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A Critique of the Uniform Product Liability Law -- A Rush to Judgment

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A CRITIQUE OF THE UNIFORM PRODUCT LIABILITY LAW—A RUSH TO JUDGMENT

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I. INTRODUCTION

The Department of Commerce, through its Task Force on Product Liability and Accident Compensation, recently issued its Draft Uniform Product Liability Law (UPLL).¹ Although the UPLL is a thought provoking piece of work filled with interesting insights and observations about the inadequacies of the present state of the law in products liability, it should not be promulgated as a model statute. In its attempt to balance the claims of industry—which seek greater protection from unjustified litigation²—against those of consumers who view product liability law as a significant weapon in the arsenal of consumer protection,³ the UPLL has managed to come down in a totally unprincipled manner on both sides of almost every important question. If it was thought that products liability law was difficult to predict and administer in its common law form, it is suggested that this new statutory creature will complicate the task even further. For all its faults, the common law of products liability has a rational sense built on the foundation of centuries of tort law.⁴ What is presented to us in this proposed legislation is a set

1. DRAFT UNIFORM PRODUCT LIABILITY LAW (UPLL), reprinted in 44 Fed. Reg. 2996 (1979). This law is intended to serve as a model law for use by the states. See Introduction to the UPLL, 44 Fed. Reg. at 2996. This Act contains 21 sections (§§ 100-21). The complete text of the UPLL, as well as the analysis of each section appears in the appendix to this Article.

2. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978); Henderson, *Manufacturer's Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625 (1978); AMERICAN INSURANCE ASS'N, *PRODUCT LIABILITY LEGISLATIVE PACKAGE* (1977); PRODUCTS LIABILITY LEGAL STUDY, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY (Dep't. of Commerce), vol. III at 113-33 (NTIS 1977); THE ALLIANCE OF AM. INSURERS *PRODUCT LIABILITY TORT REFORM PROPOSAL* (1976); DEFENSE RESEARCH INSTITUTE, *PRODUCT LIABILITY POSITION PAPER* (1976).

3. See Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C.L. REV. 677 (1978); Testimony of Ralph Nader, Senate Select Committee of Small Business (December 8, 1976).

4. A. WEINSTEIN, A. TWERSKI, H. PIEHLER & W. DONAHER, *PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT* (1978); D. NOEL & J. PHILLIPS, *PRODUCTS LIABILITY IN A NUTSHELL* (1974); Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L.

of rules and their exceptions, presumptions and evidentiary gambits that have no cohesive quality. Many of the ideas presented by the UPLL have enormous potential for inclusion into the common law development of products liability over the next decade, but they will require the careful hand of the courts to assure that such doctrines are developed through careful attention to the varying fact patterns which create the rich tapestry of products liability law. It is much too early for legislation to pre-empt the creativity of the common law in the continuing development of products liability law.

II. THE BASIC STANDARDS OF LIABILITY

As its first major goal, the UPLL undertakes the establishment of the basis of liability for a products liability action. It does so by rejecting the all-purpose definition of strict liability found in the Restatement (Second) of Torts § 402A, which provides:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability or physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

The drafters of the UPLL, in their supplementary analysis (UPLL Analysis),⁵ take the position that the Restatement definition of "defect" was originally fashioned to cover manufacturing (construction) defects and did not focus on design defects and failure to warn cases.⁶ Rather than struggle with

Rev. 521 (1974); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973) [hereinafter cited as Wade—MISSISSIPPI].

5. The DRAFT UNIFORM PRODUCT LIABILITY LAW is accompanied by a lengthy and detailed analysis which appears at 44 Fed. Reg. 3002-19 (1979).

6. UPLL analysis § 104, reprinted in 44 Fed. Reg. 3004 (1979) (see Appendix). The problem originally arose because the language of RESTATEMENT (SECOND) OF TORTS, § 402A predicated liability on a product being "in a defective condition unreasonably dangerous to the user or consumer." The term "defect" was meaningful in the context of a production defect case since the defect could be identified by comparing the questionable product with the manufacturer's internal production standard. In a design defect or failure to warn case the term "defect" would not identify the standard against which the product should be judged. The term "unreasonably dangerous" was well suited for these cases since the concept of reasonableness required a balancing of risk-utility considerations. Dean Wade in several influential articles identified those factors which should be evaluated in setting the "reasonableness" standard of product quality:

(1) the usefulness and desirability of the product, (2) the availability of other and safer

formulating a single theoretical definition of defect, the UPLL eradicates the doctrinal differences between negligence, strict liability and warranty theories.⁷ The method for accomplishing this goal is to treat the basis of liability differently for each functional category. The UPLL thus creates different subsections for construction defects, design defects and failure to warn cases. In doing so, the UPLL drafters desired to impose strict liability for construction defects alone, and to enact an emasculated form of negligence for design

products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965). A slightly revised list of factors was delineated in Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837 (1973).

In what has come to be known as the Wade-Keeton test of strict liability the standard is applied without reference to the scienter of the defendant. Professor Keeton has expressed the following formulation of the rule:

[A] product ought to be regarded as "unreasonably dangerous" at the time of sale if a reasonable man with knowledge of the product's condition, and an appreciation of all the risks found to exist by the jury at the time of trial, would not now market the product, or, if he did market it, would at least market it pursuant to a different set of warnings and instructions as to its use. . . . Since the test is not one of negligence, it is not based upon the risks and dangers that the maker should have, in the exercise of ordinary care, known about. It is, rather, danger in fact, as that danger is found to be at the time of the trial that controls.

Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969) [hereinafter cited as Keeton—SYRACUSE].

At the outset there was some confusion about the utilization of risk-utility analysis in design defect legislation. Some courts believed that it merely re-introduced negligence into product liability actions. See, e.g., *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209 (Alaska 1975); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1975).

This confusion was short lived. The overwhelming majority of courts have applied risk-utility analysis in establishing design defect and failure to warn cases. See *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974); *Borel v. Fireboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973); *Welch v. Outboard Marine Corp.*, 481 F.2d 252 (5th Cir. 1973); *Rogers v. Unimac Co.*, 115 Ariz. 304, 565 P.2d 181 (1977); *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *Rivera v. Rockford Mach. & Tool Co.*, 1 Ill. App. 3d 641, 274 N.E.2d 828 (1971); *Moning v. Alfano*, 400 Mich. 425, 254 N.W.2d 759 (1977); *Johnson v. Chrysler Corp.*, 74 Mich. App. 532, 254 N.W.2d 569 (1977); *Blevins v. Cushman Motor*, 551 S.W.2d 602 (Mo. 1977); *Ferry v. Luther Mfg. Co.*, 56 A.D.2d 703, 392 N.Y.S.2d 521 (App. Div. 1977); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033 (1974); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974); *Metal Window Prods. Co. v. Magnusen*, 485 S.W.2d 355 (Tex. Civ. App. 1972).

The significant outpouring of academic commentary aided the courts to recognize that risk-utility theory must be utilized. Although there may be occasional decisions which demonstrate confusion, see, e.g., *Azzarello v. Black Bros. Co.*, ___ Pa. ___, 391 A.2d 1020 (1978), there is considerable agreement as to the standard to be applied.

7. UPLL § 104, analysis § 104, reprinted in 44 Fed Reg. 2998, 3004-06 (1979).

defects and failure to warn cases.⁸ These sections, properly understood, should please neither consumers nor industry. An investigation of each subsection will demonstrate why the proposed standards of liability manage to be unfair to everyone.

A. Construction Defects

The UPLL section dealing with construction defects reads as follows:

104(A) The Product Was Defective in Construction.

The harm was caused because the product was not made in accordance with the product seller's own design or manufacturing standards. In determining whether the product was defective, the trier of fact may consider the product seller's specifications for the product, and any differences in the product from otherwise identical units of the same product line.

There are several reasons why it is premature to mandate liability for construction defects on the sole ground that the product failed to meet the manufacturers own production standards. First, a standard which judges a manufacturer by his own rather than industry standards could penalize the manufacturer who goes out of his way to build into his product a high safety level not mandated or followed by the industry.⁹ Consider, for example, a manufacturer of a high quality car who utilizes the finest grade of steel for shock absorbers. Assume that under very extreme conditions (e.g., hitting a large pothole at high speed) a spring fails and the car goes out of control. If the evidence were to disclose that the spring that failed did not meet the manufacturer's own internal construction standards and therefore failed, liability would attach. If the manufacturer's standard far exceeds those of the industry, it would seem particularly unfair to foist the manufacturer by his own petard.¹⁰ Admittedly, in some cases an argument could be made that an express warranty would exist in such a situation.¹¹ But the greater probability is that the consumer would not be aware of the performance level of the internal parts of an automobile. Why then should a manufacturer be held liable for exceeding high safety standards merely because he failed to meet his own very demanding specifications? The simple solution to this problem would be to impose the "unreasonably dangerous" standard on all product liability actions. This would mean that construction defect cases would be

8. See text accompanying footnotes 18-21 *infra*.

9. Weinstein, Twerski, Piehler and Donaher, *Product Liability: An Interaction of Law and Technology*, 12 Duq. L. Rev. 425, 433-34 n.14 (1974).

10. The interplay between quality control and design must be carefully assessed. A manufacturer may choose a higher base level of product quality and thus reduce quality control since even deviations from the norm will not bring the safety level into the danger zone. A legal standard which penalizes deviations from quality control norms could thus influence a decision in favor of greater quality control and against higher base level safety.

11. It is possible that an express representation could be made with regard to the quality of the car such that a warranty would be established. See U.C.C. § 2-313.

judged by the same risk-utility standards which control design defect cases.¹² To be sure, such a solution would complicate the definition of defect, whereas the UPLL seeks to delineate clear cut rules. In a society of steadily rising safety standards, this problem deserves careful attention. We may ill afford simple solutions to complex problems.

There is a second and more serious objection to the dichotomy raised between construction defects and design defects. By imposing a strict liability standard for production defects and a negligence standard for design defects, the UPLL aggravates an already difficult situation. In the development of product safety, there may be several ways to address a safety hazard. One way may be to increase quality control to assure the integrity of a crucial part. Another may be to design a back-up safety feature (a fail-safe component). By deciding that construction defect cases are not defensible (in that strict liability applies regardless of fault), and that design defect cases are defensible (on negligence or risk-utility grounds), the UPLL has made a conscious decision to favor the design alternative over quality control. This may be a short-sighted approach. It is possible that increased safety can be accomplished at a lower cost by raising quality control standards rather than by designing a fail-safe system that could engender other risks.¹³ The difficulty is that the litigation categories have been created by lawyers. Engineers who must think in functional terms may find the framework totally unsatisfactory.

In a very real sense, this problem already exists. Even those courts which apply strict liability for design defects apply risk-utility theory and are unwilling to impose liability without involving themselves in the trade-offs which are indigenous to the balancing process.¹⁴ Nonetheless, courts have *not* said that liability will automatically attach in a construction defect case if the product fails to meet the manufacturers own standards. They have applied this standard as a "rule of thumb"—as a practical guide for establishing defect. In the UPLL, this rule of thumb takes on the force of law.

B. *Design Defect*

Section 104(B) of the UPLL states:

12. If we were to subject a product which deviated from the manufacturer's especially high norm to the "unreasonably dangerous" standard, the product might well survive such scrutiny. Given the balance between risk and utility, the product might still be well above the danger zone—hence the product would be decreed a "reasonably safe" or "socially acceptable" product. See Donaher, Piehler, Twerski and Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303, 1307 (1974) and Phillips v. Kimwood Mach. Co., 269 Or. 485, —, 525 P.2d 1033, 1036 (1974) where the court says: "[W]hether the mismanufactured article is dangerously defective because of the flaw is sometimes difficult to ascertain because not every such flaw which causes injury makes the article dangerously defective."

13. In a sense this problem is the mirror-image of the one discussed earlier. In this instance the decision in favor of design rather than quality control may result in a lower standard of safety to society.

14. See cases cited in note 6 *supra*.

104(B) The Product Was Defective in Design

The harm was caused because the product was defective in design. In determining whether the product was defective, the trier of fact shall consider whether an alternative design should have been utilized, in light of:

- (1) The likelihood at the time of manufacture that the product would cause the harm suffered by the claimant;
- (2) The seriousness of that harm;
- (3) The technological feasibility of manufacturing a product designed so as to have prevented claimant's harm;
- (4) The relative costs of producing, distributing, and selling such an alternative design; and
- (5) The new or additional harms that may result from such an alternative design.

This subsection banishes strict liability as the governing standard for design defect cases. It reintroduces foreseeability as an important factor for consideration in products liability law by judging the manufacturer by what he could have foreseen *at the time of manufacture*. Under the UPLL, the question is not whether the product is unreasonably dangerous, but whether the defendant is negligent. In addition, the UPLL imposes liability only for design alternatives which were technologically feasible at the time of manufacture. The reasons for imposing the above constraints of negligence law on design defects are rather clear. It is simply deemed unfair to impose liability on a manufacturer for harms which he need not have foreseen and for technological advances not yet born.

1. Risk-Foreseeability

The two issues of: (1) foreseeability of risk, and (2) technological feasibility of alternative designs raise very different kinds of questions. The first issue focuses on the state of knowledge of the manufacturer and what he could have known at the time of manufacture. The latter focuses on the "state of the art" question. This problem was deemed of sufficient importance to warrant a section of its own in the UPLL and will be discussed in turn.¹⁵ It should be recognized that one might remove scienter as a factor in predicting the hazard in strict liability cases and yet include such a limitation on liability based on state of the art. Hazard foreseeability and state of the art need not be determined by the same legal standard. It is submitted that the UPLL was decidedly wrong in choosing the negligence framework for both questions.

What could a manufacturer have known at the time of manufacture about a product hazard if due diligence would have been applied? There is perhaps no issue more difficult for a plaintiff to litigate than what the state of knowledge should have been for a manufacturer with expertise in his field.¹⁶

15. See text accompanying notes 40-42 *infra*.

16. Keeton—SYRACUSE, *supra* note 6, at 570; Keeton, *Product Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 407-09 (1970) and Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L. J. 30 (1973).

Were the tell-tale hints of a possible hazard available and were they properly considered? What testing as full and complete as it might have been? In the rush to the marketplace, were factors overlooked that now loom large in retrospect? These questions are inordinately difficult to prove. We have, as yet, no mechanism in place to assure that negative test results will not be secreted and destroyed by the wary manufacturer. The histories of some of the drug cases indicate that scandalous liberties have been taken with test results.¹⁷ However, even putting such unethical practices aside, it is simply unfair to burden the plaintiff with proving that a product hazard that did become a reality was foreseeable at the time of manufacture. This issue should be determined by the application of strict liability. However, if there is belief that fundamental fairness demands that the manufacturer be given the opportunity to establish that a hazard was *scientifically unknowable* at the time of manufacture, then the defendant should be required to carry the burden of proof on that issue. The state of scientific knowledge and the adequacy of testing is within the control of the manufacturer who has expertise in the field. Thus, it would appear to be a fair allocation of burdens of proof to require the defendant to either convince the court that the risk that inhered in the product was not capable of scientific detection at the time of manufacture, or, in the alternative, to bear the burden of rebutting a presumption that such knowledge was attainable.

2. *The Elimination of Utility Considerations*

In reviewing the list of considerations included in the UPLL for the determination of negligence, the authors were struck by the absence of any mention of the utility of the product in its present state and how that utility would be affected by the introduction of an alternative safety device. Risk-utility considerations have been held to be an integral part of design defect cases by almost every court and commentator that have considered the issue.¹⁸ The omission was not an oversight. In the Analysis, the drafters of the UPLL confronted the issue squarely, stating:

17. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). See also *Auto Safety Oversight Hearing—Corvair Heaters: Hearings Before the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 136-51 (1972).

18. RESTATEMENT (SECOND) OF TORTS § 292; Fisher, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974); Keeton-SYRACUSE, *supra* note 6; Rheingold, *supra* note 4; Twerski, Weinstein, Donaher and Piehler, *The Use and Abuse of Warnings in Product Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976) [hereinafter cited as Twerski, *The Use and Abuse of Warnings*] and cases cited in note 6 *supra*. It should be noted that even under the regime of *Cronin*, when the California court had banished the use of the "unreasonably dangerous" criterion, the California courts continued risk-utility analysis. See, e.g., *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 367, 551 P.2d 398, 400, 131 Cal. Rptr. 78, 81 (1976); *Self v. General Motors Corp.*, 42 Cal. App. 3d 1, 6-8, 116 Cal. Rptr. 575, 116 Cal. Rptr. 575, ____ (1974). See also Consumer Product Safety Act of 1972, 15 U.S.C. §§ 2051-81 (1976); S. REP. No. 92-749, 92 Cong., 2d Sess. 6 (1972).

Two factors relied on by some courts in design cases were not included in the Section 104(B) balancing process. First is the "utility" of the product to the user or to society in general. Economic analysis suggests that this element would render the balancing test totally subjective and unworkable. Tested by its "utility," a whole-grain health food cereal conceivably might be subject to a lower standard of responsibility than one that was heavily sugar-coated (less "useful" to society as a whole). On the other hand, if the trier of fact focused on the subjective "value to the user," it might come to the opposite conclusion. The approach of Section 104(B) is to focus the trier of fact on how the product was made and what its dangers are, rather than making macroeconomic judgments about its value to society or to certain individuals.¹⁹

It is virtually impossible to understand how a design defect case can be evaluated without balancing risk and utility factors. Consider, for example, the leading products liability case of *Micallef v. The Miehle Co.*, in which the New York Court of Appeals overruled the patent danger doctrine.²⁰ In *Micallef*, the plaintiff was employed as an operator on a huge photo-offset printing press. One day while working on the press plaintiff discovered that a foreign object had made its way into the plate of the unit. Such a substance, known to the printing trade as a "hickie," causes a blemish or imperfection on the printing page. In order to correct this situation plaintiff informed his superior that it was his intention to "chase the hickie." The process of "chasing hickies" consists of applying, very lightly, a piece of plastic about eight inches wide to the printing place, which is wrapped around a circular plate cylinder that spins at high speed. The revolving action of the plate against the plastic removes the "hickie." While plaintiff was engaged in this maneuver the plastic was drawn into the nip point, grabbing his hand between the plate cylinder and an ink-form roller. The photo-offset machine had no safety guards to prevent such an occurrence and plaintiff was unable to quickly stop the machine because the shut-off button was distant from the point of operation of the machine.

The plaintiff in *Micallef* was fully aware of the danger of getting his hand caught in the press while "chasing hickies." It was, however, the custom of the industry to "chase hickies on the run," because once the machine was stopped, it required at least three hours to resume printing. An expert witness testified that good engineering practice would dictate that a safety guard be placed near the rollers since the danger of human contact at the point of operation was well known.

Let us assume for the sake of discussion that, in the above case, a safety guard could have been installed on the high speed press at the point of operation. Let us further assume that the safety guard could have been installed at a nominal cost in comparison to the total cost of the machine, and that it would not engender new or additional risks to the user. Under the formula set forth in Section 104(B) there would be no excuse for not equipping

19. UPLL analysis § 104(B), reprinted in 44 Fed. Reg. 3005 (1979) (see Appendix).

20. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

the press with the safety device. What if, however, the result of installing such a safety device at the point of operation would cut the effectiveness of the machine drastically - instead of turning out 20,000 sheets per hour it would slow the machine down to 15,000 sheets per hour. Would that operate as a mitigating factor so that the machine would be declared non-defective? With the elimination of the utility consideration from the evaluation of defectiveness there appears to be no way in which to consider the true costs connected with the installation of safety features.²¹ It is simply inconceivable that industry would tolerate a legislative solution to the defect question which eliminates utility from the evaluation process.

3. *Abandoning the Consumer Expectation Test*

In addition to eliminating the "utility" consideration from products liability law, the UPLL abandons the "consumer expectation" test as a threshold standard for establishing a product defect. In the past several years, courts²² and commentators²³ have expressed considerable support for a

21. The only factor enumerated in § 104(B) of the UPLL that would be relevant is (4): "The relative costs of producing, distributing and selling such an alternative design." It would appear that in considering this factor we are to focus *only* on the cost of the alternative design and *not* the general cost to society should the design alternative be mandated by law. It is difficult to fathom the meaning of the somewhat Delphic statement in the Analysis which compares whole-grain cereal with sugar-coated cereal. When the authors speak of subjecting one cereal to a "lower standard of responsibility" as against the other they leave these writers puzzled as to what they are talking about.

There is another possible interpretation of this section. It may be that dollar costs in terms of the effectiveness of the machinery could be taken into account but that social utility would not be considered. Consider for example a safety guard on identical machines that produce hypodermic needles and spears for toy darts. In both instances the dollar cost in productivity if a safety guard were installed would increase the cost per needle or per dart by \$1 per unit. Under this section we could consider the effect of cost per unit but not the detriment to society if we diminished the production of hypodermic needles as against toy darts. The fallacy with this analysis is that the only way to identify real costs is to measure the value of the loss of lives (due to the unavailability of hypodermic needles) as compared to the danger to workers who may suffer injury from the machine. Ultimately, we may have to decide whether we want safer machines as against more hypodermic needles and high speed printing presses. This is a value judgment that cannot be avoided.

However, the above interpretation of the statute assumes that there is some way of making an internal (microeconomic) risk-utility analysis. It is difficult to see how this will work. Consider the proposed safety guard on the high-speed printing press. Assume that utilizing a more protective safety guard we will reduce productivity on the machine by 3,000 sheets per hour but by utilizing a less protective guard we would reduce productivity by only 1,000 sheets per hour. How would we decide which was the safety guard which met the demands of the statute. Assume that the cost of newspaper or handbills would rise by \$.01 per unit if the less protective guard was used and by \$.03 per unit if the more expensive guard was used. How costly is *too* costly within the meaning of the statute. It all depends on how important the final work product of that machine is to society and whether we want the productivity of the machine more than the safety. This brings us back to the *utility* question. We see no way of avoiding the problem.

22. *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973); *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 92 (Tex. 1975).

threshold test which does not require that the complexities of risk-utility analysis be undertaken in every design defect case. The California Supreme Court in *Barker v. Lull Engineering Co.*²⁴ stated the argument well:

[O]ur cases establish that a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. This initial standard, somewhat analogous to the Uniform Commercial Code's warranty of fitness and merchantability . . . , reflects the warranty heritage upon which California product liability doctrine in part rests. As we noted in *Greenman*, "implicit in [a product's] presence on the market . . . [is] a representation that it [will] safely do the jobs for which it was built." . . . When a product fails to satisfy such ordinary consumer expectations as to safety in its intended or reasonably foreseeable operation, a manufacturer is strictly liable for resulting injuries. . . . Under this standard, an injured plaintiff will frequently be able to demonstrate the defectiveness of a product by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault.²⁵

The thrust of the consumer expectation test is that when the manufacturer leads consumers to believe that a product will perform at a certain level and then disappoints those expectations, liability ought to follow.²⁶ The rebuttal to this argument is provided in the following quotation from the UPLL Analysis:

The second factor not included in the Section 104(B) balancing process is a "consumer expectation" test. The reasons for this are rooted in both economics and practicality. As Professor Wade, Reporter for the "Restatement (Second) of Torts," has stated:

[T]he consumer would not know what to expect, because he would have no idea how safe the product could be made.

Wade, *supra*, 44 "Miss. L.J." at 829. Again, the notion of consumer expectations suffers from an "overkill" of subjectivity. Each trier of fact is likely to have a different understanding of abstract consumer expectations. Section 104(B) leaves consumer expectations aside and focuses the trier of fact on what design alternatives were possible as a practical matter.²⁷

To the extent that the UPLL Analysis relies on the view of Professor

23. Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 845-46 (1976); Twerski, *From Defect to Cause to Comparative Fault - Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 312-15 (1977). For the views of Professor Wade on this topic see the discussion in note 28 *infra*.

24. See note 22 *supra*.

25. *Barker v. Lull Eng'r Co.*, 20 Cal. 3d at 429-30, 573 P.2d at 454, 143 Cal. Rptr. at 236.

26. The most vociferous advocate of consumer expectations as the crucial liability factor in product liability law is Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

27. UPLL analysis § 104(B), reprinted in 44 Fed. Reg. 3005 (1979) (see Appendix).

Wade, it is quite clear that they have misconceived his position. Professor Wade has *not* taken the position that a consumer expectation test is improper. He has argued that it cannot be utilized as the *sole* test for defect, but must also be supplemented with a risk-utility analysis.²⁸ As such, he is in substantial agreement with the *Barker* court.²⁹

Turning to the merits of the consumer expectation argument, it cannot be gainsaid that it may be difficult to develop an objective standard for consumer expectations. However, such difficulty does not warrant abandoning the test. If we can agree that plaintiff should not be burdened with establishing the rigors of the risk-utility test (or design alternatives) in cases where he has been injured as a result of a product not performing up to his expectations, then it is worthwhile exploring solutions to the subjectivity problem. The fear that almost any defective product claim will pass under the rubric of consumer expectations can be dealt with by requiring that such expectations must be clearly and widely perceived to be attendant to the normal use of the product.³⁰

28. In his article entitled *On the Nature of Strict Tort Liability for Products* (appearing in 44 Miss. L.J. 825 (1973)), Professor Wade argues that the consumer expectation test alone is inadequate. The sentence quoted in the Analysis reads as follows: "[I]n many situations, particularly involving design matters, the consumer would not know what to expect, because he would have no idea how safe the product could be made." *Id.* at 829 (emphasis added). He then goes on to argue for the utilization of a risk-utility standard. In those instances where a product clearly disappoints consumer expectations he would favor recovery on that ground alone. That this is, in fact, Professor Wade's view is evident from his discussion of defect in a recent article entitled *A Conspectus of Manufacturer's Liability for Products* (appearing in 10 Ind. L. Rev. 755 (1977)) where he states:

A clearer and more meaningful term is "unreasonably dangerous," a phrase that can be applied to products that are mal-made, mal-designed, or lacking in instructions or warnings. My personal preference is to say that a product is not duly safe. Two tests are set out to determine whether a product is unreasonably dangerous. A test was initially set forth in connection with breach of warranty cases for loss of bargain. In that case, the courts said, what you look to is what the buyer expected to get. This test will work in many cases, but sometimes the buyer does not know exactly what he should have received; he is thinking only of what the product will do for him. In addition, it seems to me that in a tort action it makes more sense to put the complaint in terms of what the seller did rather than what the buyer expected. For these reasons the test is better expressed in this way: Would the seller be negligent if he put the product on the market knowing its dangerous condition? In other words, strict liability eliminates the need to prove negligence on the part of the seller or the manufacturer in letting the product get in a dangerous condition, in failing to discover that dangerous condition, or in failing to do something about it. (Emphasis added.)

Id. at 758.

29. Professor Wade's agreement with *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), would go only to its two-tiered test for liability. There is no evidence that Professor Wade would agree with the rules established in *Barker* for making out a prima facie case and for the shifting of the burden of proof to the defendant once a prima facie case has been established.

30. In an earlier article written in conjunction with my colleagues for a National Science Foundation Study, we argued that there is a sensitive interplay between design and warning (representational) parameters. Since the amount of information a consumer can carry as part of his mental baggage is limited, it is necessary to decide which dangers are to be designed out of

A note of blunt truthfulness is in order. What we fear with the consumer expectation test is that the court will turn over to the jury borderline cases that have little merit. Once these cases enter into the grist of jury decision-making, there is a reluctance by appellate courts to reverse jury verdicts. This problem lurks behind the establishment of the clear and convincing standard of proof for several issues raised within the UPLL.³¹ If the purpose of the UPLL is to tell the trial and appellate courts throughout this country that they ought not to permit plaintiff's verdicts to stand when the supporting evidence is marginal, then we ought to be spared the maze of rules and exceptions that the UPLL sets forth. A simple rule that product liability cases must be proved by clear and convincing evidence would suffice. The UPLL Analysis would then read as follows:

We have strong suspicions that some awfully weak product liability cases are being sustained by trial and appellate courts. Given the serious dislocation to the industrial community and the skyrocketing effect on product costs, we believe that the time has come to assure ourselves that only the clearest kinds of design defect and failure to warn cases should be sustained. This Act empowers trial and appellate judges to do what they should have been doing in the first place. Verdicts should be directed unless you are convinced that a bona fide case of defect has been established.

The suggestion set forth above is not made tongue in cheek. It addresses a very real problem in an honest fashion. We would not support such a formulation, but in all candor it is superior to eliminating the consumer expectation test or the risk-utility test on the specious grounds of subjectivity.

C. Failure to Warn Cases

Section 104(C) of the UPLL states:

104(C) The Product was Defective Because Adequate Warnings or Instructions Were Not Provided.

The harm was caused because the product seller failed to provide

the product and which are to be warned against. See Twerski, *The Use and Abuse of Warnings*, *supra* note 18.

The present suggestion is that if a product fails to meet consumer expectations it will be held to be defective. If our previous thesis was correct, then even warnings (representations) must be judged in a risk-utility framework. However, we believe that, in order for the representation theory to be workable and understandable by a jury, it must be presented at a fairly gross level if the product is to be declared defective because it disappoints consumer expectations. The fine tuning of the representational theory, in which the jury is permitted to assess the subtleties of the product, belongs in the overall visceral reaction which a jury brings to bear in its overall risk analysis. I would thus limit the representational problem to clearly disappointed expectations and deal with the design-warning interplay within the context of the unreasonable danger problem in which the jury is faced with design and warning alternatives. See also Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185 (1976).

31. UPLL §§ 106(d), 106(e), 107(b) & 109(B)(2), reprinted in 44 Fed. Reg. 2999-3000 (1979) (see Appendix).

adequate warnings or instructions about the dangers and proper use of the product.

(1) In determining whether adequate instructions or warnings were provided, the trier of fact shall consider:

(a) The likelihood at the time of manufacture that the product would cause the harm suffered by the claimant;

(b) The seriousness of that harm;

(c) The product seller's ability to anticipate at the time of manufacture that the expected product user would be aware of the product risk, and the nature of the potential harm; and

(d) The technological feasibility and cost of warnings and instructions.

(2) In claims based on Section 104(C), the claimant shall prove that if adequate warnings or instructions had been provided, a reasonably prudent person would not have suffered the harm.

(3) A product seller may not be considered to have provided adequate warnings or instructions unless they were devised to communicate with the person(s) best able to take precautions against the potential harm.

Section 104(C) addresses itself to the third and perhaps most explosive theory of product liability—failure to warn. It is the plaintiff's ultimate fall-back theory, since even if a design defect is difficult to establish because design alternatives may not be feasible, a warning can always be conjured up that will cover the risk which eventuated.

1. *The Cost of Warnings*

Section 1(d) addresses the need to assess the technological feasibility and cost of warnings and instructions as a factor in deciding whether a product is defective. This is as it should be. What is troubling is the gloss placed on the section in the UPLL Analysis, which provides:

Factor (d), the technological feasibility and cost of a warning, may not be significant in many cases because warnings are often relatively inexpensive to provide. However, in some situations, it may not be feasible technologically to provide a warning, or at least the type of a warning that claimant suggests should have been provided.³²

This attitude that warnings tend to be relatively inexpensive has a good bit of currency in recent case law.³³ It is, in our opinion, ill-founded and seriously unfair to industry. In an earlier article examining failure to warn cases, we argued that:

The unexamined premise that warnings are not costly in risk-utility balancing is, in our considered opinion, highly questionable. *Warnings, in order to be effective, must be selective.* They must call the consumer's attention to a danger that has a real probability of occurring and whose

32. UPLL analysis § 104(c), reprinted in 44 Fed. Reg. 3006 (1979) (see Appendix).

33. *West v. Broderick & Bascom Rope Co.*, 197 N.W.2d 202 (Iowa 1972); *Moran v. Fabergé, Inc.*, 273 Md. 538, 332 A.2d 11 (1975).

impact will be significant. *One must warn with discrimination since the consumer is being asked to discriminate and to react accordingly.* the story of the boy who cried wolf is an analogy worth contemplating when considering the imposition of a warning in a case of rather marginal risk. These considerations are of particular significance when considering whether a warning should be imposed or a design change mandated in a products liability case. Those who argue for warning as *the* judicial solution to latent defect cases labor under a naive belief that one can warn against all significant risks. The truth is that such a marketing scheme is not feasible. The warning process, in order to have impact, will have to select carefully the items which are to become part of the consumer's mental apparatus while using the product. *Making the consumer account mentally for trivia or guard against risks that are not likely to occur imposes a very real societal cost.* Even when the risks are significant, one must consider whether the consumer will perceive them as significant. If the only way to ensure that the consumer will consider them significant is to oversell the warning by increasing its intensity, one may again face the problem that all warnings will come into disrepute as overly alarming.³⁴

In formulating a failure-to-warn standard, it would be helpful to focus specifically on the broad social costs that could become associated with unnecessary warnings.

2. The Causation Problem and Warnings

Section 104(C) of the UPLL addresses itself to the cause-in-fact issue as it effects an action based on failure to warn. The UPLL provides that "[i]n claims based on Section 104(C), the claimant shall prove that if adequate warnings or instructions had been provided, a reasonably prudent person would not have suffered the harm."³⁵ The UPLL Analysis explains the reason for including a special section on causation as follows:

Subsection (2) provides that a claimant must show that if adequate warnings had been given, it is more probable than not that the injury would not have occurred. In other words, a claimant must show that the failure to provide an appropriate warning was a cause of his or her harm. In this regard the claimant can show that if the warning had been given, either the product would have been used without incident, or it would not have been used at all. The later situation is likely to arise with pharmaceuticals. The test stated in subsection (2) is an objective one which looks toward the conduct of the reasonably prudent person. Cf. "Cobbs v. Grant," 8 Cal. 3d 229, 502 P.2d 1, 104 Cal Rptr. 505. (1972) (informed consent).³⁶

At first blush, it might seem that this section does nothing more than codify the *sina qua non* or but-for rule for cause in fact. And that it does. The but-for rule, however, has never been viewed by courts and scholars as an iron

34. Twerski, *The Use and Abuse of Warnings*, *supra* note 18, at 514-15 (emphasis added).

35. UPLL § 104(c)(2), reprinted in 44 Fed. Reg. 2998 (1979) (see Appendix).

36. UPLL analysis § 104(c), reprinted in 44 Fed. Reg. 3006 (1979) (see Appendix).

clad rule³⁷ divorced from substantive liability issues. The writers who have attacked the hypothetical "but for" as a threshold test for causation have demonstrated that policy considerations determine whether a case has been made out for cause in fact.³⁸ This is especially important in the failure to warn case. If the necessity of a warning has been made out under Section 104(C)(1), then a court has already determined that a warning would serve an important purpose by reducing the risk or by informing consumers about a risk so that they could avoid use of the product entirely. To add another requirement—that plaintiff must establish that a warning would have warded off a "reasonably prudent person"—simply undoes that which has been established by the earlier section which imposes a duty to warn.

The causation requirement becomes a matter of critical importance with regard to the "informed consent" type of warning. With regard to many products, a warning cannot function to reduce the risk level attendant to the use of a product. This is especially true with regard to drugs and industrial chemicals. The function of a warning in these cases is to inform the consumer of a non-reducible risk and give him the option not to use the product. This closely parallels the doctrine of "material risk" in the law of medical malpractice.³⁹ To adopt a theory which imposes a duty to warn of such risks and then to say that recovery will be permitted if, but only if, a reasonable person would not have suffered the harm (*i.e.*, by not using the product) is to engage in "Catch 22" reasoning. The purpose of the warning is to provide the opportunity to the consumer to make a choice. If the warning has not been given, he has been deprived of his right to choose intelligently. To then say that recovery will be denied if a reasonable person would have chosen to use the product makes a mockery of the warning duty. The function of the warning is to give the plaintiff the right to be unreasonable if he so desires. Thus, a plaintiff fully informed of the risk of polio vaccination may decide to make a foolish choice and not take the vaccine. That is the consumer's right. As long

37. See *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970); *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377 (Okla. 1974); *Reynolds v. Texas & Pac. Ry. Co.*, 37 La. Ann. 694 (1885); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 41 at 237 (4th ed. 1971); Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956); Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1.

38. See Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586 (1933); Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions*, 10 IND. L. REV. 769, 778-84 (1977); Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968).

39. See *Canterbury v. Spence*, 464 F.2d 772, 790-91 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *Cobbs v. Grant*, 8 Cal. 3d 229, 245-46, 502 P.2d 1, 11-12, 104 Cal. Rptr. 505, 515-16 (1972); *Trogon v. Fruchtmann*, 58 Wis. 2d 596, 207 N.W.2d 297, 314-15 (1973); Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 691 (1975); Plant, *An Analysis of Informed Consent*, 36 FORDHAM L. REV. 639 (1968).

as his right to informed choice has been affected, it should be no defense that a reasonable person, given the risk information, would have chosen to encounter the risk. If the plaintiff never was given the information, he was deprived of his right to choose. A far better test is that articulated by the Washington Court of Appeals in *Miller v. Kennedy*,⁴⁰ in which the court, in the context of a medical malpractice case, defined the duty of a doctor to disclose risks in the following manner:

The scope of the duty to disclose information concerning the treatment proposed, other treatments and the risks of each course of action and of no treatment at all is measured by the patient's need to know. The inquiry as to each item of information which the doctor knows or should know about the patient's physical condition is "Would the patient as a human being consider this item in choosing his or her course of treatment?"⁴¹

This test can easily be paraphrased to meet the product liability situation. Once it has been established that a warning is mandated, then the question should be whether a reasonable consumer would want the information before deciding to utilize the product. It should be noted that this test applies only to those warnings whose function is merely to inform the consumer about non-reducible risks. In those instances where the function of a warning is to effect consumer behavior in his utilization of the product, we must revert to a cause-in-fact analysis. However, cause-in-fact should not be frozen into hard legislative language. It is too complex an issue. It requires the flexibility of common law case-by-case analysis to determine whether, given the underlying substantive goals which the law seeks to protect, the causation issue should be stretched or retracted. This analysis has, at times, been merged with the proximate cause question, and carries with it considerable complexity.⁴² To place all of this policy analysis within the framework of the UPLL's four line subsection seems close to ludicrous.

D. *State of the Art and Industry Custom*

The legal profession will be eternally grateful to the drafters of the UPLL for clarifying the distinction between the state of the art issue and the question of the relevance of custom evidence in a product liability action. "State of the art" is defined in Section 106(a) of the UPLL as follows:

the safety, technical, mechanical, and scientific knowledge in existence and reasonably feasible for use at the time of manufacture.⁴³

40. 11 Wash. App. 272, 522 P.2d 852, *aff'd*, 85 Wash. 2d 151, 530 P.2d 334 (1975).

41. *Id.* at ___, 522 P.2d at 860 (emphasis added) (footnote omitted). It should be noted that the court in *Miller* later contradicted itself by requiring proof that "a reasonable, prudent patient probably would not have consented to the treatment when informed of the material risks. . . ." *Id.* at ___, 522 P.2d at 864. The two tests cannot be reconciled.

42. See authorities cited in notes 34 & 36 *supra*.

43. UPLL § 106(a), *reprinted in* 44 Fed. Reg. 2998 (1979) (*see* Appendix).

This is to be distinguished from industry custom which may be introduced as a factor in the overall risk analysis. This approach codifies the common law rule regarding the role of community customs in determining whether conduct is negligent.⁴⁴ Custom is relevant to risk-utility analysis but is not binding.

When one turns from the definitional section to the methodology utilized by the UPLL for resolving the problem of technological feasibility, there are significant grounds for dissatisfaction. Section 106(d) of the UPLL provides:

Evidence that a product conformed to the "state of the art" at the time of manufacture, raises a presumption that the product was not defective within the meaning of Sections 104(B) and (C). This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Section 104(B) and (C), the product was defective.⁴⁵

This section strikes not only at strict liability but at negligence as well. It appears that even if a plaintiff is able to establish by clear and convincing evidence that the defendant was negligent (*i.e.*, failed to act reasonably at the time of manufacture) in not advancing the state of the art by developing a design modification, there will be no recovery. It must be recalled that under section 103 of the UPLL, all causes of action (including negligence) are eliminated in favor of the "product liability claim" created by the statute. Thus, "state of the art" is a defense to a negligence claim as well. The presumption of non-defectiveness mandated by section 106(d) must then also be read as a presumption against negligence, which can only be rebutted by demonstrating that the risk-cost considerations set forth in sections 104(B) and (C) have been proven by clear and convincing evidence. Since the factors set forth in sections 104(B) and (C) impose liability only for knowledge and technology available at the time of manufacture, the question must be faced as to how does one rebut section 104(B) and (C). Each of those subsections have as a factor "the technological feasibility of manufacturing a product designed so as to have prevented claimant's harm." Presumably, technological feasibility is to be defined at the time of manufacture. But, if the state of the art was not available at the time of manufacture, then it was not technologically feasible to have designed a product which would have prevented the injury. Thus, the only way to defeat a state of the art presumption is to demonstrate that what the manufacturer did was *not* the state of the art (*i.e.*, that an alternative design was technologically feasible). If it is thought that what the authors are suggesting is double talk, we suggest that the UPLL Analysis supports our reading. It provides:

Section 106 thus provides special protection for the interests of product liability claimants in that it allows the trier of fact, in extraordinary situations, to find a manufacturer liable even though his product conformed to the "state of the art."

44. See RESTATEMENT (SECOND) OF TORTS § 295A (1965); Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147 (1942).

45. UPLL § 106(d), reprinted in 44 Fed. Reg. 2999 (1979) (see Appendix).

All presumptions authorized by this section can be rebutted by clear and convincing evidence that, in light of the factors set forth in § 104(2) or (3), that the product was defective. An example under § 104(2) where the presumption might be rebutted is where a product that conferred with a standard posed a very high probability of extremely serious injury *and at the time of manufacture there were inexpensive and safer alternative methods of designing the product.*

An example under § 104(3) where the presumption might be rebutted is if a product seller learned about a product hazard after the product was manufactured. In that instance, even though his product conformed with the "state of the art", the trier of fact may find that he should have made a reasonable effort to warn product users about such hazards.⁴⁶

Note that the UPLL Analysis suggests that there will be liability only if inexpensive and safer methods were available at the time of manufacture. But this is not a state of the art problem; it is the defense of custom. The state of the art question focuses on technological feasibility. The result of all this discussion is that a plaintiff, under the UPLL, would be barred from proving that the defendant was *negligent* in not advancing the state of the art. He could not accomplish this feat even if his evidence was clear and convincing. Thus, the state of the art presumption is *irrebuttable* as it affects negligence. If negligence is to be obliterated, then it should be so stated and we ought not be forced to find our way through a maze only to determine at the end that there is no way out.

There does appear to be an alternative reading of the statute that deserves exploration. It is possible that section 106 creates a presumption of non-defectiveness which can be rebutted by a clear and convincing demonstration of defectiveness. Perhaps the element of technological feasibility built into sections 104(B) and (C) is not a *sine qua non*, so that if the product were highly dangerous the manufacturer could be liable for not developing a design which advanced the state of the art. Such a reading of the statute would be at odds with the UPLL Analysis, but would at least make sense out of the rebuttable presumption section of the statute. The difficulty with this approach is that it is not logically defensible. If in fact the design was not technologically feasible and the defendant was not negligent, then the manufacturer should not be liable regardless of the danger level of the product. Rebutting the presumption by demonstrating that the product was highly dangerous does not make it fair to a defendant who could do no more than utilize existing technology.

Putting aside the issue of what it would take to rebut the "state of the art" presumption, there is yet another question which must be confronted. Why is there a presumption of any kind in favor of the defendant? The self-evident answer is that once the state of the art has been met the defendant

46. UPLL analysis § 106, reprinted in 44 Fed. Reg. 3007 (1979) (emphasis added) (see Appendix). There appears to be a typographical error in the text of the Analysis. In the second quoted paragraph there is reference to §§ 104(2) and (3). The reference should be to §§ 104(B) and (C). Similarly the reference in the third quoted paragraph to § 104(3) should be to § 104(C).

should be entitled to a presumption in his favor—he has, after all, conformed to existing technology. But, we forget in what posture the issue is raised. Invariably, the plaintiff has raised a design alternative which is both technologically and economically feasible at the time of trial.⁴⁷ There are at least grounds for suspicion that the state of technology was not as limited as we might have thought. The key statutory words that require attention are “[e]vidence that a product conformed to the “state of the art” at the time of manufacture”⁴⁸ The assumption is that scientific knowledge can be frozen and easily determined at any given point in time. That is sheer nonsense. The state of technical knowledge and technological feasibility is in a constant ebb and flow. The fact that an alternative design was attainable is significant. To require a plaintiff who stands from the outside to cut through the maze of industry knowledge and identify technological feasibility at a particular point in time seems drastically unfair. Technological feasibility ought to be a total *irrebuttable* defense when it is legitimately made out. But, the manufacturer who is best able to marshal the evidence to support the proposition that it was not feasible should be made to carry the burden on this issue. It makes no sense whatsoever to throw on to the party least able to marshal the facts the burden to prove, by clear and convincing evidence, that a presently feasible design could have been accomplished by industry if they had properly advanced the state of their knowledge. If the advance was not made, industry can best tell us of the false positives and blind alleys of their research (if in fact they performed the research properly) which led them away from making the desired advance.

E. Process Liability

The UPLL brings to light for the first time a proposal which would substantially insulate a manufacturer from liability, if the design safety review process which led to the formulation of a design standard met certain defined prerequisites. The idea is a most interesting one. Given the sharp criticism which has been voiced with regard to the complexity and polycentricity of design defect cases,⁴⁹ there is much to be said for focusing more on

47. The Analysis to § 106(d) which supports a presumption of nondefectiveness if a product conformed to the “state of this art” at the time of manufacture contends that the overwhelming majority of case law would direct a verdict for defendant in this instance. See 44 Fed. Reg. 3007 (1979) (emphasis added). Although this writer would support that conclusion as a prediction of what courts would do, some of the authority cited does not necessarily speak to that issue. The Analysis cites two Oregon cases, *Roach v. Kononen*, 269 Or. 457, 525 P.2d 125 (1974) and *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322 (1978). *Roach v. Kononen* hardly stands for the proposition that plaintiff must prove that the design was technologically feasible *at the time of manufacture* but rather for the question of the quality of the evidence necessary to make out a *prima facie* case under risk-utility analysis. As noted earlier a court could eliminate scienter as a requirement and still maintain that an alternative design be technologically feasible. Nonetheless, the Oregon cases do not support the statement in the Analysis.

48. UPLL § 106(d) reprinted in 44 Fed. Reg. 2999 (1979) (see Appendix).

49. See Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534-42 (1973); Henderson, *Design Defect*

the process through which design safety decisions are made and less on the substantive merit of the design. The UPLL proposes such an approach with regard to voluntary safety standards. Section 106(e) of the UPLL provides:

A product seller may by a motion request the court to determine whether the injury-causing aspect of the product conformed to a non-governmental safety standard having the following characteristics:

(1) It was developed through careful, thorough product testing and a formal product safety evaluation;

(2) Consumer as well as manufacturer interests were considered in formulating the standard;

(3) It was considered more than a minimum safety standard at the time of its development; and

(4) The standard was up-to-date in light of the technological and scientific knowledge reasonably available at the time the product was manufactured.

If the court makes such a determination in the affirmative, it shall instruct the trier of fact to presume that the product was not defective. This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Sections 104(B) and (C), the product was defective.⁵⁰

Section 107 repeats almost verbatim the standard set forth above as the governing rule for governmental safety standards. The idea in principle has much merit, but it would be reckless to enact it in its present form.

First, with respect to voluntary safety standards, it is clear that without substantial safeguards it would be impossible to determine whether the product was developed through the utilization of a thorough design safety review process.⁵¹ To set up a formal design safety review process is not difficult. To have some assurance that such a process is not merely an empty shell is quite another matter. How, for example, is the court to know whether test results have not been buried? What assurances do we have that documentation of all risks and hazards which had been considered will take place? The UPLL contains no criminal penalties for failure to disclose product risks or for failing to report disturbing test results. It is entirely possible that the formula design safety review process which will be undertaken to meet the demands of the statute will be antiseptically clean, whereas the real review process will take place in executive session. For the UPLL to consider giving a presumption of validity to a safety review process, without mandating the reporting of test results and the documentation of all risk considerations at pain of

Litigation Revisited, 61 CORNELL L. REV. 541, 547-50 (1976); Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643, 648-54 (1978).

50. UPLL § 106(e), *reprinted* in 44 Fed. Reg. 2999 (1979)(see Appendix).

51. The decision to give legal status to both voluntary and governmental standards was not presaged by Interagency Task Force Report. See PRODUCTS LIABILITY LEGAL STUDY, INTER-AGENCY TASK FORCE ON PRODUCTS LIABILITY (Dep't of Commerce), vol. IV at 127-31 (1977). Indeed the Legal Study, after listing a myriad of reasons for not giving status to voluntary and governmental standards, decisively concludes that they should be only a "floor" below which product-related dangers are intolerable.

criminal liability, is to invite a process which has the potential for enormous fraud.⁵²

There is yet another and perhaps more important consideration. The science of design safety review is yet in its infancy. In a study which is presently in progress⁵³ we have found that industries with considerable technological sophistication have significant blind spots in their design safety review process. For example, the gathering of accident data, a crucial factor in establishing the degree of risk, is not well attended to. Accident investigation tends to be in the hands of claims adjustors whose focus is primarily claims settlement, not product integrity. Thus, the feedback mechanism to manufacturers does not provide for the kind of in-depth analysis which would serve to enhance product safety.⁵⁴ Furthermore, where data is available it is at the individual manufacturer's level. There is, as yet, no comprehensive system for integrating in-depth accident analysis across individual company lines. In fact, there is a strong tendency to secret this information.

52. This is not to be read as an attack on voluntary standard setting agencies who seek to foster responsible standards. But, no process can be any better than the information brought to it by the participants. The reference in the standards to consumer input is not meaningful unless some provision is made for financing expertise to inform the consumer representatives of the problem. Even then no outsider can match the information and data which only industry can provide. *Roach v. Kononen*, 269 Or. 457, 525 P.2d 125 (1974), hardly stands for the proposition that plaintiff must prove that the design was technologically feasible *at the time of manufacture*. If anything *Roach* would lead the reader to believe that the manufacturer's ability to foresee the hazard is totally relevant in a strict liability case. The court says:

[I]t is generally recognized that the basic difference between negligence on the one hand and strict liability for a design defect on the other, is that in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did. The article can have a *degree of dangerousness which the law of strict liability will not tolerate even though the actions of the designer were entirely reasonable in view of what he knew at the time he planned and sold the manufactured article*. As Professor Wade points out, a way of determining whether the condition of the article is of the requisite degree of dangerousness to be defective (unreasonably dangerous; greater degree of danger than a consumer has a right to expect; not duly safe) is to assume that the manufacturer knew of the product's propensity to injure as it did, and then to ask whether, with such knowledge, something should have been done about the danger before the product was sold. In other words, a greater burden is placed on the manufacturer than is the case in negligence because the law assumes he has knowledge of the article's dangerous propensity which he may not reasonably be expected to have, had he been charged with negligence.

Id. at ____, 525 P.2d at 129 (emphasis added). See also *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, ____, 525 P.2d 1033, 1036 n.6 (1974). In *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322 (1978), when the court says that "plaintiffs' prima facie case of a defect must show more than the technical possibility of a safer design," *id.* at ____, 577 P.2d at 1326, it was not addressing the question of technological feasibility.

53. A research project entitled *Product Safety-Developing Standards for Social Responsibility* is presently in progress. The investigators are Professors Weinstein, Twerski, Donaher and Piehler.

54. See MacCollum, *Accident Reporting: An Exercise in Futility*, NATIONAL SAFETY NEWS 80 (August 1975).

Another area of concern is the need to define when in the course of product development a safety review process should begin, and which disciplines are to be involved. Should the law mandate that all disciplines such as safety engineering, quality control, testing, service and marketing be involved at the concept stage of product development? Should there be a requirement that the hazard considerations raised by each discipline be recorded for posterity? Most manufacturers shudder at the thought that hypothetical thinking about product design be documented.⁵⁵ Yet, the UPLL blithely asserts that a formal safety evaluation process will suffice to create a presumption in favor of the manufacturer without addressing these and other complex issues which surround the safety review process. The concerns voiced with regard to voluntary standard setting agencies are equally valid when considering governmental standards. The data is so shallow and the art of standard setting so uncertain that without a clear definition with regard to what constitutes sophisticated standard setting, we ought not to place the plaintiff in the difficult position of rebutting a presumption by clear and convincing evidence that the standard is inadequate.

F. Statutes of Limitation

The structure of the statute of limitations section of the UPLL is interesting and complex.⁵⁶ The statute essentially provides for a three year from time of injury limitation, circumscribed by a repose statute which denies recovery for injuries occurring after ten years from the time of sale. Both of the above limitations are further subject to a provision that recovery will be denied if injury has taken place after the "useful sale life" of the product has expired.

The three year from time of injury limitation is not controversial. It reflects the average tort statute of limitation presently existing in most of the states. The UPLL also contains a provision extending the limitation period beyond the time of injury in situations where the claimant would be unlikely to discover that he or she has been injured, and thus protects the consumer in the relatively rare case where the products injury did not reveal itself to the plaintiff until well after the injury mechanism has been triggered.⁵⁷

The "repose" provisions are directed at what has come to be known as the "long tail" problem. The UPLL Analysis asserts that the "open-endedness" of the product liability claim has become a source of major concern to insurers.⁵⁸ It also acknowledges that the fears are exaggerated:

55. Industry is, in general, wary of documenting its hazard data. The fear that every bit and shread of information will be revealed in discovery and thus used against it in a future law suit is real. It would appear that we are on the horns of a dilemma. We cannot have intelligent standard setting without data but we cannot get data because of industry's trepidation that it will be used in an illegitimate fashion.

56. UPLL § 109, reprinted in 44 Fed. Reg. 2999-3000 (1979)(see Appendix).

57. *Id.* § 109(c), reprinted in 44 Fed. Reg. 3000 (1979)(see Appendix).

58. *Id.* analysis § 109, reprinted in 44 Fed. Reg. 3008 (1979)(see Appendix).

The limited available data show that the concern about older products may be exaggerated. See ISO, "Closed Claim Survey," at 105-108 (indicating that over 97 percent of product-related accidents occur within six years of the time the product was purchased and in the captive goods area 83.5 percent of all bodily injury accidents have occurred within ten years of manufacture). Nevertheless, as the Task Force Report indicated, the underwriters' concern about *potential* losses associated with older products may be an important factor in the recent increase in liability insurance premiums for manufacturers of durable goods.⁵⁹

This raises the question of why it is that the statutory provisions are directed against potentially valid claims when they should be directed toward the rating practices of insurers. If the fear of the insurers is not well founded, then it would behoove the government to question rating practices that are built on nothing more than hypothecation rather than on facts. This criticism becomes all the more valid when one examines the impact of the repose statute on both the workplace and consumer products. The UPLL Analysis correctly identifies that workplace injuries are often a combination of product fault and employer disregard for safety.⁶⁰ It attempts a slight shift by adding some additional responsibility to the employer's liability.⁶¹ However, given the very long life of capital equipment, the ten year statute of repose is simply unfair. Admittedly, the UPLL specifically excludes the case of the express warranty which assures that a product can safely be used for a period in excess of ten years.⁶² However, the fact remains that manufacturers of heavy industrial equipment place their products on the market with full knowledge that there is a thriving market in used machinery which permits employees to be exposed to the product for many years. The original sales price reflects the resale value. Why then should there be a blanket exemption merely because the manufacturer has avoided the use of express warranty language?

Furthermore, the statutory language which focuses on the date of delivery of the product, rather than on the tortious activity of the manufacturer, seems to exempt the manufacturer from any duty to either warn or retrofit machinery after the ten year period has expired. Thus, if the manufacturer were to discover that injuries of a certain variety were taking place with such frequency that the introduction of a safety guard would be in order, as long as this information had come to light after the ten year repose date, the manufacturer would have no duty to warn or retrofit the machine. Liability would not attach because the duty to warn arose after the repose period had run. The only exception to the repose statute which could possibly affect such

59. *Id.*, reprinted in 44 Fed. Reg. 3009 (1979)(see Appendix).

60. *Id.*

61. After the ten year repose statute has run, if the worker can prove by a preponderance of the evidence that the product causing the injury was unsafe, the worker may bring a claim against the workplace employer and recovers all loss of wages that otherwise would not be compensated under the applicable worker compensation statute. *Id.* § 109(B)(1)(a), reprinted in 44 Fed. Reg. 2999 (1979)(see Appendix).

62. *Id.* § 109(B)(3)(a), reprinted in 44 Fed. Reg. 3000 (1979)(see Appendix).

a case does not, in our opinion, do so. Section 109(B)(3)(b) of the UPLL provides that "[t]he ten (10) year period of repose established in Section 109(B) does not apply if the product seller intentionally misrepresents a product, or fraudulently conceals information about it, where that conduct was a substantial cause of the claimant's harm."⁶³ The UPLL Analysis does not indicate that this subsection would cover the failure to warn which arises due to information which comes to a manufacturer's attention after the repose period had run.⁶⁴ Again, the very real question is why manufacturers should be totally absolved from responsibilities for products which they well know will remain in use for well past the repose period. Such blanket immunity is defended primarily on the grounds that insurance companies are nervous about claim practice, which to date has little basis in fact. Insurance regulation would seem a far superior method to deal with such illegitimate considerations.

The most novel part of the UPLL seeks to limit liability based on the useful sale life of a product. The UPLL provides that in determining whether the useful sale life has expired, the trier of fact may consider the following:

- (a) The effect on the product of wear and tear or deterioration from natural causes;
- (b) The effect of climatic and other local condition conditions in which the product was used;
- (c) The policy of the user and similar users as to repairs, renewals and replacements;
- (d) Representations, instructions and warnings made by the product seller about the product's useful sale life; and
- (e) Any modification or alteration of the product by a user or third party.⁶⁵

Although the UPLL suggests that representations made by the product seller may be taken into account, it does not address itself to the fact that in most instances sellers as a class tell us very little about "useful sale life." Products are not sold with reference to their life cycle. It is a subject which is scarcely mentioned by sellers except within the context of advertising puffing.

There is no way to avoid this problem in a product liability action since the first element which must be established in each case is defect. When the product has been subject to prolonged use, the question becomes whether the product is defective, or whether it has been used past its prime. In discussing this question in another forum the authors argued that:

The first step in resolving this problem is to recognize that we have been permitting marketing problems to masquerade as basic liability questions. It is strange that the question of how long is a product supposed to last is viewed to be within the purview of the jury in the standard

63. *Id.* § 109(B)(3)(b), reprinted in 44 Fed. Reg. 3000 (1979)(see Appendix).

64. *Id.* analysis § 109(B)(3), reprinted in 44 Fed. Reg. 3010 (1979)(see Appendix).

65. *Id.* § 109(A)(1), reprinted in 44 Fed. Reg. 2999 (1979)(see Appendix).

product liability case. If a car, for example, becomes a dangerous instrumentality after six years, and a hair dryer subject to serious failure after three years, those facts are well within the possession of manufacturers. Repair data and product life information are calculated by major industry and figure into the determination of output. To be sure, this data is not able to pinpoint product failure with exactitude. But product deterioration information is available in the sense that there is knowledge of when the troublesome period tends to set in. Yet, for some reason this information is kept a deep dark secret from the consuming public. It is only when plaintiffs bring a product claim that product life becomes a focal question. It does seem ludicrous to send the issue of how long should a product last to a jury when industry knows the answer to that question—and could affect consumer behavior by sharing it with the public.⁶⁶

It is disappointing that the UPLL—which purports to establish national products liability law—does not seek to assign any responsibility to the manufacturer for failing to identify useful sale life, but satisfies itself with a bland provision which permits the consideration of affirmative representations by the product seller.

There is yet another aspect of the useful sale life question that deserves attention. The UPLL identifies as a relevant consideration “[t]he policy of the *user* and *similar users* as to repairs, renewals and replacements.”⁶⁷ Why the statute limits this consideration to “users” and not to manufacturers is mystifying. One of the most significant questions that must be asked with regard to prolonged product life is whether the manufacturer bears responsibility for keeping a product alive beyond its useful sale life. The sale of replacement parts is one of the most lucrative aspects of product sales. Should not the question be asked as to whether the product or machine that failed was kept alive by the *sale* of replacement parts? Perhaps a product that failed safely at an earlier stage of its existence failed catastrophically several years after a replacement part was sold which permitted the product to re-enter the useful sale life cycle. In short, useful sale life cannot be determined without first asking whether product sellers, through their replacement part business and their service and repair policy, do not have a hand in prolonging product life. To throw this entire burden on the consumer is drastically unfair.

G. Plaintiff's Conduct

This section purports to follow the Uniform Comparative Fault Act. The authors have been critical with the across the board application of the comparative fault principle in product liability because it significantly diminishes manufacturer responsibility in certain classes of design defect cases.⁶⁸

66. Twerski, *From Defect To Cause To Comparative Fault - Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 338-39 (1977).

67. UPLL § 109(A)(1)(c), reprinted in 44 Fed. Reg. 2999 (1979)(emphasis added)(see Appendix).

68. Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977) [hereinafter cited as Twerski-INDIANA].

This Act aggravates the problem. Not only does it recognize the comparative fault principle for almost all product liability cases, but it also totally eliminates liability based on plaintiff's conduct in certain defined categories.

1. *The Uniform Comparative Fault Act—Causation*

The Uniform Comparative Fault Act (UCFA) is a carefully drafted and balanced piece of legislation. In a thoughtful, well-considered section, the UCFA provides:

In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.⁶⁹

The drafters of the UCFA have indicated in their comments that the policy factors embodied in the proximate cause concept are subject to apportionment. They say:

In determining the relative fault of the parties, the factfinder will also give consideration to the relative closeness of the causal relationship of the negligent conduct of the defendants and the harm to the plaintiff. Degrees of fault and proximity of causation are inextricably mixed, as a study of last clear chance indicates, and that common law doctrine has been absorbed in this Act. This position has been followed under statutes making no specific provision for it.⁷⁰

This section must be read together with section 1(b) of the same Act which reads:

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. *Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.*⁷¹

The drafters of the UCFA explain their position in a comment to this section:

For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause.

69. UNIFORM COMPARATIVE FAULT ACT § 2(b) [hereinafter cited as UCFA]. The UCFA was drafted by the National Conference of Commissioners on Uniform State Laws and approved and recommended by it for enactment in all the states, at its annual conference, Vail, Colorado July 29-August 5, 1977. The UCFA was the subject of commentary by Wade, *Products Liability and Plaintiff's Fault: The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1978) [hereinafter cited as Wade-MERCER]. The UCFA and comments are reproduced in full at 29 MERCER L. REV. 392-401 (1978).

70. UCFA comment § 2(b).

71. UCFA § 1(b) (emphasis added).

"Injury attributable to the claimant's contributory fault" refers to the requirement of a causal relation for the particular damage. Thus, negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a seat-belt restraint played a part, and not, for example, to the damage to the car. A similar rule applies to a defendant's fault; a physician, for example, negligently setting a broken arm, is not liable for other injuries received in an automobile accident.⁷²

It would appear that under the UCFA cause-in-fact is not subject to apportionment, but that the proximate cause question is a factor in the overall determination of fault. The reason for this distinction is that the proximate cause question deals with the question of whether a particular risk properly falls within the risk of the harm which the law has condemned. This is so closely related to the fault question that it becomes artificial to separate it out when dealing with the fault apportionment.

The UPLL takes a different position on this question. The UPLL Analysis states:

Section 111 departs from the UCFA in one respect—it does not consider "the extent of the casual relationship between the conduct and the damages claimed" as a factor in apportioning responsibility. While the distinction may be a difficult one to draw, this Act is premised on apportioning *responsibility* only—pure causation in terms of the physical cause of the particular injury is irrelevant to that concept.⁷³

Apparently the UPLL opposition to the view of the UCFA is that it seeks to apportion the cause-in-fact question. As indicated above, we do not believe that this is an accurate reading of the UCFA. But if that is the problem, it is easily remedied by limiting the fault apportionment to the proximate cause question and specifically excluding cause-in-fact from the apportionment process. It is our view, however, that whether we formally merge cause-in-fact and proximate cause into fault apportionment or not, juries will be affected by those issues and will set their apportionment with those issues well in mind. Furthermore, courts will be loathe to direct verdicts on proximate cause and cause-in-fact with full knowledge that apportionment is in the wings as a possible compromise to the all or nothing decision mandated by a directed verdict. Finally, there is the real hope that by utilizing the comparative fault mechanism, we might permit experts to testify on the causation issue with something other than the exaggerated form of all or nothing testimony which does not reflect the real world.⁷⁴ For legislation which seeks

72. UCFA comment § 1(b).

73. UPLL analysis § 111, reprinted in 44 Fed. Reg. 3011-12 (1979) (see Appendix). The Analysis cites as authority, Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956), as authority for its stand on the apportionment of cause-in-fact. The authors are mystified as to how that article supports the UPLL contention. The major thrust of the Malone article is that cause-in-fact is inextricably tied to policy grounds.

74. Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 414 (1978) [hereinafter cited as Twerski-MERCER] and Donaher, Piehler, Twerski and Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303 (1974).

to bring a sense of fairness to product liability law, the contraction of the comparative fault question seems a rather odd choice.

2. *Failure to Inspect and Failure to Discover Defect*

Section 111(c) of the UPLL provides:

(i) A claimant is not required to have inspected the product for defective condition. Failure to have done so does not render the claimant responsible for the harm caused.

(ii) Where a claimant using a product is injured by a defective condition that would have been apparent to an ordinary prudent person, the claimant's damages are subject to reduction according to the principles of subsections (a) and (b).⁷⁵

The UPLL begins by drawing a distinction between two kinds of plaintiff conduct (i) failure to inspect for defect and (ii) failure to discover an obvious defect. The former is not an affirmative defense while the latter reduces the plaintiff's verdict by the percentage of his fault. No argument could be more compelling *against* the utilization of the comparative fault principle in the instance of plaintiff's failure to discover a defect than that presented in the UPLL Analysis in *support* of the proposition.

Cases can arise where a defect would be very apparent to an ordinary prudent person. In such cases, it is appropriate to allow the trier of fact to diminish claimant's damages according to the latter's responsibility for the injury that occurred. Thus, in the example of the candy bar, if a claimant with good eyesight ate a candy that had bright green worms crawling over it, he or she should bear some responsibility for any ill effects suffered. If the product seller was aware of the defect in the goods at the time of sale, the punitive damages section of the Act (Section 120) would provide a strong disincentive to not sell such a product.⁷⁶

The example offered is grotesque and demonstrates beyond cavil that comparative fault ought not to be utilized in this class of product cases. Indeed, a legislator would probably be drawn and quartered if forced to publicly defend a vote in favor of the reduction of damages to the plaintiff in the candy bar case. The questions are obvious. Why did the plaintiff eat the candy bar? Do we really believe that he saw the green worms and proceeded to eat the candy? The obvious answer is that the plaintiff did not notice the worms. But, why? Well, he did not expect a candy bar to have worms. That is hardly an unreasonable position to defend. Then why should his recovery be diminished? The only answer is that he did not look before he ate. But, that means that he has a duty to inspect for defects—a proposition which is denied by the above section 111(c)(1)(i). The UPLL Analysis to that section makes it crystal clear that a plaintiff has no duty to inspect a product because the law assures him a product which is reasonably safe for ordinary use.⁷⁷ If we impose a duty to discover obvious defects it can only stem from

75. UPLL § 111(c), reprinted in 44 Fed. Reg. 3000 (1979)(see Appendix).

76. *Id.* analysis § 111(c), reprinted in 44 Fed. Reg. 3012 (1979)(see Appendix).

77. *Id.*

our belief that plaintiff has seen the defect and has decided to encounter it nonetheless. In the candy bar case that would be a most unlikely explanation, but if it were true then it ought to place the plaintiff's conduct within the category of voluntary and unreasonable assumption of a known risk—conduct which under UPLL section 109(c)(2) is a complete defense. We are thus puzzled by the "failure to discover" duty which is imposed on the plaintiff. If it analytically a hybrid and does not deserve status as a discrete category.

3. *Using a Product With a Known Defective Condition*

The sections concerning the assumption of risk defense draw a distinction between plaintiff conduct which is clearly unreasonable and that which is arguably unreasonable. In the former, plaintiff's conduct is an absolute bar—in the latter, the issue goes to the jury for a comparative fault determination. The UPLL provides in section 111 (c)(2):

(2) Using a Product With a Known Defective Condition.

(i) A claimant who knew about a product's defective condition, but who voluntarily and unreasonably used the product, shall be held solely responsible for injuries caused by that defective condition.

(ii) In circumstances where a claimant knew about a product's defective condition and voluntarily used the product, but where the reasonableness of doing so was uncertain, claimant's damages shall be subject to reduction according to the principles of subsections (a) and (b).⁷⁸

It thus appears that if a jury were to find a plaintiff's conduct to be unreasonable under subsection (ii) he would merely have his recovery reduced, whereas if the court (presumably) were to find the selfsame conduct clearly unreasonable it would direct a verdict for the defendant. This must be the first time that anyone has proposed that a determination of fact by a jury will lead to a result different than if the selfsame finding of fact were made by a court. The UPLL Analysis supports this interpretation, stating:

Where it is clear that a claimant both voluntarily and unreasonably used a product with a known defective condition, the product seller is not liable under this Act. To allow a claim in such a situation would permit individuals, in effect, to create their own product liability claim. In that regard, it should be noted that consent is a defense to even intentional wrongs.

However, there may be cases where an individual voluntarily uses a product with a known defective condition, but the reasonableness of this conduct becomes a matter of dispute. For example, if a person discovers a welt in a tire, should that person be required to stop immediately and call for assistance, or is it reasonable to proceed to a nearby gasoline station to have the tire repaired? Many cases arise in this shadowy zone. . . . Subsection (c)(2) allows the trier of fact to consider claimant's conduct and reduce damages where it is appropriate to do so.⁷⁹

78. *Id.* § 111(c)(2), reprinted in 44 Fed. Reg. 3000 (1979)(see Appendix).

79. *Id.* analysis § 111(c), reprinted in 44 Fed. Reg. 3012 (1979)(see Appendix).

It would appear that a fair reading of the UPLL Analysis leads to the conclusion that cases which arise in the "shadowy zone" of reasonableness will go to the jury for a determination of comparative fault.⁸⁰ Thus a jury could find the conduct "unreasonable" and the plaintiff would merely have his recovery reduced. If the court, however, were to find such conduct unreasonable (because reasonable persons could not differ) then recovery would be barred. Such a jurisprudential anomaly deserves explanation. None is found in the UPLL or its Analysis.

There are, however, more fundamental problems with this section of the UPLL. The Analysis suggests that we ought to adopt voluntary assumption of the risk as a defense because it is analogous to consent, which is a complete defense to an intentional tort. The argument is hardly to be taken seriously. The difference between consent granted in advance—which serves as an invitation to the intentional act of the defendant—and the conduct of a defendant which has been condemned as substandard and puts the plaintiff to a choice has been long recognized.⁸¹ Indeed, the very problem which is so serious in product liability cases is determining the voluntariness of the plaintiff's action. How free is the plaintiff to choose? How voluntary is voluntary? Is a plaintiff who makes a conscious choice to utilize a piece of dangerous machinery in an employment setting acting voluntarily? Is one who decides to use his car (defect and all) for a business appointment a free agent? The most significant virtue of the merging of assumption of the risk into the general contributory fault formula is that the jury is given all of the factors and is asked to weigh them in the balance. The UPLL does not define voluntariness. It merely returns us to one of the most confused areas of the common law at a time when statutory law has taken hold of the problem and fostered a reasonable solution to it.

When one turns to the merits of recognizing voluntary and unreasonable assumption of a known risk as a complete bar, it becomes important to focus on the kinds of fact patterns in which plaintiffs may be totally precluded from recovery. Consider, for example, the case of *Bartkewich v. Billinger*.⁸² Plaintiff was at work on the west side of a glass cutting machine while his supervisor operated the controls on the east side of the machine. At some time prior

80. The UPLL does not directly address the question as to whether "reasonable assumption of the risk" is to be considered in the comparative fault formulation. The UCFA Sec. 1(b) recognizes only "unreasonable assumption of the risk" as a defense. The comments to the UCFA specifically exclude the case of reasonable assumption of risk from comparative fault (since it is not fault and should have no bearing on recovery).

The ambiguity of the UPLL is especially serious since it commits the "shadowy zone" cases of reasonableness to go to the jury. Is the jury to be instructed that they are to reduce the plaintiff's verdict only if they find the plaintiff's conduct to be unreasonable? Section 111(c)(2)(ii) refers us only to sections (a) and (b) for guidance as to the principles for reduction of damages. Those sections shed no light on this problem.

81. Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17 (1961) and Twerski, *Old Wine in a New Flask - Restructuring Assumption of Risk in This Products Liability Era*, 60 IOWA L. REV. 1, 19-20 n.83 (1974).

82. 432 Pa. 351, 247 A.2d 603 (1968).

to the accident the supervisor left the scene, leaving the plaintiff alone at the machine. As he continued to operate the machine Bartkewich noticed that glass appeared to be jamming the mechanism, and became concerned that the machine was being damaged. To thwart this possibility plaintiff attempted to remove a piece of glass with his hand, but his glove caught in the machinery and he was injured. The plaintiff presented expert testimony that the machine was defectively designed in that it did not contain adequate safety features such as on-off switches on both sides of the machine, or a barrier or guard to keep individuals from putting their extremities into the machine.

In reversing a jury verdict for the plaintiff, the Pennsylvania Supreme Court took the position that in certain instances the lack of proper safety devices could constitute an unreasonable danger. This result would follow, however, only where the absence of the safety device caused an accidental injury of the type that could be expected from the normal use of the product. In this case defendant did exactly what was obviously dangerous—he reached into an operating glass-breaking machine. The court in righteous indignation asked the following question of the plaintiff:

If he thought the machine was being damaged, what did he think would happen to his hand? It is unfortunate that [plaintiff] incurred a serious injury, but we do not believe that appellant was obligated to build a machine that was designed not only to keep glass in, but also to keep people out.⁸³

Having defined the defendant's duty in this fashion, the Pennsylvania Supreme Court directed that the defendant's motion for a judgment notwithstanding the verdict be granted. It is to be expected that a court interpreting section 111(c)(2) would find that a plaintiff had voluntarily and unreasonably assumed a known risk and would thus be totally barred from recovery. The reason for this conclusion is elementary. Plaintiff saw the jamming of the machine and realized the danger to the machine. In a split second he made a judgment which was both voluntary and unreasonable. He decided to chance his hand believing that his knowledge of the cutting process in the machine was such that he had enough time to get in and out before injury. He was wrong. His reaching into the machine certainly was not "involuntary" in any common sense of the word. And his actions could be found by a court to be most unreasonable.

There is something terribly distasteful about this result, however. Was it not foreseeable on the part of the manufacturer that workmen who operate these machines for endless hours at a stretch will make the kinds of voluntary and unreasonable judgments that the *Bartkewich* plaintiff actually made? Is it not common knowledge that employees who work with dangerous machinery develop psychological resistance to the danger level? And should not the safety features be embodied to care for one who may make voluntary and unreasonable choices? If nothing else, should we not be required to

83. *Id.* at 355, 247 A.2d at 605.

evaluate the time factor in the decision-making process? The defendant-manufacturer's decision to design a safety guard or not is made at the design drawing board and in the testing laboratory. It is made or not made with great deliberation and with cost and marketing considerations in mind. The plaintiff's decision to encounter the harm, be it voluntary or involuntary, reasonable or unreasonable, is made in a split second under the most adverse and pressing circumstances. Should not the product have been manufactured so as to protect a *Bartkewich*-type plaintiff from his own foolish decision making?

We have argued that in this kind of setting a plaintiff's verdict should not be subject to comparative fault, but that his recovery should be undiminished.⁸⁴ The very harm that was to be protected against took place in a totally foreseeable manner. We are cognizant of the fact that the UCFA takes the position that in any event a plaintiff's conduct should be taken into account. But, to take the position that comparative fault will *not* operate and that a plaintiff should be totally barred from recovery seems manifestly unfair. It negates the judgment that a safety feature should have been integrated into the machine—a judgment that would have been sustained by sections 104(B) and (C) of the UPLL.

4. *Misuse of a Product*

Section 111(c)(3) of the UPLL provides:

(i) Where a claimant has misused a product by using it in a manner that the product seller could not have reasonably anticipated, the claimant's damages shall be reduced according to the principles of subsections (a) and (b).

(ii) Where the injury would not have occurred but for the misuse defined in subsection (3)(i), the product is not defective for purposes of liability under this Act.⁸⁵

a. *Foreseeable Misuse*

The first question that must be faced with regard to this section is whether a plaintiff's verdict will be reduced when his misuse was foreseeable. The UPLL does not appear to address itself to this question. The inference is that foreseeable misuse is simply not grounds for reduction of the plaintiff's verdict. Although the authors have expressed general agreement with this principle elsewhere,⁸⁶ we are mildly surprised by the omission of this category of a plaintiff's conduct from the scope of the comparative fault doctrine. Consider the following example:

Plaintiff is speeding 50 mph in a 25 mph zone. The tire on his car is defectively beaded. Plaintiff suffers a blowout but as a result of his speed-

84. Twerski-INDIANA, *supra* note 59, at 811-12.

85. UPLL § 111(c)(3), *reprinted in* 44 Fed. Reg. 3000 (1979)(see Appendix).

86. Twerski-MERCER, *supra* note 64, at 426-30.

ing he is not able to bring his car under control. It hits a culvert and the plaintiff is seriously injured.

Note that the misuse of the product is quite foreseeable. The defect in the tire and the conduct of the plaintiff were both "but for" causes of the accident since the absence of either of the causes would have avoided the accident. Should a plaintiff's verdict be reduced by the percentage of his fault? We have argued that a reduction in this instance is not justified:

The plaintiff has been sold a product which has created in his mind a set of consumer expectations with regard to performance. At fifty miles per hour the plaintiff has a right to total reliance on the assumption that the product will function as marketing has represented. It is of no great consequence that we may not be able to make out a technical case of express warranty or misrepresentation; the realities to the consumer are precisely the same. In short, when the consumer is using the product within the clear parameters of its normal functioning mode, the general or non-product contributory negligence should not enter into the picture, even as comparative negligence. The factor of reliance on product performance is so significant that it is simply unfair to penalize the plaintiff for relying on the set of consumer expectations which the defendant led him to rely upon.⁸⁷

It is quite clear that the UCFA disagrees with this position and believes that comparative fault ought to be imposed even when the plaintiff's conduct is foreseeable.⁸⁸ It is hard to believe that the UPLL has cast its lot with the authors' position on this matter, but if it has it should be spelled out clearly. Neither the UPLL nor its Analysis considers the foreseeable misuse question as it effects the reduction of a plaintiff's damages.

b. *Unforeseeable Misuse*

The position of the UPLL with regard to unforeseeable misuse is difficult to follow. Section 111(c)(3)(i) seems to provide that damages will be reduced by the percentage of a plaintiff's fault in the case of unforeseeable misuse. This is, however, modified by subsection (ii) immediately following, which provides that where the injury would not have occurred but for the misuse, the product is to be declared non-defective. This language is puzzling. If when the misuse is a "but for" cause the product is declared non-defective then the previous subsection (i) which provides for reduction of damages must apply when the misuse was not a "but for" cause. This would lead to the rather nonsensical conclusion that a plaintiff would have his recovery reduced for misuse even when the misuse was not a "but for" cause of his harm.

The language of the UPLL Analysis contradicts the plain reading of the UPLL and leads one to a more rational interpretation of this section. It explains that:

87. Twerski-INDIANA, *supra* note 59, at 816-17.

88. Wade-MERCER, *supra* note 60, at 384.

Subsection (c)(3) imposes no liability on the product seller where an injury occurs *solely* because claimant misused the product not in some way that the product seller could not reasonably anticipate. Reasonably anticipated conduct is conduct which would be expected of an ordinary and prudent person. See Section 102(6) and commentary. Misuse by claimant in this context is equivalent to modification or alteration of the product by a third party. . . .

In determining whether the product seller should have warned or instructed the claimant about potential misuses, the trier of fact should consider the factors listed in Section 104(C).

Where misuse of a product was a partial cause of an injury, claimant's damages are subject to reduction.⁸⁹

Note that under the gloss of the UPLL Analysis, only where the misuse is the *sole* cause of the injury (and the product has no causal relationship to the injury) is misuse a total defense. Where, however, both the product and the misuse are partial causes of the injury the plaintiff's verdict will be reduced under the comparative fault principle. The UPLL should be conformed to meet with the explanation set forth in Analysis.

The section on product misuse is but another example of why a statutory definition of misuse is premature at this stage of product liability litigation. The belief that the misuse cases can be divided into two categories and retain any sense of sophistication is simply wrong.⁹⁰ Such a classification does not differentiate between plaintiff conduct which tests the warranty and plaintiff conduct which fails to maintain product integrity. Both of the aforementioned may be foreseeable; yet, a court may wish to reduce recovery for a plaintiff who fails to do his share to repair and care for a product, and not penalize a plaintiff for conduct which is negligent in general, but yet not negligent in relation to the product manufacturer who had every reason to believe that his product would be put to the test.⁹¹ The misuse question is most often tied to the proximate cause question. It is highly fact sensitive and really not a proper topic for legislation which must of necessity speak in universal language.

H. *Miscellany*

This commentary has focused primarily on the "elements" of the cause of action in a products liability case. The UPLL has a broad range of provisions which touch such diverse issues as limitation of liability for non-pecuniary damages (pain and suffering); the collateral source rule, punitive damages, the regulation of expert testimony and arbitration of claims where the amount in dispute is below \$30,000.

The sense impression after a full reading of the UPLL is that what has been undertaken, in fact, is a total reformation of the law of torts. It is not

89. UPLL analysis § 111(c), reprinted in 44 Fed. Reg. 3012 (1979)(see Appendix).

90. See text accompanying note 22 *supra*.

91. See text accompanying note 21 *supra*.

necessary to take a position at this time with regard to the wisdom of any of the aforementioned provisions. They are a mixed bag, but this much seems certain; if a drastic reformation of the common law of torts is to be undertaken, it should be done only after a full and complete discussion with all parts of the legal community. And it should *not* be done only with regard to the law of products liability. If reformation of the law of non-pecuniary damages is to be undertaken or the doctrine of collateral source is to be redefined, it should not be done piecemeal. We should not forget that the impetus for much of this change came from what the Interagency Task Force has itself characterized as a "non-crisis" situation.⁹² The mere fact that manufacturers have developed a powerful lobby with regard to products liability does not in itself justify manhandling a system of law which has a demonstrated marvelous ability to respond to social change.

I. Some Jurisprudential Thoughts

These comments would not be complete without some brief remarks as to the jurisprudential implications that would attend the enactment of the UPLL. The law of torts has been among the most creative and dynamic areas of the common law. The ability of the law of torts to respond to individual fact situations, to sense injustice and balance the needs of society against the compensatory demands of the plaintiff is a value not easily dismissed. When one cuts through the maze of provisions in the UPLL, what one finds is a plan to rigidify the law of torts and destroy one of its most important features—its flexibility. Manufacturers will argue that flexibility means the absence of standards and high plaintiff verdicts. But that is not an accurate reading of the general thrust of the case law. It has been surprisingly evenhanded even at a time when it was at its most creative stage.

There is another dominant feature that strikes one upon reading the UPLL. Products liability law has for the first time called American manufacturers onto the carpet and held them accountable for their design, testing and advertising practices. It is perhaps unpleasant for manufacturers to have to justify practices which should have been discarded, and costly to have such practices rectified. It is also important to a free a democratic society to subject the practices of manufacturers to public scrutiny. Part of the products liability crisis has little to do with dollars and cents. It has to do with the invasion of what was previously the private domain of manufacturers by courts, lawyers, consumers and public regulators. Manufacturers do not like it because it costs money. And they do not like it because they simply believe that they ought to be able to go along without being held accountable. The UPLL reduces accountability to a substantial degree. The willingness to impose voluntary and governmental standards as governing law is but one example of this phenomenon. The state of the art exception is another.

The UPLL should be opposed by the legal profession because its substan-

92. INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY (Dep't of Commerce), BRIEFING REP. 2 (Jan. 1977).

tive provisions are inadequate to the task. That has been chronicled in the earlier sections, but it also deserves opposition on a philosophical basis. It strikes at an important democratic institution by limiting its scope and reducing its ability to search into the gizzards of American industry.

III. CONCLUSION

It is unfortunate that much of the hysteria with regard to products liability law has been in response to some isolated, irresponsible decisions.⁹³ These cases have been pushed to the forefront and wedded with some ill-considered language which appears in some of the better cases. But, lawyers know that crazy cases do not make doctrine for the country or even for the state in which they have been decided.⁹⁴ The common law process goes through a "shake down" period while new doctrine is being developed. Those who believe that defendants have not gotten a fair shake in court are not reading the steady flow of judicial decisions in the products liability field. Those defendants who have taken a strong stand and have demonstrated their willingness to litigate have done very well indeed. This Draft Uniform Product Liability Law comes to us just at the time when the shake down period is coming into its own. Its provisions are unfair to consumers and unfair to industry. What is needed at this time is not new legislation, but a strong hand with insurers who have panicked industry into convulsive reaction. The common law of products liability is coming along nicely. It should be let alone to complete its mosaic. For those who seek wholesale reformation of the law of torts, we suggest that the effort deserves the broadest kind of inquiry. It ought not to be pigeonholed into the resolution of some temporary dislocation problems created by the non-crisis of products liability.

93. See, e.g., *Reyes v. Wyeth Laboratories, Inc.*, 498 F.2d 1264 (5th Cir. 1974); *Moran v. Fabergé*, 273 Md. 538, 332 A.2d 11 (1975); *Azzarello v. Black Bros. Co.*, ____ Pa. ____, 391 A.2d 1020 (1978).

94. The elimination of the "unreasonably dangerous" requirement in *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) did not prevent California courts from doing a risk-utility analysis even prior to *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). See discussion in note 18 *supra*. Likewise, given the nature of the sharp criticism which the *Moran v. Fabergé* case drew in the law reviews, it is hard to imagine either Maryland or any other state following that decision.

IV. Appendix

Draft Uniform Product Liability Law*

* The Draft Uniform Product Liability Law appears in its entirety (both statutory text and the analysis following) in 44 Fed. Reg. 2996-3019 (1979).

OUTLINE: DRAFT UNIFORM PRODUCT LIABILITY
ACT

Preamble.

Sec. 100. Short Title.

Sec. 101 Findings.

Sec. 102. Definitions.

Product seller.

Product liability claim.

Claimant.

Harm.

Manufacturer.

Reasonably anticipated conduct.

Clear and convincing evidence.

Sec. 103. Scope of this Act.

Sec. 104. Basic Standards of Responsibility.

(A) Product Defective in Construction.

(B) Product Defective in Design.

(C) Failure to Warn.

Sec. 105. Unavoidable Defects.

Sec. 106. Relevance of the State of the Art.

Sec. 107. Relevance of Compliance With Legislative or Administrative Standards.

Sec. 108. Notice of Possible Claim Required.

Sec. 109. Length of Time Product Sellers are Subject to Liability for Injuries or Damage Caused by Their Products.

(A) Useful Safe Life.

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(1) Workplace Injuries.

(2) Non-workplace Injuries.

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Sec. 110. Relevance of Third-Party Alteration or Modification of a Product.

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(A) General Rule.

(B) Apportionment of Damages.

(C) Claimant Conduct.

(1) Misuse of Product.

(2) Failure to Inspect for Defect.

(3) Utilizing a Product With a Known Defect.

Sec. 112. Multiple Defendants.

(a) Contribution and Indemnity.

(b) Effect of Release of the Person Jointly Responsible.

Sec. 113. The Relationship Between Product Liability and Worker Compensation.

Sec. 114. The Individual Responsibility of Product Sellers Other Than Manufacturers.

Sec. 115. Sanctions Against the Bringing of Frivolous Claims and Defenses.

Sec. 116. Arbitration.

- (a) Applicability.
- (b) Rules Governing.
- (c) Arbitrators.
- (d) Arbitrators' Powers.
- (e) Commencement.
- (f) Evidence.
- (g) Transcript of Proceeding.
- (h) Arbitration Award and Judgment.
- (i) Trial *de Novo*.

Sec. 117. Expert Testimony.

- (a) Appointment of Experts.
- (b) Pre-Trial Evaluation of Experts.
- (c) Need For Pre-Trial Evaluation.
- (d) Factors in Evaluation.
- (e) Findings of Fact.

Sec. 118. Non-Economic Losses.**Sec. 119. The Collateral Source Rule.****Sec. 120. Punitive Damages.****Sec. 121. Effective Date.****UNIFORM PRODUCT LIABILITY ACT****PREAMBLE**

This Act sets forth uniform standards for state product liability tort law. It does not cover all issues that may be litigated in product liability cases; rather, it focuses on those where the need for uniform rules is the greatest. The purpose of these these uniform rules is to eliminate existing confusion and uncertainty on the part of both product users and product sellers about their respective legal rights and obligations. Improving the level of certainty as to how state product liability law will deal with claims for injuries caused by allegedly defective products should also, over time, promote greater availability and affordability in product liability insurance and greater stability in rates and premiums.

Sec. 100. SHORT TITLE

This Act shall be known and may be cited as the "Uniform Product Liability Act."

Sec. 101. FINDINGS

(a) Sharply rising product liability insurance premiums have created serious problems in interstate commerce resulting in:

- (1) Increased prices of consumer and industrial products;
- (2) Disincentives to develop high-risk but potentially beneficial products;

(3) Businesses going without product liability insurance coverage, thus jeopardizing the availability of compensation to injured persons; and

(4) Panic "reform" efforts that would unreasonably curtail the rights of product users.

(b) One cause of these problems is that product liability law is fraught with uncertainty; the rules vary from jurisdiction to jurisdiction and are in a constant state of flux, thus militating against predictability of litigation outcome.

(c) Insurers have cited uncertainty in product liability law and litigation outcome as a justification for setting rates and premiums that, in fact, may not reflect actual product risk.

(d) Product liability insurance rates are set on the basis of a countrywise, not an individual state, experience. Thus, individual states can do little to solve the problem because a product manufactured in one state can readily cause injury in any one of the other 49 states or the District of Columbia.

(e) Uncertainty in product liability law and litigation outcome is added to litigation costs and may put an additional strain on the judicial system.

(f) Recently enacted state product liability legislation has widened already existing disparities in the law.

Sec. 102. DEFINITIONS

(1) *Product Seller.*

"Product seller" means any person or entity, including a manufacturer, wholesaler, distributor, or retailer, who is engaged in the business of selling such products, whether the sale is resale, or for use or consumption. The term "product seller" also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products.

(2) *Product Liability Claim.*

"Product liability claim" includes all claims or actions brought for personal injury, death, or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of any product. It includes, but is not limited to, all actions based on the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or under any other substantive legal theory in tort or contract.

(3) *Claimant.*

"Claimant" means a person asserting a legal cause of action or claim and, if the claim is asserted on behalf of an estate, claimant includes claimant's decedent. Claimants include product users, consumers, and bystanders who are harmed by defective products.

(4) *Harm.*

"Harm" includes damage to property and personal physical injuries including emotional harm. It includes damage to the product itself. Damage caused by loss of use of a product is not included, but a claim may be allowed if the seller expressly warranted this protection and this warranty was intended to extend to claimant.

(5) *Manufacturer.*

"Manufacturer" includes product sellers who design, assemble, fabricate, construct, process, package, or otherwise prepare a product or component part of a product prior to its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

(6) *Reasonably Anticipated Conduct.*

"Reasonably anticipated conduct" means conduct which would be expected of an ordinary prudent person who is likely to use the product.

(7) *Clear and Convincing Evidence.*

"Clear and convincing evidence" is that measure or degree of proof that will product in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established.

Sec. 103. SCOPE OF THIS ACT

(a) A product liability claim provided by this Act shall be in lieu of all existing claims against product sellers (including actions in negligence, strict liability, and warranty) for harms caused by a product.

(b) A claim may be asserted successfully under this Act even though the claimant did not buy the product from or enter into any contractual relationship with the product seller.

(c) The previously existing applicable state law of product liability is modified only to the extent set forth in this Act.

Sec. 104. THE BASIC STANDARDS OF RESPONSIBILITY

A product seller may be subject to liability for harm caused to a claimant who proves by a preponderance of the evidence that one or more of the following conditions apply: the product was defective in construction (Subdivision 104A); the product was defective in design (Subdivision 104B); or the product was defective in that adequate warnings or instructions were not provided (Subdivision 104C).

104(A) *The Product Was Defective in Construction.*

The harm was caused because the product was not made in accordance with the product seller's own design or manufacturing standards. In determining whether the product was defective, the trier of fact may consider the product seller's specifications for the product, and any differences in the product from otherwise identical units of the same product line.

104(B) *The Product Was Defective in Design.*

The harm was caused because the product was defective in design. In determining whether the product was defective, the trier of fact shall consider whether an alternative design should have been utilized, in light of:

- (1) The likelihood at the time of manufacture that the product would cause the harm suffered by the claimant;
- (2) The seriousness of that harm;
- (3) The technological feasibility of manufacturing a product designed so as to have prevented claimant's harm;
- (4) The relative costs of producing, distributing, and selling such an alternative design; and
- (5) The new or additional harms that may result from such an alternative design.

104(C) *The Product Was Defective Because Adequate Warnings or Instructions Were Not Provided.*

The harm was caused because the product seller failed to provide adequate warnings or instructions about the dangers and proper use of the product.

- (1) In determining whether adequate instructions or warnings were provided, the trier of fact shall consider:
 - (a) The likelihood at the time of manufacture that the product would cause the harm suffered by the claimant;
 - (b) The seriousness of that harm;
 - (c) The product seller's ability to anticipate at the time of manufacture that the expected product user would be aware of the product risk, and the nature of the potential harm; and
 - (d) The technological feasibility and cost of warnings and instructions.
- (2) In claims based on Section 104(C), the claimant shall prove that if adequate warnings or instructions had been provided, a reasonably prudent person would not have suffered the harm.
- (3) A product seller may not be considered to have provided adequate warnings or instructions unless they were devised to communicate with the person(s) best able to take precautions against the potential harm.

Sec. 105. UNAVOIDABLY UNSAFE ASPECTS
OF PRODUCTS

- (a) An unavoidably unsafe aspect of a product is that aspect incapable

of being made safe in light of the state of scientific and technological knowledge at the time of manufacture.

(b) A product seller may be subject to liability for failing to provide an adequate warning or instruction about an unavoidably unsafe aspect of the seller's product, if the factors set forth in Section 104, subdivision (C) indicate that such warnings or instructions should have been given. This obligation to warn or instruct may arise after the product is manufactured.

(c) If Section 104(C) is not applicable, the product seller shall not be subject to liability for harm caused by an unavoidably unsafe aspect of a product unless the seller has expressly warranted by words or actions that the product is free of such unsafe aspects.

Sec. 106. RELEVANCE OF THE "STATE OF THE ART" AND INDUSTRY CUSTOM

(a) For the purposes of this section, "state of the art" means the safety, technical, mechanical, and scientific knowledge in existence and reasonably feasible for use at the time of manufacture.

(b) Evidence of changes in a product design, in the "state of the art," or in the custom of the product seller's industry occurring after the product was manufactured is not admissible for the purpose of proving that the product was defective in design under Section 104(B), or that a warning or instruction should have accompanied the product at the time of manufacture under Section 104(C). The evidence may be admitted for other purposes if its probative value outweighs its prejudicial effect.

(c) Evidence of custom in the product seller's industry is generally admissible. The product seller's compliance or non-compliance with custom may be considered by the trier of fact in determining whether a product was defective in design under Section 104(C), or whether there was a failure to warn or instruct adequately under Section 104(C).

(d) Evidence that a product conformed to the "state of the art" at the time of manufacture, raises a presumption that the product was not defective within the meaning of Sections 104(B) and (C). This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Section 104(B) and (C), the product was defective.

(e) A product seller may by a motion request the court to determine whether the injury-causing aspect of the product conformed to a non-governmental safety standard having the following characteristics:

(1) It was developed through careful, thorough product testing and a formal product safety evaluation;

(2) Consumer as well as manufacturer interests were considered in formulating the standard;

(3) It was considered more than a minimum safety standard at the time of its development; and

(4) The standard was up-to-date in light of the technological and scientific knowledge reasonably available at the time the product was manufactured.

If the court makes such a determination in the affirmative, it shall instruct the trier of fact to presume that the product was not defective. This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Sections 104(B) and (C), the product was defective.

SEC. 107. RELEVANCE OF COMPLIANCE WITH LEGISLATIVE OR ADMINISTRATIVE STANDARDS

(a) A product seller may by a motion request the court to determine whether the injury-causing aspect of the product conformed to an administrative or legislative standard having the following characteristics:

(1) It was developed as a result of careful, thorough product testing and a formal product safety evaluation;

(2) Consumer as well as manufacturer interests were considered in formulating the standard;

(3) The agency responsible for enforcement of the standard considered it to be more than a minimum safety standard at the time of its promulgation; and

(4) The standard was up-to-date in light of the technological and scientific knowledge reasonably available at the time the product was manufactured.

(b) If the court makes such a determination in the affirmative, it shall instruct the trier of fact to presume that the product was not defective. This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Section 104 (B) and (C), the product was defective.

SEC. 108. NOTICE OF POSSIBLE CLAIM REQUIRED

(a) An attorney who anticipates filing a claim under this Act shall present a notice of this claim stating the time, place and circumstances of events giving rise to the claim along with an estimate of compensation or other relief to be sought.

(b) This notice shall be given within six months of the date of entering into an attorney-client relationship with the claimant in regard to the claim. For the purposes of this Act, such a relationship arises when the attorney, or any member or associate of the attorney's firm, agrees to serve the claimant's interests in regard to the anticipated claim. Notice shall be given to all persons or entities against whom the claim is likely to be made.

(c) Any product seller who receives notice pursuant to subsection (a) promptly shall furnish claimant's attorney with the names and addresses of all persons the product seller knows to be in the chain of manufacture and distribution, if requested to do so by the attorney at the time the notice is given. Any product seller who fails to furnish such information shall be subject to liability as provided for in subsection (e).

(d) A claimant who delays entering into an attorney-client relationship to delay unreasonably the notice required by subsection (a) shall be subject to liability as provided in subsection (e).

(e) Any person who suffers monetary loss because of the failure of a claimant or his attorney or of a product seller in the chain of manufacture and distribution to comply with the requirements of this section may recover damages, costs, and reasonable attorney's fees from that party. Failure to comply with the requirements of this section does not affect the validity of any claim or defense under this Act.

SEC. 109. LENGTH OF TIME PRODUCT SELLERS ARE SUBJECT TO LIABILITY FOR HARM CAUSED BY THEIR PRODUCTS

(A) Useful Safe Life.

(1) A product seller may be liable to a claimant for harm caused by the seller's product during the useful safe life of that product. "Useful safe life" refers to the time during which the product reasonably can be expected to perform in a safe manner. In determining whether a product's useful safe life has expired, the trier of fact may consider:

(a) The effect on the product of wear and tear or deterioration from natural causes;

(b) The effect of climatic and other local conditions in which the product was used;

(c) The policy of the user and similar users as to repairs, renewals and replacements;

(d) Representations, instructions and warnings made by the product seller about the product's useful safe life; and

(e) Any modification or alteration of the product by a user or third party.

(2) A product seller shall not be liable for injuries or damage caused by a product beyond its useful safe life unless the seller has so expressly warranted.

(B) Statutes of Repose.

(1) Workplace Injuries.

(a) A claimant entitled to compensation under a state worker compensation statute may bring a product liability claim under this Act for harm that occurs within ten (10) years after delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling products of that type.

Where this Act precludes a worker from bringing a claim because of subdivision (1)(a), but the worker can prove, by the preponderance of evidence, that the product causing the injury was unsafe, the worker may bring a claim against the workplace employer. If possible, the claim should be brought in a worker compensation proceeding, and shall include all loss of wages that otherwise would not be compensated under the applicable worker compensation statute.

(c) Where this Act precludes a worker's beneficiaries under an applicable wrongful death statute from bringing a wrongful death claim because of subdivision (1)(a), but they can prove, by a preponderance of evidence, that the product that caused the worker's death was unsafe, they may bring a claim against the workplace employer. If possible, the claim must be brought in a

Worker Compensation proceeding, and shall include pecuniary losses that would not have otherwise been compensated under the applicable worker compensation statute.

(d) An employer who is subject to liability under either subsection (1)(b) or (c) shall have the right to seek contribution from the product seller in an arbitration proceeding under Section 116 of the Act. Contribution shall be limited to the extent that the product seller is responsible for the harm incurred under the principles of Section 104 of this Act. The final judgment in that proceeding shall not be subject to trial de novo, but shall be treated as a final judgment of a trial court.

(2) Non-Workplace Injuries.

For product liability claims not included in subdivision (B) that involve harms occurring more than ten (10) years after delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling products of that type, the presumption is that the product has been utilized beyond its useful safe life as established by subdivision (A). This presumption may be rebutted by clear and convincing evidence.

(3) Limitations on Statutes of Repose.

(a) Where a product seller expressly warrants or promises that the seller's product can be utilized safely for a period longer than ten (10) years, the period of repose shall be extended according to these warranties or promises.

(b) The ten (10) year period of repose established in Section 109(B) does not apply if the product seller intentionally misrepresents a product, or fraudulently conceals information about it, where that conduct was a substantial cause of the claimant's harm.

(c) Nothing contained in Section 109(B) shall affect the right of any person found liable under this Act to seek and obtain contribution or indemnity from any other person who is responsible for harm under this Act.

(d) The ten (10) year period of repose established in Section 109(B) does not apply if the harm was caused by prolonged exposure to a defective product, or if an injury-causing aspect of the product existing at the time it was sold did not manifest itself until ten years after the time of its first use.

(C) Statute of Limitations.

All claims under this Act shall be brought within three years of the time the claimant discovered, or in the exercise of due diligence should have discovered, the facts giving rise to the claim.

SEC. 110. RELEVANCE OF THIRD-PARTY ALTERATION OR MODIFICATION OF A PRODUCT

(a) A product seller shall not be liable for harm that would not have occurred but for the fact that his product was altered or modified by a third party unless:

(1) The alteration or modification was in accordance with the product seller's instructions or specifications;

(2) The alteration or modification was made with the express consent of the product seller; or

(3) The alteration or modification was the result of conduct that reasonably should have been anticipated by the product seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested or intended by the product seller. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

SEC. 111. RELEVANCE OF CONDUCT ON THE PART OF PRODUCT LIABILITY CLAIMANTS

(a) General Rule.

In any claim under this Act, the comparative responsibility of, or attributed to, the claimant, shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.

(b) Apportionment of Damages.

In any claim involving comparative responsibility, the court, unless otherwise requested by all parties, shall instruct the jury to give answers to special interrogatories, or the court shall make its own findings if there is no jury, indicating—

(1) The amount of damages each claimant would have received if comparative responsibility were disregarded, and

(2) The percentage of responsibility allocated to each party, including the claimant, as compared with the combined responsibility of all parties to the action. For this purpose, the court may decide that it is appropriate to treat two or more persons as a single party.

(3) In determining the percentage of responsibility, the trier of fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party.

(4) The court shall determine the award for each claimant according to these findings and shall enter judgment against parties liable on the basis of the common law joint and several liability of joint tortfeasors. The judgment shall also specify the proportionate amount of damages allocated against each party liable, according to the percentage of responsibility established for that party.

(5) Upon a motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is still to be subject to contribution and to any continuing liability to the claimant on the judgment.

(c) Conduct Affecting Claimant's Responsibility.

(1) Failure to Discover a Defective Condition.

(i) A claimant is not required to have inspected the product for defective condition. Failure to have done so does not render the claimant responsible

for the harm caused.

(ii) Where a claimant using a product is injured by a defective condition that would have been apparent to an ordinary prudent person, the claimant's damages are subject to reduction according to the principles of subsections (a) and (b).

(2) Using a Product With a Known Defective Condition.

(i) A claimant who knew about a product's defective condition, but who voluntarily and unreasonably used the product, shall be held solely responsible for injuries caused by that defective condition.

(ii) In circumstances where a claimant knew about a product's defective condition and voluntarily used the product, but where the reasonableness of doing so was uncertain, claimant's, damages shall be subject to reduction according to the principles of subsections (a) and (b).

(3) Misuse of a Product.

(i) Where a claimant has misused a product by using it in a manner that the product seller could not have reasonably anticipated, the claimant's damages shall be reduced according to the principles of subsections (a) and (b).

(ii) Where the injury would not have occurred but for the misuse defined in subsection (3)(i), the product is not defective for purposes of liability under this Act.

SEC. 112. MULTIPLE DEFENDANTS: CONTRIBUTION AND IMPLIED INDEMNITY

(a) Rights of contribution and implied indemnity among multiple defendants shall be determined by reference to the principles of Section 111 (a & b).

(b) If the proportionate responsibility of the parties to a claim for contribution has been established previously by the court, as provided in Section 111, a party paying more than its share of the obligation, upon motion, may recover judgment for contribution.

(c) If the proportionate responsibility of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(d) Contribution is available to a person who enters into a settlement with a claimant only: (1) if the liability of the person against whom contribution is sought has been extinguished, and (2) to the extent that the amount paid in settlement was reasonable.

(e) If a judgment has been rendered, the action for contribution must be brought within one (1) year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have: (1) discharged by payment the common liability within the period of the statute of limitations or repose applicable to the claimant's right of action against him and commenced the action for contribution within one year after payment, or (2) agreed while action was pending to discharge the common

liability and, within one year after the agreement, have paid the liability and brought an action for contribution.

SEC. 113. THE RELATIONSHIP BETWEEN PRODUCT LIABILITY AND WORKER COMPENSATION

In the case of any claim brought under this Act by or on behalf of a person who has been or will be compensated for injuries under a state worker compensation law, where an employer's failure to comply with any statutory or common law duty relating to workplace safety contributed to the claimant's injuries, the employer shall be subject to a contribution claim as provided in Section 112 of this Act for a sum not to exceed the amount of the worker compensation lien.

SEC. 114. THE INDIVIDUAL RESPONSIBILITY OF PRODUCT SELLERS OTHER THAN MANUFACTURERS AS COMPARED TO OTHER PRODUCT SELLERS

(a) Manufacturers shall be responsible for defective conditions in their products according to the provisions of this Act. In the absence of express warranties to the contrary, other product sellers shall not be subject to liability in circumstances where they do not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition.

(b) The duty limitation of subsection (a) shall not apply, however, if:

(1) The manufacturer is not subject to service of process in the claimant's own state;

(2) The manufacturer has been judicially declared insolvent;

(3) The court determines that the claimant would have appreciable difficulty enforcing a judgment against the product manufacturer.

SEC. 115. SANCTIONS AGAINST THE BRINGING OF FRIVOLOUS CLAIMS AND DEFENSES

(a) After final judgment has been entered under this Act, either party, by motion, may seek reimbursement for reasonable attorneys' fees and other costs that would not have been expended but for the fact that the opposing party pursued a claim or defense that was frivolous.

(b) For the purposes of this Act, a claim or defense is considered frivolous if the court determines that it was without any reasonable legal or factual basis.

(c) If the court decides in favor of a party seeking redress under this section, it shall do so on the basis of clear and convincing evidence. In all motions under this section, the court shall make and publish its findings of fact.

(d) The motion provided for in subsection (a) may be filed and the claim assessed against the person who was responsible for the frivolous nature of the claim or defense.

(e) In situations where a claimant has been represented on a contingent fee basis and no legal costs have been or will be incurred by that claimant, the attorney for claimant may recover reasonable attorneys' fees based on the amount of time expended in opposing a frivolous defense.

(f) Claims for damages under this section shall not include expenses of persons not parties to the action.

SEC. 116. ARBITRATION

(a) Applicability.

In any claim brought under this Act where the amount in dispute is less than \$30,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial, either party may by a motion institute a pre-trial arbitration proceeding.

(b) Rules Governing.

(1) The substantive rules of a Section 116 arbitration proceeding shall be those contained in this Act as well as those in applicable state law.

(2) The procedural rules of a Section 116 arbitration proceeding shall be those contained in this section. If this section does not address a particular issue, guidance may be obtained from the the Uniform Arbitration Act.

(3) A legislatively designated state agency may formulate additional procedural rules under this Act.

(c) Arbitrators.

(1) Unless the parties agree otherwise, the arbitration shall be conducted by three persons, one of whom shall be either an active member of the state bar or a retired judge of a court of record in the state, one shall be an individual who possesses expertise in the subject matter area that is in dispute, and one shall be a lay person.

(2) Arbitrators shall be selected in accordance with applicable state law in a manner which will assure fairness and lack of bias.

(d) Arbitrators' Powers.

(1) Arbitrators to whom claims are referred pursuant to Section 116 shall have the power within the territorial jurisdiction of the court, to conduct arbitration hearings and make awards consistent with the provisions of this Act.

(2) State laws applicable to subpoenas for attendance of witnesses and the production of documentary evidence shall apply in procedures conducted under this chapter. Arbitrators shall have the power to administer oaths and affirmations.

(e) Commencement.

The arbitration hearings shall commence not later than 30 days after the claim is referred to arbitration, unless for good cause shown the court shall extend the period. Hearings shall be concluded promptly. The court may order the time and places of the arbitration.

(f) Evidence.

(1) The Federal Rules of Evidence [or designated state evidence code]

may be used as guides to the admissibility of evidence in an arbitration hearing.

(2) Strict adherence to the rules of evidence, apart from relevant state rules of privileges, is not required.

(g) Transcript of Proceeding.

A party may have a recording and transcript made of the arbitration hearing at its own expense. A party that has had a transcript or tape recording made shall furnish a copy of the transcript or tape recording at cost to any other party upon request.

(h) Arbitration Award and Judgment.

The arbitration award shall be filed with the court promptly after the hearing is concluded and shall be entered as the judgment of the court after the time for requesting a trial *de novo* has expired, unless a party demands a trial *de novo* before the court pursuant to subsection (i). The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be subject to appeal.

(i) Trial *De Novo*.

(1) Within 20 days after the filing of an arbitration award with the court, any party may demand a trial *de novo* in that court.

(2) Upon demand for a trial *de novo*, the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration. Any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(3) At the trial *de novo*, the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any matter concerning the conduct of the arbitration proceeding, except that the testimony given at the arbitration hearing may be used for impeachment purposes at a trial *de novo*.

(4) A party who has demanded a trial *de novo* but fails to obtain a judgment in the trial court, exclusive of interest and cost, more favorable than the arbitration award, shall be assessed the cost of the arbitration proceeding, including the amount of the arbitration fees, and—

(i) If this party is a claimant and the arbitration award is in its favor, the party shall pay to the court an amount equivalent to interest on the arbitration award from the time it was filed; or

(ii) If this party is a product seller, it shall pay interest to the claimant on the arbitration award from the time it was filed.

SEC. 117. EXPERT TESTIMONY

(a) Appointment.

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he or

she consents to act. An expert witness appointed by the court shall be informed of his or her duties in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. An expert witness so appointed shall advise the parties of any findings; shall be available for deposition by any party; and may be called to testify by the court or any party. The court appointed expert witnesses shall be subject to cross-examination by each party, including a party calling that expert as a witness.

(b) Compensation.

(1) Expert witnesses appointed by the court are entitled to reasonable compensation in whatever amount the court may allow. The court, in its discretion, may tax the costs of such expert on one party or apportion them between both parties in the same manner as other costs.

(2) In exercising this discretion, the court may consider:

(i) Which party won the case;

(ii) Whether the amount of damages recovered in the action bore a reasonable relationship to the amount sought by the claimant or conceded to be appropriate by the product seller.

(c) Disclosure of Appointment.

In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court has appointed the expert witness.

(d) Parties' Experts of Own Selection.

Nothing in this section limits the parties in calling expert witnesses of their own selection.

(e) Pre-Trial Evaluation of Experts.

The court in its discretion may conduct a hearing to determine the qualification of proposed expert witnesses. The court may order a hearing on its own motion or on the motion of either party.

(1) Need for Pre-Trial Evaluation.

In determining whether to grant such a motion, the court shall consider:

(i) The complexity of the issues in the case; and

(ii) Whether the hearing would deter the presentation of witnesses who are not qualified as experts on the specific issues.

(2) Factors in Evaluation.

If the court decides to hold such a hearing, it shall consider:

(i) The scope of the proposed witness' background and skills;

(ii) The formal and self-education the proposed witness has undertaken relevant to the instant case or similar cases; and

(iii) The proposed witness' potential bias.

(3) Findings of Fact.

In making a determination that a proposed expert witness is or is not qualified, the court shall state its findings of fact.

SEC. 118. NON-PECUNIARY DAMAGES

(a) Non-pecuniary damages, including "pain and suffering," shall be determined by the trier of fact. The court shall have the power to review such

damage awards.

(b) In cases where the claimant has not suffered permanent serious disfigurement, permanent impairment of bodily function, or permanent mental illness as a result of the product-related harm, non-pecuniary damages shall be limited to \$25,000.

SEC. 119. THE COLLATERAL SOURCE RULE.

In any claim brought under this Act, the claimant's recovery shall be diminished by any amount he or she has received or will receive in compensation for the same damages from a public source. This provision shall also apply to parties who may be subrogated to the claimant's rights under this Act.

SEC. 120. PUNITIVE DAMAGES

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

(b) If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of those damages. In making this determination, the court shall consider:

(1) The likelihood at the time of manufacture that a serious harm would arise from the product seller's misconduct;

(2) The degree of the product seller's awareness of that likelihood;

(3) The profitability of the misconduct to the product seller;

(4) The duration of the misconduct and any concealment of it by the product seller;

(5) The attitude and conduct of the product seller upon discovery of the misconduct;

(6) The financial condition of the product seller; and

(7) The total effect of other punishment imposed or likely to be imposed upon the product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to claimant and the severity of criminal penalties to which the product seller has been or may be subjected.

SEC. 121. EFFECTIVE DATE

This Act shall be effective with regard to all claims accruing on or after September 1, 1979.

ANALYSIS

PREAMBLE

The importance this Act places in increasing the degree of certainty in the product liability litigation process is tempered by the recognition that even with a nationwide adoption of a uniform code, its application may vary

from state to state on some issues. The goal is to promote a greater degree of certainty than the present system.

ANALYSIS

SEC. 100. SHORT TITLE

This is the customary "short title" provision. It may be placed wherever state legislative practice dictates. If a state legislature introduces parts of the Uniform Product Liability Act as separate measures, the short title should be adjusted accordingly.

ANALYSIS

SEC. 101. FINDINGS

Chapter VI and VII of the "Final Report" of the Interagency Task Force on Product Liability (Task Force Report) provide support for most of the findings made here. Additional support comes from the Report of the Subcommittee on Capital, Investment and Business Opportunities, "Product Liability Insurance," 95th Cong., 2d Sess., Report No. 95-977 (1978) (Subcommittee Report). Among other things, this Report called for clarification and simplification of "present tort law relating to product liability for formulating Federal standards to be adopted by the States***" (Subcommittee Report, at 76).

Individual state studies on product liability conducted in Missouri (Report of the Senate Select Committee on Product Liability, 1977); Illinois (Judiciary I Subcommittee on Product Liability; Report and Recommendations—Part 1, undated); Georgia (Report of the Senate Products Liability Study Committee, 1978); Maine (Governor's Task Force, 1978); Michigan (Department of Commerce Task Force on Product Liability Insurance, 1978); and Wisconsin (Product Liability, An Overview, Wisconsin Legislative Council Staff, 1978) provide additional support for individual findings.

The Maine and Georgia reports emphasize that individual state tort reforms can do little to affect the product liability tort bill passed by the Connecticut legislature in 1978 emphasized that individual state tort actions will not stabilize product liability insurance rates.

More specific references to the findings appear in the following citations keyed to the various findings.

(a)(1) Task Force Report at VI-27-28, V-19.

(2) Task Force Report at VI-28-32.

(3) Task Force Report at VI-2-26.

(4) Options Paper on Product Liability and Accident Compensation Issues, 43 FR 14612-4 (1978); Georgia Report Appendix B; Johnson Products Liability "Reform": A Hazard to Consumers, 56 N. "Carol L. Rev." 677 (1978); Comment, "State Legislative Restrictions on Product Liability Actions," 29 "Mercer L. Rev." 619 (1978). See Product Liability Legislation, Federal-State Reports, Inc. (1977-1978).

(b) Task Force Report at I-26-28, VII-15-17; Subcommittee Report at 72; Michigan Report at p. 6 (1978).

(c) Task Force Insurance Study (citing uncertainty); Task Force Report a V-48-49 (relationship of premium to risk).

(d) Task Force Report at I-28; Maine Report at 23.

(e) Task Force Report at VII-214-216; *see* ISO Product Closed Claim Survey at 118-130.

(f) *See* Federal State Product Liability Legislation; Federal State Reports (1977-1978); Product Liability Trends at 97-98, 104-05, 157-58 (1978); Business Insurance, p. 22 (12/25/78); *see also* Wisconsin Report at 29-37 (describing twenty-five separate bills on product liability introduced in one legislative session).

ANALYSIS

SEC. 102. DEFINITIONS

(1) "*Product seller*" includes all parties in the regular commercial distribution chain. It does not include the occasional private seller. This is in accord with the "Restatement (Second) of Torts." The term also includes lessors and bailors of products, in accord with the majority of case law decisions that have addressed that issue. *See* Annot. 52, "A.L.R." 3d 121 (1973).

The Act does not address several definitional problems of "product seller." First, it does not address the problem of the product seller engaged in a service. *See* "Newmark v. Gimbel's, Inc.," 54 N.J. 585, 258 A.2d 697 (1969). It is suggested that a party be considered a product seller where a sale of a product is a principal part of the transaction and where the essence of the relationship between the buyer and seller is *not* the furnishing of professional skill or services. *See* Annot., 29 "A.L.R." 3d 1425 (1970).

Second, the Act does not address the potential product liability problems of the seller of real property. It is suggested that it is only appropriate to apply product liability standards to builder-vendors who engage in the mass production and sale of homes. *See* "Schipper v. Levitt & Sons, Inc.," 44 N.J. 70, 207 A.2d 314 (1965); *But see* "Wright v. Creative Corp.," 30 Colo. App. 575, 498 P.2d 1179 (1972) (rejecting "Schipper").

Finally, the Act does not indicate whether a commercial seller of used products is subject to liability under this Act. This issue is left for resolution as a matter of individual state policy. *See* "Peterson v. Lou Bachrodt Chevrolet Co.," 61 Ill.2d 17, 329 N.E.2d 785 (1975).

(2) "*Product Liability Claim*." One key purpose of this act is to consolidate product liability actions that traditionally have been separated under theories of negligence, warranty, and strict liability. This approach was suggested by the Task Force "Legal Study" as well as the report of the Subcommittee on Capital, Investment and Business Opportunities. While an argument may be made that negligence theory is qualitatively different from strict liability and, therefore, should be preserved, product liability theory and practice has become an entity in and of itself and can only be stabilized if there is one, and not a multiplicity of causes of action.

"Product liability claim" embraces express as well as implied warranties.

(3) "*Claimant.*" Both living persons and those claiming through or on behalf of an estate are included within the meaning of the word "claimant." This would include both wrongful death and survival actions.

Although the "Restatement (Second) of Torts" left open the question of whether bystanders should be included within the compass of strict liability claims, subsequent case law has been almost uniform that bystanders should be included. See "*Giberson v. Ford Motor Co.*," 504 S.W.2d 8 (Mo. 1974) (collecting cases). See also, Annot., 33 "A.L.R." 3d 415 (1970). The definition follows this line of decisions.

Bystanders include rescuers who come upon the scene. See "*Guarino v. Mine safety Appliance Co.*," 25 N.Y.2d 460, 255 N.E.2d 173 (1969).

(4) "*Harm.*" The "Restatement" provision included physical harm to persons and property. This Act also includes emotional harm, but only as an element of parasitic damages, *e.g.*, when a person has also been harmed physically. The Act leaves open the question of whether an individual may recover for emotional harm alone under a product liability theory; this issue is left to common law development.

The Act also includes damage to the product itself. See "*Ghera v. Ford Motor Co.*," 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966). Some courts consider this an economic loss and relegate the claimant to whatever rights he or she has under the sales provision of the Uniform Commercial Code. See "*Hawkins Construction Co. v. Matthews Co., Inc.*," 190 Neb. 546, 209 N.W.2d 643 (1973).

Apart from a very limited express warranty claim, the Act does not include damages for consequential economic losses. Most courts have been in accord with "*Seely v. White Motor Co.*," 63 Cal. 2d 9, 45 Cal. Rptr. 17 (1965) on this issue and have left the claimant with whatever rights he or she has under the Uniform Commercial Code. See "*Brown v. Western Farmers Assn.*," 268 Or. 470, 521 P.2d 537 (1974); "*Eli Lilly and Co. v. Casey*," 472, S.W.2d 598 (Tex. Civ. App. 1971); "*Paul O'Leary Lumber Corp. v. Mill Equipment, Inc.*," 448 F.2d 536 (5th Cir. 1971).

The insurance costs of extending consequential economic losses beyond parties to a contract would be enormous. It is much cheaper and more efficient for the product purchaser to obtain insurance against consequential economic losses caused by business stoppage. Also, most courts believe that a commercial purchaser should be charged with the risk that his product will not match his economic expectations unless the manufacturer agrees it will. See Note, "Economic Loss in Products Liability Jurisprudence," 66 "Colum. L. Rev." 917 (1966). However, a claimant can recover for consequential economic losses under an express warranty theory. See "*Seely v. White Motor Co.*," *supra*.

(5) "*Manufacturer.*" This definition is based on one in Arizona's product liability law. See "*Ariz. Rev. Stat. Ann.*" § 12-681 (1) (1978). Its greatest import within this act is in regard to the responsibility of a manufacturer for defective products as contrasted with other product sellers. See Section 114.

(6) "*Reasonably Anticipated Conduct.*" The definition is based in part on Arizona product liability law. See "Ariz. Rev. Stat. Ann." § 12-681(4) (1978). The meaning of "reasonably anticipated" should be contrasted with "foreseeable." Almost any kind of misconduct with regard to products can be foreseeable—especially if the trier of fact is permitted to use hindsight, *e.g.*, that a soda bottle will be used for a hammer, that someone will attempt to drive a land vehicle on water, that perfume will be poured on a candle in order to scent it. See "*Moran v. Faberge, Inc.*," 273 Md. 538, 332 A.2d 11 (1975).

The approach taken places incentives for risk prevention on product sellers, while also ensuring that the price of products is not affected by the liability insurance costs that would spring from providing coverage for abnormal product use.

(7) "*Clear and Convincing Evidence.*" Proof that is clear and convincing carries with it not only the power to persuade the mind as to its probable truth or correctness of fact; it has an additional element of clinching such truth. The term is understood best in context. It requires more proof than the mere preponderance of evidence (the ordinary standard under this Act), but does not require proof beyond a reasonable doubt. See *e.g.*, "*Aiello v. Knoll Golf Club*," 64 N.J. Super. 156, 165 A.2d 531 (1960); "*Cross v. Ledford*," 161 Ohio St. 469, 120 N.E.2d 118 (1954); "*Brown v. Warner*," 78 S.D. 647, 107 N.W.2d 1 (1961).

ANALYSIS

SEC. 103. SCOPE OF THIS ACT

(a) The Act consolidates all product liability recovery theories into one. The approach taken is in accord with the Task Force "Legal Study." While some have argued that for trial tactics purposes it is useful to retain the negligence cause of action as distinct from strict liability, a claimant's attorney can retain the essence of this utility by showing the basic wrongfulness of the product seller's conduct under Section 104.

(b) The Act is in accord with the "Restatement (Second) of Torts" in that it is unnecessary for the claimant to be in contractual privity with the product seller. See "Restatement (Second) of Torts" § 402A, Comment c.

(c) The Act and its accompanying commentary do not purport to be an exhaustive compilation of the entire subject of product liability law; rather, they focus on subject matter areas that the Task Force Report suggested have created the most problems and are of major importance.

The interstices of the Act will be filled by statutory or common law additions of the individual states. Some of these interstitial issues will be pointed out in the section-by-section commentary; others will be discovered in the course of litigation under the Act.

ANALYSIS

SEC. 104. BASIC STANDARDS OF
RESPONSIBILITY

Perhaps no single product liability issue has generated more controversy than the question of defining the basic standard of responsibility to which product sellers are to be held. Much of this controversy appears to have sprung from the fact that the authors of § 402A of the "Restatement (Second) of Torts" were focusing on problems relating to product mismanufacture or defects in construction; they were not directly concerned with problems relating to defects in design or to the duty to warn. See Wade, "On the Nature of Strict Tort Liability for Products," 44 "Miss. L.J." 825, 830-32 (1973).

Courts continue to struggle to articulate the standards of responsibility of product sellers. A multiplicity of approaches have been offered. See e.g., "Barker v. Lull Engineering Co., Inc.," 20 Cal. 3d 413, 143 Cal. Rptr. 225 (1978); "Cepeda v. Cumberland Engineering Co. Inc.," 76 N.J. 152, 386 A.2d 816 (1978); "Phillips v. Kimwood machine Co.," 269 Ore. 485, 525 P.2d 1033 (1974).

The approach taken in Section 104 is to distinguish cases based on defects in construction, defects in design, and defects caused by a failure to instruct or warn. Each type of case calls for a particular type of treatment. For this reason, this Act does not have a "single" definition of the term "defect," nor does it attempt to resolve the debate over whether a product liability claimant should have to prove that the product was "unreasonably" dangerous. Compare "Barker v. Lull Engineering Co., Inc.," *supra*, and "Byrns v. Riddell, Inc.," 113 Ariz. 264, 550 P.2d 1065 (1976). Instead, Section 104 takes an approach which avoids terminological difficulties by focusing on practical considerations that courts and juries have looked to in deciding product liability cases.

This approach should not lead to problems of characterization. The claimant's pleading should indicate the theory on which he or she is proceeding within the framework of Section 104, subdivisions A, B, and C.

A product may be defective in more than one way. Furthermore, there is an important linkage between the duty to warn and defective design. In appropriate cases, a product may be found not to be defective in design if the product seller has given adequate warning about the alleged hazard. See e.g., "Wagner v. Larsen," 257 Iowa 1202, 136 N.W.2d 312 (1965); "Penn v. Inferno Mfg. Corp.," 199 So.2d 210 (La. App.) *aff'd*, 251 La. 27, 202 So.2d 649 (1967). There are limits to this possibility, however, since a product seller will not be shielded from liability for a poorly designed product, simply by indicating that the product "may be hazardous."

The following commentary discusses each subdivision of Section 104 in turn. First:

(A) *The Product Was Defective in Construction.* This history of imposing strict liability for defects in the construction of products goes back as far as 1913 when sellers of food were first held liable for failure to produce a product reasonably fit for its intended use. See "Masetti v. Armour & Co.," 75 Wash.

622, 135 P.633 (1913); Prosser, "The Assault Upon the Citadel," 69 "Yale L.J." 1099 (1960).

Subdivision (A) imposes pure strict liability on the product seller in accordance with Section 402A of the "Restatement (Second) of Torts." This has been an evolving area of strict liability intended to protect the consumer. As Comment c to the "Restatement" states, the seller "has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured [by the product]." Furthermore, "the public has the right to and does expect, in case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods * * *" *Id.*

In the course of its study, the Interagency Task Force on Product Liability found that many product sellers can absorb the financial impact of strict liability based on defects in construction. See Task Force Report, at VII-17. The product seller as a distributor of many products absorbs the costs of injuries caused by such a defect (even though having exercised all reasonable care) as part of a responsibility inextricably connected with the modern merchandising of products.

Second:

(B) *The Product Was Defective in Design.* As compared to the situation with respect to defect in construction, no court yet has imposed true strict or absolute liability on product sellers for defects in design appreciating, no doubt, the unlimited liability potential inherent in such cases where it is almost always possible to design a product more safely. Rather, the courts have balanced a variety of factors in determining whether a particular product is defective in design. See, e.g., "Barker v. Lull Engineering Co., Inc.," *supra*; "Cepeda v. Cumberland Engineering Co. Inc.," *supra*; "Schell v. AMF, Inc.," 567 F.2D 1259 (3d Cir. 1977).

There are several possible ways to limit the unlimited liability potential of design defect cases. One is to create a limited damage compensation system—private or governmental—analogous to worker compensation. Another is to continue to base liability on the individual's moral responsibility under the tort system. Subdivision (B) takes the latter course and places the burden on the claimant to show that in light of a balance of practical objective factors, the product seller should bear the full cost of the injury and have the responsibility for attempting to distribute that cost through product pricing. Basic principles of tort law suggest that the claimant should carry the burden of proof on this issue. See Kalven, Jr., "Torts: The Quest for Appropriate Standards," 53 "Calif. L. Rev." 189 (1965). But see "Barker v. Lull Engineering Co., Inc.," *supra*.

The factors listed in this subdivision for the trier of fact to consider have been derived from a very wide variety of sources. See, e.g., "Barker v. Lull Engineering Co. Ltd.," *supra*. See also Vetri, "Products Liability: Developing a Framework for Analysis," 54 "Ore. L. Rev." 293, 310 (1975); Henderson, Jr., "Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication," 73 "Colum. L. Rev." 1531 (1973); Keeton, "Product Liability and the Meaning of Defect," 5 "St. Mary's L.J." 30 (1973); Wade,

"On the Nature of Strict Tort Liability for Products," 44 "Miss. L. J." 825 (1973). The factors selected also have been reviewed from an economic perspective.

Factor (1) addresses the problem of judging design cases by hindsight, a significant and justifiable concern of product sellers. By focusing on the time of manufacture, Section 104(B) provides an incentive to product sellers to reduce risks, both by design testing and by warning of potential hazards.

Factor (2) raises the possibility that if at the time of manufacture there is the possibility of a very serious harm, the product seller's obligation to take steps to avoid it increases.

Factor (3) overlaps the Act's consideration of the "state of the art" in Section 106. The trier of fact should consider the scientific and technological knowledge available to the product seller at the time of manufacture as well as the custom in the industry.

Factor (4) recognizes that increased costs associated with an alternative design may play a part in deciding whether it is feasible to pursue. Courts occasionally have indicated that it is appropriate for the trier of fact to consider whether because of increased costs of an alternative design, "it would still be reasonable to market the product despite the danger." *Lynd v. Rockwell Manufacturing Co.*, 276 Or. 341, 554 P.2d 1000, 1006 (1976).

Factor (5) indicates that if a weighing of considerations, (1)-(4) suggests that an alternative design should have been pursued, it still is appropriate for the trier of fact to consider any new or additional harms that would arise if this alternative design were chosen.

Thus, Subdivision (B) does not set out an algebraic formula as to how each of these factors should be weighed. Certainly, as factors (1) and (2) increase, the trier of fact is more likely to find that the product was defective. On the other hand, it must balance these factors against (3), (4), and (5).

Two factors relied on by some courts in design cases were not included in the Section 104(B) balancing process. First is the "utility" of the product to the user or to society in general. Economic analysis suggests that this element would render the balancing test totally subjective and unworkable. Tested by its "utility," a whole-grain health food cereal conceivably might be subject to a lower standard of responsibility than one that was heavily sugar-coated (less "useful" to society as a whole). On the other hand, if the trier of fact focused on the subjective "value to the user," it might come to the opposite conclusion. The approach of Section 104(B) is to focus the trier of fact on how the product was made and what its dangers are, rather than making macro-economic judgments about its value to society or to certain individuals.

The second factor not included in the Section 104(B) balancing process is a "consumer expectation" test. The reasons for this are rooted in both economics and practicality. As Professor Wade, Reporter for the "Restatement (Second) of Torts," has stated:

[T]he consumer would not know what to expect, because he would have no idea how safe the product could be made.

Wade, *supra*, 44 "Miss. L.J." at 829. Again, the notion of consumer expectations suffers from an "overkill" of subjectivity. Each trier of fact is likely to have a different understanding of abstract consumer expectations. Section 104(B) leaves consumer expectations aside and focuses the trier of fact on what design alternatives were possible as a practical matter.

Third:

(C) *The Product Was Defective Because Appropriate Warnings or Instructions Were Not Provided.* A product seller may be held liable under this subdivision even though the product was not found to be defective in design or construction. Even where lack of scientific knowledge or cost factors precludes the use of an alternative design, the product seller still may be required to provide a warning about the product's hazards or to instruct about the product's use. See "Brown v. North Am. Mfg. Co." 576 P.2d 711 (Mont. 1978).

As the Task Force Report noted, rules relating to a product seller's duty to warn have changed drastically in recent years, and are unclear in some jurisdictions. See Task Force Report, at VII-18. Product sellers want to be informed about the scope of their duty. Nevertheless, practical problems make it impossible to develop a general rule that will inform the product seller—in advance of manufacture—precisely how to instruct or warn about a particular product. On the other hand, some general guidelines can be provided.

Subdivision (C)(1) lists practical factors that a trier of fact shall weigh in determining whether a particular product warning or instruction was adequate. The trier of fact should focus on both instructions and warnings; all representations about a product must be considered in evaluating whether the duty to warn has been discharged. See "McCormack v. Hanksraft Co.," 278 Minn. 322, 154 N.W.2d 488 (1967).

Factor (a) is similar to subsection (1) of subdivision (B). The trier of fact is to consider the likelihood that the harm against which the warning is directed will occur. Where the harm is more likely, the duty is greater.

Factor (B) is similar to subsection (2) of subdivision (B). The more serious the anticipated harm, the greater the duty to warn. See "Davis v. Wyeth Laboratories, Inc.," 399 F.2d 121 (9th Cir. 1968).

Factor (c) is of special importance. It recognizes that warnings are not made in a vacuum. The product seller must construct warnings and instructions in light of the training, experience, education and knowledge of those who are likely to avail themselves of those warnings or instructions. See "Halvorson v. American Hoist & Derrick Co.," 307 Minn. 48, 240 N.W.2d 303 (1976); compare "Ford Motor Co. v. Rodgers," 337 So.2d 736 (Ala. 1976); See also "Greiner v. Volkswagenwerk Aktiengesellschaft," 429 F.Supp. 495 (E.D.Pa. 1977).

This factor also allows the trier of fact to judge whether the danger was so obvious as not to require a warning. Some courts have followed the much criticized "patent danger" rule that shields the product seller from an obligation to warn about obvious hazards. Numerous jurisdictions have rejected the rule. See, e.g., "Byrns v. Riddell, Inc.," 113 Az. 264, 550 P.2d 1065 (1976);

"Casey v. Gifford Wood Co.," 61 Mich. App. 208, 232 N.W.2d 360 (1975); "Brown v. North Am. Mfg. Co.," *supra*. In situations where it is inexpensive and easy to do so, it may be appropriate to warn about an obvious danger that is highly likely to cause very serious injuries. See Marschall, "An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products," 48 "N.Y.U.L. Rev." 1065 (1973).

A product seller should be able to assume that the ordinary product user is familiar with obvious hazards—that knives cut, that alcohol burns, that it is dangerous to drive automobiles at high speeds.

Factor (d), the technological feasibility and cost of a warning, may not be significant in many cases because warnings are often relatively inexpensive to provide. However, in some situations, it may not be feasible technologically to provide a warning, or at least the type of warning that claimant suggests should have been provided.

Subsection (2) provides that a claimant must show that if adequate warnings had been given, it is more probable than not that the injury would not have occurred. In other words, a claimant must show that the failure to provide an appropriate warning was a cause of his or her harm. In this regard the claimant can show that if the warning had been given, either the product would have been used without incident, or it would not have been used at all. The later situation is likely to arise with pharmaceuticals. The test stated in subsection (2) is an objective one which looks toward the conduct of the reasonably prudent person. Cf. "Cobbs v. Grant," 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505. (1972)(informed consent).

Subsection (3) indicates that the warnings or instructions should be devised so as to communicate with the person best able to take suitable precautions. The product seller's duty to warn does not go beyond the technological and other information available at the time of manufacture. This is in accord with the overwhelming majority of court decisions. See "Robbins v. Farmers Union Grain Terminal Assn.," 552 F.2d 788 (8th Cir. 1977).

ANALYSIS

SEC. 105. UNAVOIDABLY UNSAFE ASPECTS OF PRODUCTS

Section 105 follows the "Restatement (Second) of Torts" with respect to "products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." See "Restatement (Second) of Torts" § 402A, Comment k; *see also* "N.H.Rev. Stat. Ann." § 507-D:4 (1978).

With the exception of one Illinois decision ("Cunningham v. MacNeal Memorial Hospital," 47 Ill. 2d 443, 266 N.E.2d 897 (1970)), subsequently overruled by "Ill. Ann. Stat." ch. 91 §§ 181-84 (1971 as amended), this approach has been followed by the common law courts throughout the United States. See, e.g., "Moore v. Underwood Memorial Hospital," 147 N.J. Super. 252, 371 A.2d 105 (1977)(serum hepatitis contracted from blood supplied); "Dalke v. Upjohn Co.," 555 F.2d 245, (9th Cir. 1977)(tooth discoloration from

tetracycline); "Chambers v. G. D. Searle & Co.," 441 F. Supp. 377 (D. Md. 1975) (stroke allegedly from birth control pills); "Coffer v. Standard Brands, Inc.," 30 N.C. App. 134, 226 S.E.2d 534 (1976)(shell in nuts); "Hines v. St. Joseph's Hospital," 86 N.M. 763, 527 P.2d 1075 (1974)(blood transfusion).

Subsection (a) sets the time from which to judge the state of scientific and technological knowledge as the point when the product leaves the manufacturer's control. See "Cochran v. Brooke," 243 Or. 89, 409 P.2d 904 (1966).

Subsection (b) makes clear that a product seller may be subject to liability for failure to provide an adequate warning about an unavoidably unsafe aspect of a product. There are certain hazards, particularly in the pharmaceutical field, which are known or can be discovered through the exercise of reasonable care even though they cannot be avoided. See "Dalke v. Upjohn Co.," *supra*; "Chambers v. G. D. Searle & Co.," *supra*; "Toole v. Richardson-Merrell, Inc.," 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

The factual question underlying the legal issue of whether warnings or instructions were adequate is whether product sellers meet their duty to promulgate warnings and instructions commensurate with their *actual* knowledge gained from research and adverse reaction reports and their constructive knowledge as measured by scientific literature and other available means of communication. See "Dalke v. Upjohn Co.," *supra*, at 248; "McEwen v. Ortho Pharmaceutical Corp.," 270 Or. 375, 528 P.2d 522, 528-29 (1974). *Contra*, "Bruce v. Martin-Marietta Corp.," 544 F.2d 442 (10th Cir. 1976).

Subsection (b) also supports the concept of continuing obligation to warn and instruct based on new information about an unavoidably unsafe aspect of a product, discovered *after* it has been manufactured. See "Love v. Wolf," 226 Cal. App.2d 378, 38 Cal. Rptr. 183 (1964); "Sterling Drug, Inc. v. Yarrow," 408 F.2d 978 (8th Cir. 1969).

Finally, subsection (c) subjects a product seller to liability for an unavoidably unsafe aspect of a product if the seller expressly warrants that a product is free from such defects. For example, if the product seller states that a product is "free and safe from all dangers of addiction" and the claimant becomes addicted to the drug, the seller would be subject to liability. See "Crocker v. Winthrop Lab., Div. of Sterling Drug, Inc.," 514 S.W.2d 429 (Tex. 1974).

The approach taken in Section 105 recognizes that there may be circumstances where a seriously injured person is left without compensation for an injury caused by an unavoidably unsafe aspect of a product. This is unlikely to be a common occurrence, however, given the presence of other parties in the distributive chain. See Willing, "The Commnet k Character: A Conceptual Barrier to Strict Liability," 29 "Mer. L. Rev." 545, 580-81 (1978). For reasons of policy, Section 105 proposes that a product seller not be held responsible for harms that are simply unavoidable. See A. Johnson, "Products Liability 'Reform': A Hazard to Consumers," 56 "N. Carol. L. Rev." 676, 690 (1978). If the costs of these harms are to be shifted from the individual, they should be borne by society at large. Section 105 should help

encourage the development of new products without unleashing on the public unsafe products that are defective in construction or design under Section 104. It also makes clear to policy-makers that the tort-litigation system is not the means for addressing injuries caused by this type of hazard.

ANALYSIS

SEC. 106. RELEVANCE OF THE STATE OF THE ART AND INDUSTRY CUSTOM

Subsection (a) adopts a fundamental principle of evidence law for the purposes of product liability cases. It excludes the showing of post-accident changes in the design of a product, the "state of the art," or industry custom when the evidence is offered to show that the product was defective at the time of manufacture. See Federal Rule of Evidence 407 and Advisory Committee commentary.

The reasons underlying this rule are twofold: first, subsequent changes are deemed irrelevant (all they show is as one gets older, one may get wiser); and second, admission of such evidence may discourage the making of repairs. While the latter rationale has been challenged, see "*Ault v. International Harvester Co.*," 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975), the relevance of such evidence on the issue of defectiveness is of very limited value. On the other hand, the prejudicial effect of showing the subsequent change or repair—particularly one undertaken by the product seller himself—is quite substantial. See "*LaMonica v. Outboard Marine Corp.*," 48 Ohio App.2d 43, 355 N.E.2d 533 (1976); "*Haysom v. Coleman Lantern Co.*," 89 Wash.2d 474, 573 P.2d 785 (1978).

Subsection (a) does permit the introduction of evidence of changes in the "state of the art" when it is relevant for purposes other than showing that the product was defective at the time of manufacture. Thus, evidence of such changes may be admissible to show that the product seller knew of the defect at a certain point in time. It might also be admissible where the product seller claimed the product hazard was impossible to avoid. In cases of this kind, the court should balance the probative value of the evidence against its prejudicial nature. Allowing the introduction of evidence in these cases should not become a vehicle for avoiding the basic purpose of the rule.

Subsections (b), (c), (d), and (e) address one of the major issues that have divided product sellers and consumer groups concerned about product liability. Product sellers have argued that when their products comply with the "state of the art," it is unfair to deem them defective. They further contend that industry custom is likely to incorporate all cost-justified product safety features. See R. Posner, "Economic Analysis of Law," 71 (1972). Consumers respond that it is inappropriate to permit product sellers to fix indirectly their own standard of liability. See Johnson, "Products Liability 'Reform': A Hazard to Consumers," 56 "N. C. L. Rev." 677, 680-81 (1978).

In reality, there may be less of a dispute between product sellers and consumers on this issue than appears on the surface. The approach taken in

Section 106 attempts to clarify matters by distinguishing between "custom" and "state of the art."

Subsection (a) defines "state of the art" to distinguish it from custom in the industry. It was derived from a recently enacted section of Arizona law. "Arix. Rev. Stat. Ann." § 12-681(6)(1978). The subsection (a) definition comprehends a level of safety that was possible as a practical matter at the time of manufacture.

Under subsection (b), compliance with industry custom is merely evidence that the trier of fact may consider in determining whether a product was defective under subdivisions (B) and (C) of Section 104. *See, e.g.*, "Bruce v. Martin-Marietta Corp.," 544 F. 2d 442 (10th Cir. 1976); "Baker v. Chrysler Corp.," 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976); "Maxted v. Pacific Car & Foundry Co.," 527 P. 2d 832 (Wyo. 1974); "Roach v. Kononen," 269 Ore. 457, 525 P. 2d 125 (1974); "Olson v. Arctic Enterprises, Inc.," 349 F.Supp. 761 (D.N.D. 1972).

Subsection (c) also permits introduction of evidence of non-compliance with custom—evidence likely to be introduced by a product liability claimant. While it might be argued that non-compliance with custom should signal that, in fact, the product was defective, situations may arise where the product manufacturer followed an alternative procedure that was no less safe (perhaps even safer) than custom in the industry. For that reason, non-compliance with custom is admissible, but does not create a situation where the trier of fact would consider the product defective *per se*. *See* "Poches v. J. J. Newbury Co.," 549 F.2d 1166 (8th Cir. 1977).

Subsection (d) raises a presumption of nondefectiveness if a product conformed to the "state of the art" at the time of manufacture. This follows "Colo. Rev. Stat. ann." § 13-21-403 (1978), but does not go as far as "Ky. Rev. Stat. Ann." ch. 411, § 3(2)(1978), which creates a presumption for both "state of the art" and custom in the industry. The overwhelming majority of case law probably would direct a verdict for defendant in this instance. *See, e.g.*, "Olson v. Arctic Enterprises, Inc.," *supra*; "Wilson v. Piper Aircraft Corp.," 282 Ore. 61, 577 P.2d 1322, 1326 (1978) (" . . . plaintiff's *prima facie* case of a defect must show more than the technical possibility of a safer design"); "Bruce v. Martin-Marietta Corp.," *supra*; "Maxted v. Pacific Car and Foundry Co.," *supra*; "Roach v. Kononen," *supra*.

Only a few intermediate appellate court decisions, primarily from one state, impose liability where the product was in accord with the technical, mechanical, and scientific knowledge reasonably feasible for use at the time of manufacture. *See, e.g.*, "Gelsumino v. E. W. Bliss Co.," 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973) and its progeny. *But see* "McClellan v. Chicago Transit Authority," 34 Ill. App. 3d 151, 340 N.E.2d 61 (1975). *Compare* "Olson v. A.W. Chesterton Co.," 256 N.W. 2d 530 (N. Dak. 1977).

Section 106 thus provides special protection for the interests of product liability claimants in that it allows the trier of fact, in extraordinary situations, to find a manufacturer liable even though his product conformed to the "state of the art."

All presumptions authorized by this section can be rebutted by clear and convincing evidence that, in light of the factors set forth in § 104(2) or (3), that the product was defective. An example under § 104(2) where the presumption might be rebutted is where a product that conferred with a standard posed a very high probability of extremely serious injury and at the time of manufacture there were inexpensive and safer alternative methods of designing the product.

An example under § 104(3) where the presumption might be rebutted is if a product seller learned about a product hazard after the product was manufactured. In that instance, even though his product conformed with the "state of the art", the trier of fact may find that he should have made a reasonable effort to warn product users about such hazards. See Commentary to section 105.

Subsection (e) acknowledges that non-governmental entities may develop product standards that are both rigorous and sound. See Task Force Report, at IV-13-17. The review of such standards is a complex matter, and it is left to the court to decide whether a particular standard meets the criteria of subsection (e). Qualifying standards are given a special status—they create a presumption that the product was not defective in design under Section 104, subdivision (B).

ANALYSIS

SEC. 107. RELEVANCE OF COMPLIANCE WITH LEGISLATIVE OR ADMINISTRATIVE STANDARDS

Product sellers have contended that it is unfair to call a product defective when the challenged aspect of that product conformed to an applicable administrative or legislative standard. Some product liability loss prevention experts have suggested that making compliance with such standards a defense might create incentives for manufacturers to comply with them. Interagency Task Force on Product Liability, "Selected Papers," at 266 (Remarks of Professor Alvin S. Weinstein).

On the other hand, consumer groups have criticized such standards, claiming that many are formulated solely by and for industry. The approach of the common law as well as that embodied in the Consumer Product Safety Act, 15 "U.S.C." § 2074a (1976), is that most government safety standards are merely minimum standards. They are not set at a level that would make it appropriate to regard compliance with such standards as an absolute defense in a product liability case. See "*Roberts v. May*," 583 P.2d 305, 308 (Colo. App. 1978). Even if the standards were set above minimum safety criteria when formulated, keeping them up-to-date remains a problem.

Section 107(a) comports with this general approach by not treating compliance with legislative and administrative standards as an absolute defense. Nevertheless, it allows some "credit" for compliance with such standards in appropriate circumstances. In sum, Section 107(b) creates a rebuttable pre-

sumption of non-defectiveness if the product seller persuades the court that the standard:

- (1) Was developed as the result of careful, thorough product testing and a formal product safety evaluation;
- (2) Was developed through a procedure where both consumer and manufacturer interests were considered;
- (3) Was more than a minimum safety standard; and
- (4) Was up-to-date at the time the product was manufactured.

The section follows the existing case law that has made adjustment for standards that are sound. See "*Jones v. Hittle Service, Inc.*," 219 Kan. 627, 549 P.2d 1383 (1976) (universally accepted standards for odorizing LP gas outweigh expert opinion); "*McDaniel v. McNeil Laboratories, Inc.*," 197 Neb. 190, 241 N.W. 2d 822 (1976) (determination of the FDA prevails in absence of proof that the manufacturer furnished incomplete, misleading, or fraudulent information); "*Raymond v. Riegel Textile Corp.*," 484 F.2d 1025 (1st Cir., 1937)(standard promulgated under the Flammable Fabric Act was outdated). Cf. "Restatement (Second) of Torts" § 288c (1975) (requiring claimant in all cases of compliance to show that a reasonable person would have taken additional precautions).

Section 107 does not speak to two topics relating to compliance with governmental standards. First, it does not treat "failure to comply." This area is left to common law development under the general principles of negligence *per se*. See W. Prosser, "Torts," at 190, n.31. Second, the Act does not cover the situation where the government has issued mandatory design and installation specifications. See "*Hunt v. Blasius*," 55 Ill. App.3d 14, 370 N.E.2d 617 (1977) (holding that compliance is an absolute defense).

ANALYSIS

SEC. 108. NOTICE OF POSSIBLE CLAIM REQUIRED

The purpose of this section is to inform product sellers at an early date that the product they produce may be defective. Under present law, a claimant may delay informing a product seller about a claim until the statute of limitations nearly has expired. In most jurisdictions, this period is two or three years. Although 77.8 percent of all bodily injury claims are reported within six months, see ISO, "Closed Claim Survey," at 100 (1977), the 22.2 percent that are not reported during this period are of concern because they represent about 68 percent of the claim payments.

A reasonable notice of claim requirement in product liability law promotes the interests of product users because it is a low-cost means of assisting product safety. Presumably, if informed about defective conditions at an early stage, a product seller is more likely to take action to correct such conditions and thus forestall future injuries. This is why notice of claim provision have been utilized in other contexts. See, e.g., Uniform Commercial Code § 2-607 (warranty breaches); 18 E. McQuillan, "Municipal Corpo-

rations" § 53.154 (ed. rev. 1977) (suits against municipalities for injuries); 3 A. Larson, "Workmen's Compensation Law" § 78.00 *et seq.* (1976) (notice of injury to employer). *See also* Comment, "Notice Requirement in Warranty Actions Involving Personal Injury," 51 "Calif. L. Rev.," 586 (1963); Phillips, "Notice of Breach in Sales and Strict Tort Liability Law: Should There Be a Difference?," 47 "Ind. L.J." 457, 468-69 (1972) (observing that requiring notice of claims may encourage defendants to make reasonable settlements).

This section is adapted from the recently enacted "Minn. Stat. Ann." § 604.04 (1978). It differs from analogous notice of claim provisions in that it does not provide that a claim or defense will be barred by the failure to meet its conditions. As the court noted in "Greenman v. Yuba Power Products, Inc.," 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697, 700 (1962), such a provision may "become a booby trap for the unwary. The injured consumer is seldom 'steeped in the business practice which justifies the rule,' [James, Product Liability, 34 Texas L. Rev. 192, 197] and at least until he has had legal advice it will not occur to him to give notice***"

Instead, Section 108 places a duty to give the notice of claim on the attorney. It imposes a cost on the attorney for investigation and other expenses that stem from the failure to give notice.

Section 108 also places a burden on product sellers, who are notified of an anticipated claim, to provide the attorney with the names and addresses of others known to be in the chain of distribution. Product sellers may also be held liable under this section for costs that stem from the failure to provide these names.

Section 108 assumes that claims arising under this section can be consolidated with the principal product liability claim brought under this Act.

ANALYSIS

SEC. 109 LENGTH OF TIME PRODUCT SELLERS ARE SUBJECT TO LIABILITY FOR HARM CAUSED BY THEIR PRODUCTS

Perhaps more than any other single factor alleged to be "the cause" of the countrywide product liability problem are the rules governing the responsibility of manufacturers for older products. Most product liability policies not only include claims based on products manufactured or sold during the given year, but also products manufactured or sold in the past. In the case of sellers of durable goods, this creates an "open-ended" liability situation.

The Supreme Court of Oregon summarized the general common rule with the statement: "Promonged use of a manufactured article is but one factor, albeit an important one, in the determination of whether a defect in the product made it unsafe***" *See* "Tucker v. United Crane & Shovel Corp.," 256 Ore. 318, 473 P. 2d 862 (1970) (boom crane manufactured in 1956, collapsed in 1965). *See also* "Gates v. Ford Motor Co.," 494 F. 2d 458 (10th Cir. 1974) (24-year-old tractor); "Kaczmarek v. Mesta Machine Co.," 463 F. 2d 675 (3d Cir. 1972) (30-year-old pickling machine); "Mondshour v. General

Motors Corp.," 298 F. Supp. 111 (D. Md. 1969) (17-year-old bus).

Partly in response to this open-ended liability potential, a number of states have enacted statutes of repose that begin at the time a product is first sold and distributed. See, e.g., "Ariz. Rev. Stat. Ann." § 12-551 (1978) (12 years after product "first sold for use or consumption ***"); "Fla. Stat. Ann." § 95.031(2) (1978) ("12 years after the date of delivery of the completed product"); "Ill. Ann. Stat." § 21.2(b) (1978) (12 years from date of first sale—strict liability); "Ind. Stat. Ann." § 33-1-1.5-5 (1978) ("10 years after the delivery *** to the initial user"); "Neb. Rev. Stat." 25-702(2) (1978) (10 years after first sale); "Utah Code Ann." § 78-15-3(1) (1977) (6 years after date of initial purchase; 10 years after date of manufacture).

The advantages of these statutes are that they: (1) establish an actuarially certain date after which no liability can be assessed; and (2) eliminate tenuous claims involving older products for which evidence of defective condition may be difficult to produce. See "Telegraphers v. Ry. Express Agency," 321 U.S. 342 (1944).

On the other hand, a fundamental problem with these statutes is that they may deprive a person injured by a product of the right to sue even before the injury has occurred. See Johnson, "Products Liability 'Reform': A Hazard to Consumers," 56 "N.C.L. Rev." 677, 689-90 (1978); "Victorson v. Bock Laundry Machine Co.," 37 N.Y. 2d 295, 335 N.E.2d 275 (1975).

The limited available data show that the concern about older products may be exaggerated. See ISO, "Closed Claim Survey," at 105-108 (indicating that over 97 percent of product-related accidents occur within six years of the time the product was purchased and in the captive goods area 83.5 percent of all bodily injury accidents have occurred within ten years of manufacture). Nevertheless, as the Task Force Report indicated, the underwriters' concern about *potential* losses associated with older products may be an important factor in the recent increase in liability insurance premiums for manufacturers of durable goods. See Task Force Report, at VII-21.

Section 109 attempts to provide product sellers with some security against stale claims, while preserving the claimant's right to obtain damages for injuries caused by unsafely manufactured products. It accomplishes this result through provisions on useful safe life, statutes of repose (with separate provisions for workplace and non-workplace injuries), and a statute of limitations.

(A) *Useful Safe Life*. The common law in most states is that "[t]he age of an allegedly defective product must be considered in light of its expected useful life and the stress to which it has been subjected." "Kuisis v. Baldwin-Lima-Hamilton Corp.," 457 Pa. 321, 319 A.2d 914, 923 (1974) (brake-locking mechanism on a crane fell after more than 20 years of use). The "Kuisis" court noted further that in "certain situations the prolonged use factor may loom so large as to obscure all others in the case." *Id.*

The basic problem with most proposals to codify this rule into a useful life limitation has been the vagueness of the concept. Thus, while the Task Force Report noted that "if a useful life limitation were identified in statutory

form, it might be expected that it would be given more serious attention by both judge and jury," Task Force Report, at VII-27, it also observed that "the concept would still lack specificity." *Id.*

Subdivision 109(A) was derived from "Minn. Stat. Ann." § 604.03 (1978). It serves to remind the court and the trier of fact that a product seller may be held liable only for harms caused during the useful safe life of the product. It does not attempt to apply fixed useful life standards for all products. See Phillips, "An Analysis of Proposed Reform of Products Liability Statutes of Limitations," 56 "N.C.L. Rev." 663, 673 (1978). Rather, it identifies factors that may help the trier of fact determine how long a product reasonably can be expected to perform in a safe manner. Section 109 uses the term "useful safe life" (as compared to "useful life") because the period in which the product can have some utility may be well beyond the period in which the product is safe. For example, some drivers may continue to use tires that lack sufficient treads for safety.

Factors (a)-(e) are self-explanatory. Factor (d) refers to the useful safe life stated by the product seller. Relying on this provision, a product seller could indicate that a product should not be used beyond a certain period of time. However, subdivision (A) does not give the product seller absolute power to limit a product's useful safe life. While this was suggested in "Velez v. Craine & Clark Lumber Corp.," 33 N.Y.2d 117, 305 N.E.2d 750 (1973), subdivision (A) gives the trier of fact the power to determine whether the product seller's limitation was a reasonable one. Cf. "Henningsen v. Bloomfield Motors, Inc.," 32 N.J. 358, 161 A.2d 69 (1960). Further, this subdivision makes clear that a product seller's limitation on useful life cannot bind the rights of a bystander. Nevertheless, where the product seller imposes a reasonable limitation, the trier of fact should give very serious consideration to this fact in determining whether the product was used beyond its useful life.

Factor (e), dealing with modifications of the product by users or third parties, relates to conduct that might shorten the useful life of the product. While the Act treats product modifications in a separate section, they are also factors in determining whether a product has been used beyond its useful life.

(B) *Statutes of Repose.* Statutes of repose differ from statutes of limitations in that they set a fixed limit after the time of the product seller's allegedly wrongful conduct—a limit beyond which the product seller will not be held liable. The rationale of such statutes is two-fold: First, if not aware of a claim, the passing of time may make it extremely difficult for a product seller to construct a good defense because of the obstacle of securing evidence. Although the burden of proof on the issue of defectiveness remains on the claimant under the Act, a jury, as a practical matter, may demand an explanation from a product seller when the claimant has suffered a severe injury. The second rationale is that persons ought to be allowed, as a matter of policy, to plan their affairs with a reasonable degree of certainty. This goes to the heart of the product liability insurance rate setting problem. Even though past data show that 83.5 percent of bodily injury claims arise within a ten-year period, there is no safeguard in the existing law that the past will

portend the future. There is always the possibility that the number of claims for older products will increase. See ISO, "Closed Claim Survey," at 107.

(1) *Workplace injuries.* In the context of workplace injuries, the product seller's tort liability ends ten years from the date of the delivery of the completed product to its first purchaser or lessee who is not himself primarily engaged in the business of selling such a product. According to ISO data, 97.4 percent of product liability incidents occur within 72 months of the time a product is purchased. See ISO, "Closed Claim Survey," at 108. *Although the number of claims that would be cut off by this statute is small, the potential for such claims to arise has been a cause of the increase in product liability premiums.*

Although the data are limited, it appears in many instances that the reason for an unsafe workplace product has less to do with conduct of the product seller than it has to do with the party having direct responsibility for the care and maintenance of the workplace product—the employer. See ISO, "Closed Claim Survey," at 141. This is even more likely to be the case with products that are more than ten years old.

Therefore, subsection (1)(b) grants a product liability claimant subjected to an unsafe workplace product a claim against the workplace employer for lost wages and reasonable medical costs. As a practical matter, this provision amends state worker compensation law. The same is true of subsection (1)(c), which grants beneficiaries under state wrongful death acts a right to recover the pecuniary loss they suffered because an employer exposed the decedent to an unsafe product.

For purposes of this subsection an "unsafe" product is not only one that is defective within the meaning of Section 104, but also one that has been improperly maintained, altered or modified by the employer. The term also includes products that are no longer safe because they have simply worn out.

The Act places a strong incentive for accident prevention on the party who is in the best position to accomplish that goal. When a product is more than ten years old and is in an unsafe condition, the employer—not the product seller—is in the best position to take action to prevent workplace product injuries. This value of this incentive outweighs any new potential cost that may arise in the worker compensation system.

In the very few cases where an employer may be subject to additional liability, the product seller is not totally "off the hook." If the product seller has produced an unsafe product that has failed after a ten-year period because of a defective condition inherent in the equipment at the time of manufacture, the employer who is liable under this subsection has the right in an arbitration proceeding to bring a contribution claim against the product seller. The employer will then be able to recover, on a comparative responsibility basis, the amount that is appropriate under the circumstances of the accident.

As compared to ordinary arbitration proceedings under this Act (which are subject to a trial *de novo*), the results of this arbitration proceeding are treated as a final judgment.

While product sellers may question the constitutionality of this arbitration provision, no serious constitutional issue can arise. The product seller benefits from this provision compared to present law which subjects product sellers to unlimited liability claims for full *tort* damages, including costs arising from pain and suffering and the possibility of punitive damages.

(2) *Non-workplace injuries*. For the most part, this subsection deals with consumer products. ISO data reflect that very few claims are for consumer goods arise after a ten-year period. Most such claims are for durable goods and would be handled under subsection (1) provisions relating to workplace injuries. See ISO, "Closed Claim Survey," at 105-197 (1977). Nevertheless, consumers justifiably are concerned about overly broad absolute cut-offs to their right to sue. This provision recognizes consumer concerns in three basic ways:

(1) The term of the statute is ten years—beyond the term enacted or proposed in a number of states;

(2) The statute begins to run at the time of purchase, not the time of manufacture; and

(3) The statute does not contain an absolute cut-off, but rather a presumption that the product has been used beyond its useful life. Colorado law adopts this approach. "Colo. Rev. Stat. Ann." § 13-21-403(3) (1978); most other state product liability statutes do not.

Consumer concerns are also addressed by three of the additional restrictions contained in the next section. These restrictions are applicable to both consumer and workplace products.

(3) *Limitations on statutes of repose*. The statute contains four key limitations on its scope of operation.

First, liability may result where a product seller has expressly warranted or promised that a product can be safely for a period longer than ten (10) years. See also Uniform Commercial Code § 2-725(2).

Second, the statute of repose provisions do not apply where product sellers intentionally have misrepresented their products.

Third, subdivision (B) does not affect contribution and indemnity claims. Thus, an interim seller will not have to absorb a liability loss that was the true responsibility of the original manufacturer. See Defense Research Institute (Monograph) "Products Liability Position Paper," at 22; See also Phillips, "An Analysis of Proposed Reform of Products Liability Statutes of Limitations," 56 "N.C.L. Rev." 663, 670-71 (1978).

Fourth, there is an exception for pharmaceuticals that cause harms that take many years to manifest themselves, see, e.g., "Krug v. Sterling Drug, Inc.," 416 S.W.2d 143 (Mo. 1967), and products that cause perceptible harm only through prolonged exposure. See "Michie v. Great Lakes Steel Div., National Steel Corp.," 495 F.2d 213 (6th Cir. 1974). See also Johnson, "Products Liability 'Reform': A Hazard to Consumers," *supra*, at 690-91 ("slumbering defects").

(c) *Statutes of Limitation*. Tort statutes of limitations traditionally begin at the time a person is injured. This subdivision follows that approach.

Nevertheless, in accord with consumer concerns, subdivision (C) extends the limitation period beyond the time of injury in situations where the claimant would be unlikely to discover that he or she has been harmed, *e.g.*, long-term pharmaceutical harms. See Birnbaum, "First Breaths' Last Gasp: The Discovery Rule in Products Liability Cases," 13 "The Forum" 279 (1977). 000

ANALYSIS

SEC. 110 RELEVANCE OF THIRD-PARTY ALTERATION OR MODIFICATION OF A PRODUCT

This section deals with the situation where a third party—one other than the product seller or the claimant—has altered or modified the product and this has led to claimant's harm.

A few courts have imposed liability on the product seller in this situation provided that the third party's conduct was in some manner "foreseeable." See, *e.g.*, "Blim v. Newbury Industries, Inc." 443 F.2d 1126 (10th Cir. 1971) (machine safety guard removed by co-worker). Decisions that hold the original product seller responsible in these instances border on absolute liability. Thus, insurers appear to have a just concern about broad-scale imposition of liability where third party intervention has been the principle cause of the accident. As the American Insurance Association has noted:

It is difficult enough to calculate the risk associated with a given product even where there is access to knowledge about its basic inherent characteristics*** The task becomes impossible if the premium calculations must take into account not only the inherent properties of the machine, but also its transformation in the hands of others, and their neglect of repair and maintenance.

AIA (monograph) "Products Liability Legislative Package," at 16 (1977). Moreover, if the law ignores modification of products, it will fail to place the incentive for risk prevention on the party or parties who have engaged in the wrongful conduct.

The authors of the "Restatement (Second) of Torts" § 402A recognized this fact and only subjected the product seller to liability when the seller's product reached "the user or consumer without substantial change in the condition in which it [was] sold." Comment g to this section stated the matter more firmly:

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

Recently, a number of state legislatures have enacted the essence of this comment into law. See "Ariz. Rev. Stat. Ann." § 12-683(2) (1978); "Ind. Stat. Ann." 33-1-1.5 § 4(b)(3) (1978); "Ky. Rev. Stat. Ann." ch. 411, § 4 (1978);

"N.H. Rev. Stat. Ann." § 507-D:3 (1978); "R.I. Gen. Laws Ann." ch. 299, § 9-1-31 (1978); "Tenn. Code Ann." ch. 703, § 9 (1978); "Utah Code Ann." § 78-15-5 (1977).

According to ISO's statistics, product modification occurs only in approximately 13 percent of the cases. Of these cases, the largest number of product modifications result from the conduct of employers (39 percent). See ISO "Closed Claim Survey," at 140-41. This raises the main problem of rules that limit a product seller's responsibility for subsequent product alterations or modifications—often the injured worker cannot sue the one who is really at fault because of the "exclusive remedy" provisions or worker compensation statutes. However, it seems fair to suggest that the destruction of a tort remedy against the employer

Should not of itself create a third-party remedy against the manufacturer or distributor of the product in question. If Worker Compensation is regarded as the proper remedy in other cases of an exclusive employer's wrong, then so too should it be where that wrong involves [a] product acquired from third party defendants.

AIA (monograph) "Product Liability Legislative Package," at 15-16 (1977). Nevertheless, Section 110 takes account of the hardship that can result from an overly broad liability limitation on product modification or alteration; the provision is very narrowly drawn.

First, a product seller may avoid liability for a defective product *only* where the harm would not have occurred "but for" the alteration or modification. In contrast, the "Restatement" and the recently enacted state statutes cited above would shield the manufacturer whenever the third party's conduct was a "substantial cause." A rule of this type, however, invites litigation over what is "substantial," and also may diminish a product seller's responsibility for otherwise culpable conduct.

Cases in accord with the approach taken in Section 110 include "Temple v. Wean United, Inc.," 50 Ohio St.2d 317, 364 N.E.2d 267 (1977); "Santiago v. Package Machinery Co.," 123 Ill. App. 2d 305, 260 N.E.2d 89 (Ill. App. 1970); "St. Pierre v. Gabel," 351 So. 2d 821 (La. App. 1977).

Second, as subsections (a)(1) and (2) indicate, the product seller can not avoid responsibility for product alterations or modifications which the seller suggested (per instructions) or which the seller expressly consented.

Third, the product seller has a duty to anticipate certain modifications or alterations of his product. As Section 102(6) (Definitions) indicated, this refers to conduct that would be engaged in by a reasonably prudent person. Subsection (a)(3) is not intended to encompass every type of act foreseeable by virtue of hindsight or otherwise.

Finally, subsection (b), adapted from Rhode Island Gen. Law Annot. ch. 299, Sec. 1 (1978), makes clear that ordinary wear and tear in a product is not the equivalent of a modification or alteration. However, a third party's failure to observe routine care and maintenance is considered a modification. In such instances, the third party is responsible for the injury. See "Ore. Rev.

Stat." § 30.915 (1977); "N.H. Rev. Stat. Ann." § 507-D:3 (1978); "Utah Code Ann." § 78-15-5 (1977).

ANALYSIS

SEC. 111. RELEVANCE OF CONDUCT ON THE PART OF PRODUCT LIABILITY CLAIMANTS

Section 111 attempts to resolve existing uncertainty in the law about the relevance of a product liability claimant's conduct. It does this in two ways: First, it applies principles of comparative responsibility to situations where claimant's conduct suggests that he or she has some responsibility for the product-related incident. Second, it characterizes three basic kinds of such conduct and provides rules for each of them, namely, failure to inspect for a defective condition, use of a product with a known defective condition, and misuse of a product.

Although there is no assurance that the use of comparative responsibility principles will lower the cost of product liability claims, the inherent fairness of such principles has led to their adoption by over 30 states, and also has resulted in the adoption of a Uniform Comparative Fault Act (UCFA) by the National Conference of Commissioners of Uniform State Laws. This Act borrows freely from the UCFA and its accompanying commentary.

Some courts and commentators have voiced concern about the semantical and theoretical difficulties of mixing the "apples" of negligence with the "oranges" of strict liability. *See, e.g.,* "Kirkland v. General Motors Corp.," 521 P.2d 1353 (Okla. 1974); Robinson, "Square Pegs (Products Liability) in Round Holes (Comparative Negligence)," 52 "Calif. St. B.J." 16 (1977). These concerns appear to be more theoretical than real, particularly under this Act (as well as in common law product liability) where defendants are held liable based on conduct which may reflect varying degrees of fault. The utility of comparative responsibility for product liability cases has been appreciated by both state legislatures, *e.g.,* "Ark. Stat. Ann. §§ 27-1763-1765) (Supp. 1977); "Me. Rev. Stat. Ann." tit. 15 § 156 (Supp. 1978)), and courts *e.g.,* "Thibault v. Sears, Roebuck & Co.," 6 Prod. Saf. & Liab. Rep. 1000 (S. Ct. N.H. 1978); "Daly v. General Motors Corp.," 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); "Busch v. Busch Const., Inc.," 262 N.W.2d 377 (Minn. 1977); "Butaud v. Suburban Marine & Sport. Goods, Inc.," 555 P.2d 42 (Alaska 1976). It has also been recommended by a congressional subcommittee. *See* Report of the House Subcommittee on Capital, Investment and Business Opportunities at 76 (1978).

Section 111 places a strong incentive for risk prevention on the party who is best able to accomplish that goal. It also avoids burdening the careful product user with liability insurance costs assessed to persons who misuse or are otherwise at fault in their handling of products. While some economical analyses indicate that a comparative responsibility system creates a risk of economic inefficiency because of an over-investment in safety, the Act makes a value judgment that such an "over-investment" is a risk worth taking.

(a) *General Rule.* This subsection describes the general principle of comparative responsibility that will be applied under this Act. It *assumes* that the product seller has engaged in conduct that would lead to liability under this Act. Where the claimant has engaged in subsection (c)-type conduct and thus is at least partially responsible for the injury, such conduct will diminish the amount of the claimant's award proportionately to that measure of responsibility.

Section 111 adopts the consumer-oriented fairness of pure comparative negligence as compared with the "non-discriminating rough justice of the modified type . . ." See "Prefatory Note," UCFA.

(b) *Apportionment of Damages.* In order to apply comparative responsibility principles under this Act, it is necessary for the trier of fact to supply certain information in written interrogatories. Subsection (b)(1) indicated that the trier of fact should set forth the amount of damages a claimant would receive if his comparative responsibility were disregarded. This helps assure that the trier of fact does not inflate or deflate the amount of damages claimant would deserve if he were free from responsibility.

Subsection (b)(2) requires the trier of fact to indicate the percentage of responsibility allocated to each party, including the claimant. Persons not before the court are not included, in part because of the extreme difficulty of determining the fault of such parties. Also, a jury's determination of an absent person's "fault" would not be binding on that person. In any event, both claimants and product sellers will have a significant incentive for joining available defendants since the greater the number of parties at fault, the smaller the percentage of fault allocated to each, whether claimant or product seller.

Subsection (b)(3) provides a general guideline to assist the trier of fact in comparing "fault" among the parties. The UCFA comments indicate that in appropriate cases, the trier of fact may also consider:

(1) Whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved:

(2) The magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury;

(3) The significance of what the actor was seeking to attain by his conduct;

(4) The actor's superior or inferior capacity; and

(5) The particular circumstances, such as the existence of an emergency requiring a hasty decision.

Section 111 departs from the UCFA in one respect—it does not consider "the extent of the casual relationship between the conduct and the damages claimed" as a factor in apportioning responsibility. While the distinction may be a difficult one to draw, this Act is premised on apportioning *responsibility* only—pure causation in terms of the physical cause of the particular injury is irrelevant to that concept. See Malone, "Ruminations on Cause-In-Fact," 9 "Stan. L. Rev." 60 (1956).

Subsection (b)(4) helps to assure that the mathematics of comparative responsibility will be correctly determined. The court must determine the award for each claimant according to its findings made under this subsection. The subsection also indicates that the common law rule of joint and several liability of joint tortfeasors continues to apply under this Act. Claimant can recover the total amount of his or her judgment against any product seller who is liable under this Act.

However, as with the UCFA, the judgment for each claimant will also show the share of each party's total obligation to the claimant. This should save litigation costs and avoid the need for a special motion or a separate action on the issue. In situations where an employer would be immune from suit by the product claimant, the limitation of Section 113 applies.

Subsection (b)(5) follows the UCFA in providing for the reallocation of damages among the parties at fault when one of the parties' share is uncollectable. The reallocation procedure applies to a claimant who is contributorily at fault. This approach avoids the unfairness of the common law rule of joint and several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint and several liability, which would cast the total risk of uncollectibility on the claimant.

(c) Conduct Affecting Claimant's Responsibility.

(1) *Failure to Discover a Defective Condition.* At common law the product user had an obligation to inspect for defects; failure to do so could bar a claim. See "*Palmer v. Massey-Ferguson, Inc.*" 3 Wash. App. 508, 476 P.2d 713 (1970). However, under modern tort law, the product user is assured of a product that is reasonably safe for its ordinary use. See "*Restatement (Second) of Torts*" § 402A (1965); "*Cepeda v. Cumberland Eng. Co.*," 76 N.J. 152, 386 A. 2d 816 (1978). Section 111(c) follows these cases and does not require the product user or consumer to inspect a product for a defect. See "*Kassouf v. Lee Bros. Inc.*," 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962) (plaintiff without inspection, ate a chocolate bar containing worms and maggots).

Cases can arise where a defect would be very apparent to an ordinary prudent person. In such cases, it is appropriate to allow the trier of fact to diminish claimant's damages according to the latter's responsibility for the injury that occurred. Thus, in the example of the candy bar, if a claimant with good eyesight ate a candy bar that had bright green worms crawling over it, he or she should bear some responsibility for any ill effects suffered. If the product seller was aware of the defect in the goods at the time of sale, the punitive damages section of the Act (Section 120) would provide a strong disincentive to not sell such a product.

(2) *Using a Product With a Known Defect Condition.* Where it is clear that a claimant both voluntarily and unreasonably used a product with a known defective condition, the product seller is not liable under this Act. To allow a claim in such a situation would permit individuals, in effect, to create their own product liability claim. In that regard, it should be noted that consent is a defense to even intentional wrongs. See W. Prosser, "Torts," *supra*, at 101.

However, there may be cases where an individual voluntarily uses a product with a known defective condition, but the reasonableness of this conduct becomes a matter of dispute. For example, if a person discovers a welt in a tire, should that person be required to stop immediately and call for assistance, or is it reasonable to proceed to a nearby gasoline station to have the tire repaired? Many cases arise in this shadowy zone. See "Henderson v. Ford Motor Co.," 519 S.W.2d 87 (Tex. 1974) with "Ford Motor Co. v. Lee," 237 Ga. 554, 229 S.E.2d 379 (1976). Subsection (c)(2) allows the trier of fact to consider claimant's conduct and reduce damages where it is appropriate to do so.

Subsections (c)(1) and (2) avoid a problem that existed under the "Restatement," though through no fault of the "Restatement" drafters. Persons who engaged in very similar conduct were treated in a very different manner. For example, those who used a product after failing to discover a defective condition were granted a full claim and those who used a product after they had discovered that defective condition were barred. See "Restatement (Second) of Torts" § 402A, Comment n. This dichotomy caused litigation and appeals over the issue of whether or not plaintiff "knew" of a particular defect at the time he utilized a product. See "Karabatsos v. Spivey Co.," 49 Ill. App. 3d 317, 364 N.E.2d 319 (Ill. App. 1977); "Teagle v. Fischer & Porter Co.," 89 Wash. 2d 149, 570 P.2d 438 (1977); "Poches v. J. J. Newberry Co.," 549 F.2d 1166 (8th Cir. 1977).

(3) *Misuse of a Product*. Subsection (c)(3) imposes no liability on the product seller where an injury occurs solely because claimant misused the product in some way that the product seller could not reasonably anticipate. Reasonably anticipated conduct is conduct which would be expected of an ordinary and prudent person. See Section 102(6) and commentary. Misuse by claimant in this context is equivalent to modification or alteration of the product by a third party. See "Rogers v. Unimac Co., Inc.," 115 Ariz. 304, 565 P.2d 181 (1977); "General Motors Corp. v. Hopkins," 548 S.W.2d 344 (Tex. 1977); "Edwards v. Sears, Roebuck & Co.," 512 F.2d 276 (5th Cir. 1975); see also Section 110.

In determining whether the product seller should have warned or instructed the claimant about potential misuses, the trier of fact should consider the factors listed in Section 104(C).

Where misuse of a product was a partial cause of an injury, claimant's damages are subject to reduction. See "General Motors Corp. v. Hopkins," *supra*.

ANALYSIS

SEC. 112. MULTIPLE DEFENDANTS: CONTRIBUTION AND IMPLIED INDEMNITY

Section 112 is based on sections 4 and 5 of the UCFA. Here, however, contribution and implied indemnity are merged in one section. Express indemnity—where one party has agreed to hold the other harmless for damages

arising out of product liability actions—is left to commercial and common law. See Task Force Report, at VII-99. There is clear precedent for the merger of contribution and implied indemnity. See “Safeway Stores, Inc. v. Nest-Kart,” 21 Cal. 3d 322, 146 Cal. Rptr. 550 (1978); “Dole v. Dow Chemical Co.,” 30 N.Y.2d 143, 282 N.E.2d 288 (1972); “Skinner v. Reed-Prentice Division, Etc.,” 70 Ill. 2d 1, 374 N.E.2d 437 (1977); “Busch v. Busch Constr., Inc.,” 262 N.W.2d 377 (Minn. 1977). See also “N.Y. Civ. Prac. Law” § 1402 (McKinney Supp. 1976). This approach avoids the all-or-nothing aspect of implied indemnity law. In most situations, fault will be apportioned among product seller defendants. However, a situation could arise where the trier of fact could find that one product seller in the distribution chain was responsible for a product injury. This section should be read in conjunction with Section 113.

Subsection (a) establishes the basic rule that contribution will be determined by the proportionate responsibility of the defendants. Section 111 outlines the procedure for the trier of fact to make the appropriate determinations.

Subsection (b) outlines a simplified procedure where a party who has paid more than a proportionate share can recover from one who has paid less.

Subsection (c) indicates that if the court has not determined the proportionate responsibility of the parties, contribution may be obtained in a separate action.

Subsection (d) indicates when a contribution action may be brought by a joint tortfeasor who has settled with claimant.

Subsection (e) sets time limits for bringing a contribution action.

It should be noted that contribution is appropriate among joint tortfeasors; each defendant contributing to the same harm is liable to the claimant for the whole amount of damages. If the defendants are liable for separate harms, contribution is not appropriate. See UCFA, comment on section 4.

Finally, an important issue in the area of contribution is left to the states, that is, the effect of a release of one tortfeasor but not the others. UCFA section 6 suggests an appropriate approach to this issue; the commentary on that section discusses the pros and cons of alternative approaches.

ANALYSIS

SEC. 113. THE RELATIONSHIP BETWEEN PRODUCT LIABILITY AND WORKER COMPENSATION

The relationship between product liability and worker compensation is a major topic covered in depth in the Task Force Report. See VII-85-113. Under current law in a number of states, the interaction of product liability and worker compensation law may result in the manufacturer of a workplace product paying the entire out-of-pocket cost of a product-related workplace injury plus damages for pain and suffering. This result occurs because the product manufacturer is unable to place a portion of the cost of that injury on an employer whose *negligence* may have helped bring about the claimant's

injury. See "Liberty Mut. Ins. Co. v. Westerlind," 373 N.E.2d 957 (Mass. 1978); "Seaboard Coast Line R. Co. v. Smith," 359 So.2d 427 (Fla. 1978); Task Force Report, at VII-89-99.

After weighing many considerations, the Task Force and the United States Department of Commerce concluded that the development of worker compensation as a sole source for recovery in product-related accidents would be the best solution to the problem, but only if the worker received additional benefits in the course of overall worker compensation reform. A model product liability law is an inappropriate vehicle for making major alterations in worker compensation law.

The search for the next solution is not an easy one. If full contribution or indemnity by the product manufacturer against the employer is permitted, the employer may be forced to pay an employee—through the conduit of the third-party tortfeasor—an amount in excess of the employer's statutory worker compensation liability. This, arguably, thwarts a central concept behind worker compensation, *i.e.*, that the employer and employee receive the benefits of a guaranteed, fixed schedule, non-fault recovery system, which constitutes the *exclusive* liability of the employer. On the other hand, if contribution or indemnity is not allowed, the product manufacturer will bear the burden of a full common law judgment, despite the possibly greater responsibility of the employer. As the Supreme Court of Minnesota recently noted, this "obvious inequity is further exacerbated by the right of the employer to recover directly or indirectly from the third party the amount he has paid in compensation regardless of the employer's own negligence." See "Lambertson v. Cincinnati Corp.," 257 N.W.2d 679, 684 (Minn. 1977).

Equally troublesome is the fact that the present system appears to dull employer incentives to keep workplace products safe. the ISO "Closed Claim Survey" suggests that employer negligence is involved in 56 percent of product liability workplace cases. See ISO "Closed Claim Survey," Report 10, at 81 (1978).

The solution adopted by Section 113 has the support of the Supreme Court of Minnesota in "Lambertson v. Cincinnati Corp.," *supra*. The product manufacturer is allowed limited contribution up to the amount of the worker compensation lien. This reduces the inequity against the product manufacturer, but preserves the employer's interest in not paying more than worker compensation liability. Compare "Skinner v. Reed-Prentice Division, Etc.," 70 Ill. 2d 1, 374 N.E.2d 437 (1977)(full contribution allowed).

Admittedly, a shortcoming of Section 113's approach is that it does not reduce transaction costs substantially. Compare the approach suggested by the American Insurance Association, "Product Liability Legislative Package," *supra*, at 64. Also, the employer will not necessarily bear a full share of the economic costs of the injury sustained by the claimant. Nevertheless, considering all of the equities involved, Section 113 appears to offer the soundest solution apart from totally modifying worker compensation law to create a sole source remedy.

ANALYSIS

SEC. 114. THE INDIVIDUAL RESPONSIBILITY OF PRODUCT SELLERS OTHER THAN MANUFACTURERS

Section 114, derived in part from Tennessee law, *see* "Ten. Code Ann." § 23-3706 (Supp. 1978), addresses the problem of excessive product liability costs for parties in the distribution chain other than manufacturers in a way that does not compromise incentives for risk prevention. It also leaves the claimant with a viable defendant whenever he or she has been injured by a defective product.

The ISO "Closed Claim Survey" shows that manufacturers account for 87 percent of the total product liability payment amount, while wholesalers and retailers account for 4.6 percent. *See* ISO "Closed Claim Survey," Report 3, at 35 (1977). Case law suggests that distributors and retailers of products often shift this cost on to the manufacturer through an indemnity suit. *See e.g.*, "Hales v. Monroe," 544 F.2d 331, 332 (8th Cir. 1976); "Anderson v. Somborg," 158 N.J. Super. 384, 386 A.2d 413, 419-20 (1978); "Litton Systems, Inc. v. Shaw's Sales & Serv. Ltd.," 119 Ariz. 10, 579 P.2d 48, 50 (1978).

Despite their relatively small role vis-a-vis manufacturers as product liability defendants, retailers and distributors frequently are brought into a product liability suit. *See, e.g.*, "Tucson Industries, Inc., v. Schwartz," 108 Ariz. 464, 501 P.2d 936 (1976); "Vergott v. Deseret Pharmaceutical Co., Inc.," 463 F.2d 12 (5th Cir. 1972); "Duckworth v. Ford Motor Co.," 320 F.2d 130 (3d Cir. 1963). In view of ISO data showing that for every dollar of claims paid, at least 35 cents is spent in defense costs, *see* ISO, "Closed Claims Survey." Report 14, at 118, the end result is that retailers and distributors are subject to substantial product liability costs, both in terms of premiums and defense costs. These costs are added to the price of products and waste legal resources. *See* "Pender v. Skillcraft Industries, Inc.," 358 So.2d 45 (Fla. App. 1978).

Under Section 114, product sellers other than manufacturers must exercise reasonable care in their handling of products. This obligation includes warning about discoverable hazards. The focus of judicial inquiry will be on the opportunity the product seller (other than a manufacturer) had to discover the hazard and on whether circumstances put the seller on notice as to the character of the product. *See* "Edwards v. E. I. DuPont de Nemours & Co.," 183 F.2d 165, 167 (5th Cir. 1950).

Subsection (a) provides that non-manufacturer product sellers are not subject to liability when they had no reasonable opportunity for product inspection which would or should, in the exercise of the defective condition. For example, if a defective product is in a sealed container and there is no way for a retailer to be aware of the condition, the retailer is not liable. In general, Section 114 does not impose liability on non-manufacturer product sellers where there are defects in construction or defects in design that a reasonable person would have had no opportunity to discover. The manufacturer can avoid many of these defects; the distributor or retailer cannot.

However, a non-manufacturer product seller can waive the benefits of subsection (a) through an express warranty. Cf. "Ky. Rev. Stat." § 411.340 (1978). For the purposes of this section, the term manufacturer is defined in Section 102(5).

Subsection (b) addresses the justifiable concern of Justice Traynor in "Vandermark v. Ford Motor Co.," 61 Cal. 2d 256, 37 Cal. Rptr. 896, 899, (1964) that:

In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in ensuring that the product is safe or may be in a position to exert pressure on the manufacture to that end.

It should be noted that a number of courts have extended strict liability to retailers. See, e.g., "McKisson v. Sales Affiliates, Inc.," 416 S.W.2d 787 (Tex. 1967); "Houseman v. C. A. Dawson & Co.," 106 Ill. App. 2d 225, 245 N.E.2d 886 (1969). See also U.C.C. § 2-315.

If the manufacturer is not subject to service of process or has been judicially declared insolvent, or where a court determines that the claimant would have appreciable difficulty in enforcing a judgment against the product manufacturer, the retailer or distributor has the same strict liability obligations as a manufacturer. Thus, subsection (b) only operates where a member of the enterprise is reasonably available to the injured plaintiff.

Some economists may criticize the thrust of Section 114 to the extent that it makes compensation of the victim paramount to the structuring of incentives that would optimize product safety. Another approach is that of a recently enacted Nebraska statute which flatly exempts non-manufacturer product sellers from liability unless they have been negligent. See Neb. Legis. Bill No. 665(3)(1978). See also "Sam Shainberg Company of Jackson v. Barlow," 258 So.2d 242, 244 (Miss. 1972) (same result under case law). However, the Nebraska approach can leave a person injured by a *defective* product (as defined by Section 104) without compensation. While this would be the unusual case, the law makes clear that in these situations the party who actually sold the product should bear the loss.

From another perspective on incentives for risk prevention, the obligation under Section 114 to make a reasonable examination of the product should ensure that the retailer or distributor will exert pressure on the manufacturer to make the product safe. Also, retailers or distributors can become manufacturers for the purposes of this Act if they design, assemble, fabricate, or otherwise prepare a product or component part of a product prior to sale, as well as if they hold themselves out as the manufacturer. See Section 102(5) (Definitions) and accompanying commentary.

ANALYSIS

SEC. 115. SANCTIONS AGAINST THE BRINGING OF FRIVOLOUS CLAIMS AND DEFENSES

The ISO data indicate that a substantial amount of product liability

costs are incurred in the defense of product liability claims and lawsuits. See ISO, "Closed Claim Survey," Report No. 14 (1977) (defense costs equal about 35 percent of claim payments. Some have placed the blame for unnecessary defense costs and needless litigation on the contingent fee system. Nevertheless, as the plaintiff's bar properly observes, the contingent fee brings no return to a claimant's attorney where he or she is unsuccessful. On the other hand, some have argued that the contingent fee system has a negative impact in certain product liability cases to the extent that it causes insurers to settle even non-meritorious cases because the cost of defending such cases may be greater than the amount of settlement.

Analysis of the countervailing arguments suggests that the best solution to reducing unnecessary litigation costs is to address the heart of the problem—in short, discourage frivolous claims and defenses.

Section 115 is based, in part, on § 41 of the "Illinois Civil Practice Act" (as amended, 1976). It is also predicated on a proposal of the California Citizens' Commission on Tort Reform advocating sanctions against "frivolous" claims or defenses. See Report of the California Citizens' Commission on Tort Reform, "Righting the Liability Balance," at 146-47, 153-54 (1977).

The underlying purpose of Section 115 has broad support in existing statutes and court rules. Support comes from Rule 11 of the Federal Rules of Civil Procedure, which subjects an attorney to disciplinary action if he or she knowingly files a pleading or defense where no grounds support it. See "Barnett v. Laborers's Inter. U. of North America," 75 F.R.D. 544 (W.D. Pa. 1977). Similarly, Federal Rule of Appellate Procedure 38 permits a court to award "just damages and single or double costs" to a party who has been subject to a "frivolous" appeal. Additionally, Federal Rule of Civil Procedure 37(c) provides sanctions for an unreasonable failure to admit averments of fact or the genuineness of documents. In the Federal courts, the above rules are supplemented by 28 "U.S.C." § 1927 (1976) (imposing costs on an attorney who "multiplies the proceedings***). See "A.L.R." 3d 209 (1976).

Under subsection (a), the statute may be invoked by either a product liability claimant or seller. Recovery is limited to reasonable attorney's fees and other costs that would not have been expended but for the fact that the opposing party pursued a claim or defense that was frivolous.

Under subsection (b), to make a finding that the claim was frivolous, the court must make a finding that the claim was without *any* reasonable legal or factual basis. This standard allows full room for bringing claims under novel legal theories.

Subsection (c) provides additional assurances that only frivolous claims will be sanctioned. First, the court may only impose damages under Section 115 on the basis of clear and convincing evidence, not merely the preponderance, of evidence. See "State of West Virginia v. Chas. Pfizer & Co.," 440 F.2d 1079, 1092 (2d Cir. 1971). Second, the court must set forth its findings of fact.

Subsection (d) gives the court latitude to impose costs on either attorney or client. As the Task Force Report noted, it is unlikely that many plaintiffs will be financially able to respond to such a claim. Task Force Report, at VII-61. It must be remembered that the attorney is in the best position to make a judgment about the reasonableness of bringing a claim or raising a defense. See ABA Code of Professional Responsibility, DR 7-102(A)(1)(2).

Subsection (e) protects a claimant's attorney who has expended time opposing a frivolous *defense*. This section can be invoked even where the claimant has *lost* a case.

Subsection (f) makes clear that recovery under this section is limited to expenses invoked by plaintiff or defendant and not those of parties outside the lawsuit.

ANALYSIS

SEC. 116. ARBITRATION

The Task Force Report suggested that compulsory non-binding arbitration may result in more accurate decisions, reduce overall litigation costs, and expedite the decision process. See Task Force Report, at VII-229-39.

Other reasons offered in support of arbitration procedures in product liability cases include: (1) Cases would be decided more accurately because a small group, with a member who is an expert in the field, should be able to comprehend the esoteric details of product liability cases; (2) Overtime, a resource bank of relatively neutral experts less easily misled (in technical areas) than a jury of laypersons could be developed; (3) Arbitrators should be less affected by the emotional aspects of the case or by the artistry of counsel; and (4) The privacy of arbitration proceedings (as compared to judicial proceedings) should prompt more complete revelation of special manufacturing designs or processes. This, in turn, would permit more accurate judgments. See Task Force Report, at VII-235.

The ISO "Closed Claim Survey" suggests further that arbitration should also reduce accident reparation transaction costs. Even allowing for the fact that more substantial product liability claims are litigated to a verdict than are handled by arbitration, ISO data indicate that the average expense for lawyers as well as other allocated loss adjustments costs is considerably less when the case is handled by binding arbitration as compared with a court verdict. See ISO "Closed Claim Survey," Report 14, at 120.

On the other hand, costs may increase under arbitration if there are numerous appeals for trials *de novo*. This potential problem may not be as serious, however, as once thought. Data collected by the Department of Justice show that appeal rates at the state level for a trial *de novo* have ranged from 5 to no more than 15 percent of all cases arbitrated. See Hearings before the Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, United States Senate, 95th Cong., 2d Sess., April 14, 1978. (Statement of Attorney General, Griffin B. Bell). See also Report of the California Citizens Commission on Tort reform. "Righting the Liability Bal-

ance," at 143 (1977) citing rejection of arbitration should expedite the reparations process. The Task Force Report showed that in the medical malpractice area, for example, the arbitration process had achieved a more expeditious resolution of claims than those operating under the jury system. See Task Force Report, at VII-238.

Indeed, the benefits of arbitration have prompted the Department of Justice to recommend that mandatory non-binding arbitration be used in federal courts in all tort and contract cases. The Department of Justice reached this conclusion after its Office of Judicial Improvements made a thorough analysis of the matter in a study conducted wholly independently of the Task Force Report. These concurrent efforts appear to have reached the same conclusion.

Section 1-6 draws on portions of the Department of Justice's proposed bill on mandatory, non-binding arbitration, see S. 2253, 95th Cong. 1st Sess.; H.R. 9778, 95th Cong., 1st Sess., the Statement of Attorney General Griffin B. Bell, *supra*, as well as state legislation on the topic of arbitration.

(a) *Applicability.* The Act provides for mandatory arbitration where the amount in dispute is less than \$30,000, exclusive of interest and cost. While the figure is \$20,000 less than the Department of Justice Bill's \$50,000 level, it should cover the bulk of product liability claims. In that regard, the ISO closed claim data, trended for severity, show that the average paid claim in bodily injury cases is \$26,004. While some have suggested limiting arbitration to smaller claims, it is the larger claims that have been the greater cost items in product liability cases, See ISO, "Closed Claim Survey," at 113.

While there has been no state experience with cases at the \$30,000 level, Attorney General Bell has noted that when Pennsylvania increased the jurisdictional amount for the state's arbitration program from \$3,000 to \$10,000, there was no increase in the appeal rate. See Statement of Attorney General Griffin B. Bell, *supra*.

It seems relatively certain that an arbitration procedure will help expedite and reduce costs connected with smaller claims. ISO closed claim data show that the large majority of product liability payments are relatively small (more than two-thirds are under \$1,000—even when trended for severity). See ISO, "Closed Claim Survey," at 113.

(b) *Rules Governing.* Subsection (1) indicates that arbitrators should apply the product liability substantive law rules of this Act. Where the Act does not provide a rule of decision, relevant state law would be applied.

Subsection (2) indicates that where a procedure is not covered, *e.g.*, when a court can vacate a judgment, the Uniform Arbitration Act (UAA) (enacted in a number of states) is to be used as a resource.

The Act also permits the state to designate an alternative source of rules in subsection (3).

(c) *Arbitrators.* The rules provide latitude for the parties to select a single arbitrator. Otherwise, the arbitration is to be conducted by three persons, one who is a lawyer or retired judge, one who has expertise in the subject matter area that is in dispute, and one who is a layperson. This provision differs

slightly from the Department of Justice proposal in light of the needs of product liability. Having an individual who is familiar with the esoteric nature of the subject matter involved will help expedite the case and serve as a deterrent to the presentation of biased expert testimony. In addition, this subsection provides for a layperson to be included to help assure that the consumer perspective regarding product safety is represented. The process of selecting a layperson may be complicated, but it is suggested that either normal jury rolls be utilized or a list of laypersons be compiled for this purpose.

Aside from general guidelines regarding fairness and lack of bias, the Act does not outline the method of choosing arbitrators, but leaves that matter to the individual states. A state can help implement the general guidelines by requiring each arbitration panel candidate to disclose any personal acquaintance with the parties or their counsel and allow a *voir dire* examination. *see* Mich. "Comp. Laws Ann." § 600.5045(1) (2) (Supp. 1978). Some of the better procedures include:

(1) Having the American Arbitration Association select a pool of candidates according to its established selection procedures. Each party is allowed to reject certain candidates and rate the remainder in order of preference. Additional provisions take effect if this procedure fails to produce a panel. *See* "Mich. Comp. Laws Ann." § 600.5044(4)(5) (Supp. 1978);

(2) Having the court appoint arbitrators. "Mass. Gen. Laws Ann." ch. 231, § 60B (1978).

(3) Having an arbitration administrator appoint arbitrators. "Wis. Stat. Ann." § 655.02 (1978).

(4) Having the parties and court combine to appoint arbitrators. "Neb. Rev. Stat." § 44-2840, 2841 (1976); "Ohio Rev. Code Ann." § 21(A) (1977).

(d) *Arbitrators' Powers*. These provisions are taken from the Department of Justice proposal on arbitration. They grant the arbitrators jurisdiction and also give them powers of subpoena.

(e) *Commencement*. This provision is also derived from the Department of Justice proposal. Its purpose is to help expedite the proceeding. The Act contains a slight modification of the Justice proposal in order to allow an extension for "good cause shown." This seems appropriate in light of the fact that some product liability cases are very complex. *Cf.* "Ariz. Rev. Stat. Ann." § 12-567(C) (Supp. 1978)(medical malpractice).

(f) *Evidence*. One method of expediting the process is to use informal means of proof. Nevertheless, some guidelines are needed. The Act follows the department of Justice proposal in referring to the Federal Rules of Evidence as general guidelines. Strict adherence to rules of evidence is not required. *See* "Ariz. Rev. Stat. Ann." § 12-567-(D) (Supp. 1978).

(g) *Transcript of Proceeding*. With respect to the provision of a transcript of proceeding, the Act generally follows the Department of Justice draft.

(h) *Arbitration Award and Judgment*. The Act follows the Department of Justice proposal provisions on award and judgment. The parties may request a trial *de novo* on issues of law or fact. If they do not so request in a

timely manner, the action is at an end—there is no appeal.

(i) *Trial De Novo*. The Act follows the Department of Justice proposal provisions on trial *de novo*. Additional guidance on this topic may be found in the Uniform Arbitration Act § 8-131. The Act excludes evidence about the existence of a prior arbitration proceeding, the nature or amount of the award, and matters concerning the conduct of the arbitration (with the exception of the admission of testimony for impeachment purposes) at the trial *de novo*. A number of state medical malpractice arbitration statutes have taken the opposite view, *i.e.*, they admit the results of the arbitration proceeding on the premise that this will be a deterrent against persons seeking retrials of the proceeding. *See, e.g.*, "Ariz. Rev. Stat. Ann." § 12-567(M) (Supp. 1978); "Mass. Gen. Laws Ann." ch. 231 § 60B (Supp. 1978). *Cf.* "Wis. Stat. Ann." § 655 19(2) (1978) (excluding findings and order of arbitration panel). *See also* Volume VI, "Legal Study," at 155-56.

The approach of Section 116 would appear to be in accord with the Federal Constitution. *Cf.* "ExParte Peterson," 253 U.S. 300, 309 (1920). Moreover, with the exception of two Ohio lower court decisions, state courts have upheld the constitutionality of provisions that do admit panel findings before the jury. *See* "Eastin v. Broomfield," 116 Ariz. 576, 570 P.2d 744, 750 (1977); "Attorney General v. Johnson," 282 Md. 168, 385 A.2d 57, 67-68 (1978); "Paro v. Longwood Hospital," 369 N.E.2d 985 (Mass. 1977); "Prendegast v. Nelson," 199 Neb. 97, 256 N.W.2d 657 (1977); "State ex rel. Strykowski, v. Wilkie," 81 Wis.2d 491, 261 N.W.2d 434 (1978). *Contra* "Simon v. St. Elizabeth Medical Center," 3 Ohio Op. 3d 164, 355 N.E.2d 903, 907-909 (C.P. 1976); "Graley v. Satayatham," 74 Ohio Op.2d 316, 343 N.E.2d 832 (C.P. 1976). *See generally*, Redish, "Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications," 55 "Tex. L. Rev." 759, 793 (1977); Lenore, "Mandatory Medical Malpractice Mediation Panels—A Constitutional Examination," 44 "Ins. Counsel J." 416, 422 (1977).

Nevertheless, a jury may have difficulty evaluating the conclusions of another fact finder where the jury was not privy to the prior fact finder's qualifications and mode of operation. Even if these matters could be explained to the jury, it might get sidetracked from the actual evidence in the case. *See* the observations of Judge Hinton in a classic comment, 27 "Ill. L. Rev." 195 (1932); 18 "A.L.R." 2d 1287 (1951). *But see* Federal Rule of Evidence 803 (22) (admitting felony convictions in a cognate civil case). For these reasons, the Act has followed the Department of Justice proposal on the issue.

Section 116(i)(iv)(aa) chooses an alternative deterrent against ill-considered appeals for trials *de novo* that does not interfere with the trial *de novo*, if a party fails to obtain a judgment more favorable than the arbitration award, the court will assess the cost of the arbitration proceeding, including the amount of arbitration fees, plus interest, against that party.

In light of the fact that the present product liability system has created serious problems and the fact that compulsory binding arbitration has the potential for dealing with some of those problems, this slight incentive for

retaining a sound arbitration award should not run afoul of constitutions in most states. *See* Task Force Report, at VII-233. The Act does not enumerate grounds upon which a court may vacate an arbitration award. Guidance on this issue may be obtained from section 12 of the Uniform Arbitration Act.

ANALYSIS

SEC. 117. EXPERT TESTIMONY

In General. The Task Force's "Legal Study" demonstrated that product liability cases often are compromised because of the lack of standards with regard to selecting and presenting expert testimony *See* Volume IV, "Legal Study," *supra* at 153-155. One part of the problem is the biased expert: another is the unqualified expert.

Even if experts are properly qualified and objective, a jury of laypersons is often in a poor position to determine which expert is correct. For this reason, this Act gives the court power to make greater use of pre-trial arbitration where an unbiased, qualified expert will serve on the panel. *See* Section 116. Where arbitration is not used, however, this section should promote the goal of presenting objectives and sound expert testimony to the jury.

(a) *Appointment of Experts.* Subsection (a) is based on Rule 706 of the Federal Rules of Evidence and similar state rules. It indicates that courts have the power to appoint experts on their own authority. A number of courts have utilized this power even without the benefit of Federal Rule of Evidence 706 or a similar state rule. *See* 95 "A.L.R." 2d 390 (1964). As the Task Force Report noted, the presence of a court-appointed expert "has a cautionary impact on the expert for hire whose theories at trial are subject to dispute not only by an adversary expert, but also by a neutral-court-appointed one." Task Force Report, at VII-43, citing, Mitchell, "The Proposed Federal Rules of Evidence: How They Affect Product Liability Practice," 12 "Duquesne L. Rev." 551, 557-58 (1974). *See also* 2 J. Wigmore, "Evidence" § 563, at 648 (3d ed. 1940) ("*** this expedient would remove most *** abuses").

One problem with court-appointed experts is that the trier of fact may give them an aura of infallibility they do not deserve. Under Section 117, this possibility is diminished because the experts are subject to cross-examination by *both* parties. Also, the section allows the court in its discretion to decline to disclose to the jury that the expert witness is, in fact, court-appointed.

(b) *Compensation.* Under Federal Rule of Evidence 706 and similar state rules, compensation of experts is left to the judge's discretion. This subsection goes a step further and provides two guidelines for compensating experts. Both guidelines should serve as an added inducement for attorneys to present objective expert testimony. The guidelines suggest that the court may impose the cost of the court-appointed expert on losing parties as well as on parties the court finds have been wrong in their estimation of damages.

(c) *Disclosure of Appointment.* This section follows Federal Rules of Evidence 706. In most instances, it is important for the trier of fact to appreciate that the witness is court-appointed. However, circumstances may arise

where the court believes that disclosure of that fact will give the witness too much credence with the jury. Therefore, the court has discretion to withhold the information when it is appropriate to do so.

(d) *Parties' Experts of Own Selection*. This section also allows Federal Rule of Evidence 706. Precluding the parties from introducing their own experts would best too much power in court-appointed experts.

(e) *Pre-Trial Evaluation of Experts*. A rule authorizing a court-appointed expert does not, in and of itself, provide guidance about who is properly qualified to testify in product liability cases. There are many approaches to that issue. One approach, used in some medical malpractice statutes, would require that an expert witness "spend a substantial portion of his professional time in the actual practice of his area of expertise. This was not followed because a person may be well-versed in technical product liability matters even if he does devote substantial time to testifying in cases. See Task Force Report, at VII-44. Unfortunately, it is impractical to utilize a "standard test" for all experts in product liability cases. See Donaher, Pichler, Twerski, and Weinstein, "The Technological Expert in Products Liability Litigation," 52 "Tex. L. Rev." 1303, 1325 (1974).

(1) *Need for Pre-Trial Evaluation*. It is not necessary or cost-efficient to utilize the procedure outlined by Donaher *et. al.*, *supra*, in all cases. This rule gives some guidance to the trial court in deciding whether to conduct a pre-trial hearing on the qualifications of expert witnesses. It is appropriate to do so in more complex cases and also where the pre-trial hearing would serve as a deterrent to the presentation of witnesses who were not qualified. Either party may bring this matter before the court by motion.

(2) *Factors in Evaluation*. The factors in evaluation are drawn from Donaher *et. al.*, *supra*.

The court should inquire into the expert witness' background and skills and determine whether they are appropriate for the purpose of the case. The court should not only examine the witness' formal education, but also whether he or she had undertaken specific preparation for the litigation before the court. Finally, the court should examine a witness for bias. A witness with marginal expert skills, but who also had a strong bias should be considered unqualified.

(3) *Findings of Fact*. If it seems clear to the court that the expert's background and experience do not qualify the expert to testify, it should state this conclusion in its findings of fact under section (h).

ANALYSIS

SEC. 118. NON-PECUNIARY DAMAGES

Non-pecuniary damages include awards for pain and mental suffering. They are to be contrasted with pecuniary damages which compensate victims for lost wages, medical costs, and other expenditures brought about by a product-related accident.

According to the ISO Closed Claim Survey, 70 percent of claims closed

with payment include amounts in addition to a claimant's pecuniary loss. See ISO, "Closed Claim Survey," at 54 (1978). Moreover, the average amount of payment above pecuniary loss increases significantly in the higher payment ranges. *Id.*, at 54-55. A most important reason for the difficulty in setting product liability rates is the "open-endedness" of damages for pain and suffering. See Task Force Report, a VII-64-65.

The Task Force Report suggested that limits on awards for pain and suffering "would reduce uncertainty and thereby mitigate the 'apprehension factor' that has contributed to the rise in product liability insurance rates." *Id.*, at VII-65. Nevertheless, such awards have deep historical roots and should not be limited in a manner that unreasonably curtails the rights of injured parties.

Section 118 addresses each of the major rationales offered in support of award for non-pecuniary damages. First, in proposing to limit such awards, this section implicitly takes the position that the common law rationale for pain and suffering awards generally does not apply under this Act. The award for non-pecuniary damages arose in early common law cases as a substitute for an injured plaintiff seeking personal "vengeful retaliation." See Task Force Report, *Id.* In those cases, the defendant usually committed an intentional wrong. This rationale has little application to cases arising under strict product liability. Under this Act, a manufacturer is liable for harm caused by products found to be defective in construction regardless of fault. In cases of harm caused by products found to be defective in design or defective because of the absence of adequate warnings, the trier of fact must consider more sophisticated matters than whether the defendant "acted as a reasonable person under all the circumstances"—the general negligence standard.

A second rationale to support awarding damages for pain and suffering is that they have an important deterrent function. The Task Force Report found evidence that the general product liability problem caused manufacturers to devote more attention to product liability loss prevention techniques. See Task Force Report, at VI-50. Section 117 retains this deterrent function while placing some reasonable limits on awards for pain and suffering.

A third rationale, supported by members of the plaintiff's bar and some economic legal scholars, is that awards for pain and suffering are a reasonable attempt to provide some compensation for the serious discomfort that a plaintiff endures. See R. Posner, "Economic Analysis of the Law," 82 (1972). Other studies have questioned whether monetary awards for pain and suffering do anything to alleviate the symptoms they are alleged to address. See J. O'Connell and R. Simon, "Payment for Pain & Suffering" (1972); Peck, "Compensation for Pain: A Reappraisal in Light of New Medical Evidence," 72 "Mich. L. Rev." 1355 (1974). Section 117 adheres to the former assumption to this degree: When a claimant has suffered permanent serious disfigurement or serious mental illness, the amount of damages for pain and suffering are left to the sound discretion of the trier of fact with appropriate review by the court in cases of abuse of that discretion.

However, where the claimant has not suffered permanent serious disfigurement or permanent mental illness as a result of the product-related harm, damages for pain and suffering are limited to \$25,000.

An ample body of case law in the area of worker compensation and more recently automobile injury reparation statutes serve as guidance for courts in determining "permanent serious disfigurements." *See, e.g., "Falcone v. Branker,"* 135 N.J. Super. 137, 342 A.2d 875 (1975) (collecting cases). That term has been held to provide a sufficient basis for legal interpretation. *See "In Re Requests of Governor and Senate, Etc.,"* 389 Mich. 411, 208 N.W.2d 469, 480 (1973).

Courts also have defined and explained the term "mental illness" in a number of contexts. *See "Carroll v. Cobb,"* 139 N.J. Super. 439, 354 A.2d 355 (1976) (voter registration requirements); *"Sachs v. Commercial Insurance Co. of Newark, N.J."* 119 N.J. Super. 226, 290 A.2d 760 (1972) (insurance policy); *"In re Humphrey,"* 236 N.C. 141, 71 S.E.2d 915 (1952) (incompetency proceedings); *"Commonwealth v. Moon,"* 383 Pa. 18, 117 A.2d 96 (1955) (committal proceedings); *"Interstate Life & Accident Insurance Co. v. Houston,"* 50 Tenn. App. 172, 360 S.W.2d 71 (1962) (insanity exclusion provision).

Objections to limits on awards for non-pecuniary damages take several forms: One is that such limits may violate due process or equal protection clauses of some state constitutions. *Cf. "Wright v. Central DuPage Hosp. Assoc.,"* 63 Ill. 2d 313, 347 N.E.2d 736, 743 (1976) (restriction of amount of general damages in medical malpractice); *"Graley v. Satayatham,"* 74 Ohio Op. 2d 316, 343 N.E.2d 832, 836 (C.P. 1976) (requiring list of collateral source benefits in medical malpractice). Another is state constitutional prohibitions on damage limitations. *See, e.g., "Ariz. Rev. Stat. Ann.,"* Const. Art. 18, § 6 (1956); *"Ky. Rev. Stat. Ann.,"* Const. § 54 (1963); *"Penn. Stat. Ann.,"* Const. Art. 3, § 18 (1969). An argument that § 117 does not violate such prohibitions is that a strict product liability cause of action did not exist at the time the constitution was adopted and is therefore exempt from its interdictions. *See "Rail N Ranch Corp. v. State,"* 7 Ariz. App. 558, 441 P.2d 786, 788 (1968).

These objections notwithstanding, Section 118 can be supported by three basic rationales. First, the common law reason for the rule does not support the application of damages for pain and suffering in strict liability cases. Second, the common law rule will continue to operate where injuries are serious. *Cf. "Rybeck v. Rybeck,"* 141 N.J. Super. 481, 358 A.2d 828, 836 (1976), *appeal dismissed*, 150 N.J. Super. 151, 375 A.2d 269 (1977) (limited court access for pain and suffering in no-fault—"the law is permitted to treat large problems differently from small problems if there is a rational basis for the difference"). Finally, some ceiling or limit on damages for pain and suffering will reduce uncertainty in one of the greatest liability insurance rate-making problem areas.

ANALYSIS

SEC. 119. THE COLLATERAL SOURCE RULE

The collateral source rule is a principle of tort law under which the defendant is not permitted to take "credit" for any money that an injured plaintiff received from another (collateral) source. The rule embraces both payments for loss of wages and medical expenditures.

The rule may permit double recovery by the plaintiff and also increase transaction costs. Section 119 recognizes these possibilities and provides for a limited modification of the collateral source rule where the claimant has received compensation for the same damages from a public source. Its approach is similar to that followed in medical malpractice by the states of Tennessee and Pennsylvania. *See* Task Force, "Legal Study," Vol. V, at 146.

There are two significant arguments against proposals to modify the existing rule. The first is that the "wrongdoer" should not have the benefit of a windfall. Proponents contend that it is better that the plaintiff have the benefit of a windfall than the defendant.

This argument can be rebutted in the context of product liability. Under Section 104 of this Act and the law of most states, product sellers may be held responsible for damages on a strict liability basis not merely because the defendant has engaged in negligent or intentionally wrongful conduct. Therefore, a selective modification of the collateral source rule in the context of product liability, as compared with medical malpractice, may be justified. *Cf.* "Graley v. Satayatham," 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C. P. 1976); "Simon v. St. Elizabeth Medical Center," 3 Ohio Op. 3d 164, 355 N. E. 2d 903 (C. P. 1976) (holding unconstitutional selective abolition in medical malpractice context). Other sates, however, have upheld such selective abolition, or modification. *See* "Eastin v. Broomfield," 116 Ariz. 576, 570 P.2d 744, 751-752 (1977).

The second argument against modifying the collateral source rule is that a manufacturer should not be permitted to "externalize" the cost of an injury caused by its products. This argument is very strong where the injured plaintiff has purchased health and accident coverage. In that instance, the defendant product seller should not be able to benefit from the claimant's prior prudence. Nevertheless, some proposals have modified the rule in that situation. *See* "Neb. Rev. Sta." § 44-2819 (Supp. 1976); "Prendergast v. Nelson," 190 Neb. 97, 256 N.W.2d 657, 669 (1977); National Product Liability Council, "Proposed Uniform State Product Liability Act," § 207 (undated). *See also* Comment, "An Analysis of State Legislative Responses to the Medical Malpractice Crisis," 1975 "Duke L. J." 1417, 1447-59.

On the other hand, where the claimant has received damages from a public source, the argument is less persuasive. The benefits received were not through the claimant's pre-accident financial planning or made a part or one's remuneration from employment; rather they were derived from public tax funds that accumulated in part by contributions from the product seller. Since the product seller would be able to distribute the same cost again

among consumers through product pricing, the public may be subjected to excessive costs.

A probable effect of Section 119 will be to reduce double expenditures in the context of medical costs. The ISO "Closed Claim Survey" suggests that medical costs represent approximately 19.7 percent of product liability claims. *See* ISO, "Closed Claim Survey," at 57 (1977). Nevertheless, the cost savings generated by this section probably will be modest. The ISO closed claim data, which were quite limited on this point, show that approximately 6.4 percent of claimants have been reimbursed by public collateral sources. *See* ISO, "Closed Claim Survey," at 181 (1977). Collateral sources paid for 19.8 percent of the claims in those cases. (This closely parallels the general percentage of medical benefits.) Although generating only modest savings, Section 119 should help reduce overall insurance costs. Liability insurers should take this matter into account when they formulate rates and premiums.

Section 119 also takes account of existing legislation that may authorize subrogation by public collateral sources. In order to reduce transaction costs and duplicative distribution costs, this section precludes subrogation.

Finally, Section 119 does not alter existing law that prohibits the defendant from introducing in evidence the fact that the plaintiff has been indemnified by a collateral source. That approach was rejected because it would leave the trier of fact in the role of balancing the delicate policy elements that surround proposals calling for abolition of the collateral source rule. Also, that approach would reduce the potential benefit of collateral source rule modifications in that it would increase transaction costs and lower predictability and consistency in the allocation of collateral benefits. *See* Task Force Report, at VII-74-75. *Cf.* Defense Research Institute, "Products Liability Position Paper," at 44-45 (1976) (advocating modification of evidentiary rules to allow trier of fact to consider all collateral benefits).

ANALYSIS

SEC. 120 PUNITIVE DAMAGES

Some product sellers and others have called for the abolition of punitive damages on the ground that they serve no proper "tort law" purpose, *see* Proposed Uniform State Product Liability Act § 206 (National Product Liability Council) (undated); *see generally* the Defense Research Institute Monograph, "The Case Against Punitive Damages" (1969) (marshalling arguments) and at least one court has accepted these arguments in the area of product liability. *See* "Walbrun v. Berkel, Inc.," 433 F. Supp. 384-85 (E.D. Wis. 1976); "Roginsky v. Richardson-Merrell, Inc.," 378 F.2d 832 (2d Cir. 1967) (dictum).

Nevertheless, as Section 120 acknowledges, punitive damages serve an important function in deterring product sellers from producing, distributing, or selling dangerous products. *See* "Toole v. Richardson-Merrell, Inc.," 251 Cal. App. 2d 630, 60 Cal. Rptr. 398 (1967); "Gillham v. Admiral Corp.," 523 F.2d 102 (6th Cir. 1975). At the same time, this section recognizes and ad-

addresses problems that the concept has caused in the context of product liability.

While many product sellers have expressed great concern about the economic impact of punitive damages, the ISO Closed Claim Survey suggests that the number of cases in which such damages are imposed is insubstantial. See ISO, "Closed Claim Survey," at 183 (1977). Nevertheless, concern about punitive damages has caused some insurers to decline insurance coverage for these damages. Also, a number of states and some insurers have declined to do so for the policy reason that a product seller should not be permitted to pass this cost on to an insurer. Transcending all concerns is the total lack of structure surrounding punitive damages.

Subsection (a) addresses a basic argument against punitive damages, namely that they apply a criminal law sanction to a civil law case. The defendant does not have the benefit of constitutional protections that would be available to him under the criminal law. Section 120(a) moves away from the ordinary "preponderance of evidence" test of civil cases and toward the criminal standard, but does not turn completely to a pure criminal law standard of proof "beyond a reasonable doubt." Instead, the Act requires the plaintiff to show by "clear and convincing" evidence that punitive damages are justified. See Section 102(7) (Definitions).

Section 120(a) also requires that the claimant show that the product seller's conduct demonstrated reckless disregard for the safety of others. By "reckless disregard" the provision means a conscious indifference to the safety of persons who might be injured by the product, the traditional barrier that the plaintiff must cross in order to obtain punitive damages. See W. Prosser, "Torts," at 9-10 (4th Ed. 1971). The reckless disregard standard is identified in statutory form to avoid any possible misinterpretation of this basic area of law—it should be clear that a product seller does *not* have to pay punitive damages under ordinary strict liability or negligence standards.

Subsection (b) follows the current common law system in allowing the jury to determine in its discretion whether punitive damages should be awarded. See Prosser, "Torts," *supra*, at 9. On the other hand, this subsection draws upon a newly enacted Minnesota statute (Minn. Stat Ann. 549.21 (1978)) in having the court, rather than the jury, determine the amount of those damages. This approach is in accord with the general pattern of the criminal law where the jury determines "guilt or innocence" and the court imposes sentence. This is particularly appropriate in product liability cases where, under current law, product sellers are potentially subject to repeated imposition of punitive damages for harm caused by a particular product.

Subsection (b) provides guidelines for the court to determine the amount of punitive damages. The guidelines offered are based on "Minn. Stat. Ann." 549.21(3) (1978). The drafters of that statute relied on a very thorough analysis of product liability and punitive damages. See Owen, "Punitive Damages in Products Liability Litigation," 74 "Mich. L. Rev." 1257, 1299-1319 (1976).

Factors (1) and (2) are self-evident. If the facts show that the product seller actually was aware of the specific hazard *and* its seriousness, *and* mar-

keted it anyway, a higher award is in order.

Factor (3), profitability, recognizes that punitive damages may be used to directly attack the profit incentive that generated the misconduct.

Factor (4) is important regardless of the basic requirement that the product seller must have reckless disregard for the safety of others. If the product seller consciously concealed its activities, this augurs for a higher award.

Factor (5) acknowledges that a product seller who was reckless in producing the product, but who acted quickly to remove the product from the market upon discovery of the hazard, should not be subject to as harsh a sanction as one who failed to act. Some have suggested that punitive damages should be awarded only where corporate management has either authorized, participated in, or ratified conduct that shows a conscious or reckless disregard for public safety. *See* Task Force Report, at VII-79. Section 120 rejects that approach because it could foster legal disputes as to whether an individual stood "high enough" in the corporate structure to cause that individual to bear responsibility for punitive damages. Nevertheless, in circumstances where a non-management employee caused the harm and management acted quickly to undo that harm once it was discovered, a lower award may be appropriate.

Factor (6) is traditional under the common law. It is one that has been subject to criticism from product sellers and economists. Nevertheless, in light of the fact that deterrence of wrongful conduct is the principal reason behind punitive damages, it is appropriate to consider the impact an award will have on a particular product seller.

Factor (7) is more important in product liability cases than in others because it addresses the problem of multiple exposure to punitive damages. This factor directs the court to consider both criminal and civil liability to which the product seller has been or may be subjected.

This Act takes the position that the award of punitive damages should go to the claimant and not the state. While the argument that since the damages are non-compensatory they should go to the state has some merit the approach was rejected because of constitutional problems and the fact that it might place a claimant's attorney in a potential conflict of interest situation (is he trying the case for his client or the state?). *See* Task Force Report at VII-79.