The final and most pressing question is: How should the legal system proceed in order to preserve the tort system? It would be nice to think that a simple change of attitude on the part of the judiciary would eliminate most of the problem. Yet the habits of mind formed in the recent past and the continued expansion of liability in the most recent decisions suggest that it is simply unwise to expect much help from judicial self-correction, especially in the short run. At this point, legislation appears to be the only answer. The question of its precise nature and form is one that can be debated at great length, and there is surely much force to the objection that no statute can ever respond to the richly textured issues that are always raised by questions of causation and reasonableness. Yet by the same token it is necessary to beware of overstating the limitations of the legislative approach. If desired, for example, it is possible to reinstate the traditional statutory rule that refuses to allow evidence of subsequent product improvement to establish a prior product defect.<sup>67</sup> Similarly, statutes can be enacted to preclude the jury

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67. *E.g.*, CAL. EVID. CODE § 1151 (West 1966): "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." The leading decision in support of the admissibility of subsequent improvements is the California case, *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974). That decision dealt with a point arguably covered by the California statute, but held that evidence introduced in a strict liability case is not evidence of "negligence as culpable conduct" under § 1151. The statute could be revised to change this result by adding the words "or product defect" after the words "culpable conduct."

The draft provision in the American Insurance Association proposed legislative package provides, after a comprehensive definition of a products liability action:

from making open ended determinations about the design strengths and weaknesses of defendant's products.<sup>68</sup> And it is surely possible to pass a statute that insists upon the application of the basic principles of contributory or comparative negligence in products cases.<sup>69</sup> Reforms along these lines will not of course dispense with the need to litigate the delicate factual questions that occur at the margins of any legal doctrine. Yet at least such legislation could require courts to distinguish between hard and easy cases. In so doing, such legislation could preserve the traditional functions of the tort law. And it would aid in the return of the law of products liability to its sensible middle ground.

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In any products liability action evidence of any alteration, modification, improvement, repair or change in, or discontinuation of the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of a product, whether made by the defendant or any other party after the date the product entered the stream of commerce shall not be admitted for any purpose.

AMERICAN INSURANCE ASSOCIATION, PRODUCT LIABILITY LEGISLATIVE PACKAGE: STATUTES DESIGNED TO IMPROVE THE FAIRNESS AND ADMINISTRATION OF PRODUCT LIABILITY LAW 40 (Mar. 1977). No means no.

68. One proposed statute might read:

In any products liability design defect action, no product shall be treated as defective if it was designed in accordance with the state of the art existing at the time the manufacturer of the product parted with its possession and control, or sold it, whichever occurred last. Where there are two or more possible product designs, the adoption of any design in substantial use in the defendant's trade or business or in allied or similar trades or businesses shall be treated as non-defective. This section shall not bar causes of action based upon the failure to conform to statutory or regulatory standards of product design, nor to bar causes of action based upon the fact that the product does not perform in ways reasonably expected by the ultimate consumer.

69. Such a statute might read: "In any products liability action the plaintiff's recovery shall be barred by his contributory negligence." It is possible to draft a parallel statute for comparative negligence jurisdictions. It is also possible to indicate the types of conduct that do and do not constitute contributory negligence. This can be accomplished, for example, by adopting the language on the subject contained in RESTATEMENT (SECOND) OF TORTS § 288A (1965).