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Aaron Twerski

*Brooklyn Law School*, [aaron.twerski@brooklaw.edu](mailto:aaron.twerski@brooklaw.edu)

Alvin S. Weinstein

William A. Donaher

Henry R. Piehler

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# IN DEFENSE OF PROCESS

AARON D. TWERSKI\*  
ALVIN S. WEINSTEIN\*\*  
WILLIAM A. DONAHER\*\*\*  
HENRY R. PIEHLER\*\*\*\*

*In this Article, the authors respond to Professor Henderson's critique of their process proposal. Although they share some of his concerns, they remain convinced that scrutinizing the process by which design decisions are made will better promote the goal of consumer safety.*

Professor Henderson has asked some very hard questions. In the spirit of the Socratic method we shall respond to them by posing other questions. In the process, we may from time to time divert from the hoary Socratic tradition by making some affirmative statements, but, for the most part, we shall be content with tossing some of those red and white nonpolycentric rocks into his own backyard.

Professor Henderson criticizes our suggested "process defense" on three grounds: (1) the process defense is subjective and thus nonverifiable;<sup>1</sup> (2) the clear and convincing evidence burden to be used to establish liability when a manufacturer convinces a court that its "decisionmaking process was comprehensive and well-articulated"<sup>2</sup> is inappropriate for the resolution of polycentric design defect cases;<sup>3</sup> and (3) manufacturers would be afraid to commit themselves to the documentation necessary to establish the defense.<sup>4</sup>

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\*Visiting Professor of Law, Boston University; Professor of Law, Hofstra University. A.B., 1962, Beth Medrash Elyon Research Institute; B.S., 1970, University of Wisconsin; J.D., 1965, Marquette University.

\*\*Professor of Mechanical Engineering and Public Policy, Carnegie-Mellon University; Adjunct Professor of Law, Duquesne University. B.S., 1951, University of Michigan; M.S., 1953, Ph. D., 1955, Carnegie Institute of Technology.

\*\*\*Professor of Law, Duquesne University. A.B., 1949, Catholic University of America; LL.B., 1952, Harvard University.

\*\*\*\*Professor of Metallurgy, Materials Science, and Public Affairs, Carnegie-Mellon University. S.B., 1960, S.M., 1962, Sc.D., 1967, Massachusetts Institute of Technology.

<sup>1</sup> See Henderson, Should a "Process Defense" Be Recognized in Design Defect Cases?, 58 N.Y.U.L. Rev. 585, 593-600 (1981) [hereinafter Henderson, Critique].

<sup>2</sup> Twerski, Weinstein, Donaher & Piehler, Shifting Perspectives in Products Liability: From Quality to Process Standards, 55 N.Y.U.L. Rev. 347, 384 (1980).

<sup>3</sup> Henderson, Critique, supra note 1, at 600-04.

<sup>4</sup> Id. at 606-11.

It is time for some straight talk. Why have commentators<sup>5</sup> and legislators<sup>6</sup> been clamoring for more specific standards with regard to design defect litigation? Although we do not doubt Professor Henderson's sincere concern with the institutional ability of courts to handle polycentric litigation, we question whether this rather philosophical issue is what motivates lawmakers and excites the imagination of the defense bar in their calls for legislative change. We ask Professor Henderson whether in his heart of hearts he believes that his proposals do not themselves suffer from a polycentricity problem. We doubt that this problem will be made manageable by his own statutory proposals that permit the establishment of a *prima facie* design defect case if the suggested alternative design

could have been adopted by the manufacturer for use at the time the product in question was manufactured, without causing increases in the costs of production, distribution or use of the product, or decreases in the utility of the product, *unless such increases and decreases when taken together are significantly outweighed by the added safety benefits of such alternative formula or design.*<sup>7</sup>

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<sup>5</sup> E.g., Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. Rev. 643 (1978).

<sup>6</sup> E.g., Model Uniform Product Liability Act §§ 104, 107, 44 Fed. Reg. 62,714, 62,721-26, 62,728-30 (1979); Colo. Rev. Stat. § 13-21-403 (Cum. Supp. 1980); Ind. Code Ann. § 34-4-20A-4(b)(4) (Burns Cum. Supp. 1980); Ky. Rev. Stat. § 411.310(2) (Cum. Supp. 1980).

<sup>7</sup> Henderson, *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. Rev. 625, 631 (1978) (emphasis added). This standard has been incorporated, with minor alterations, in the National Product Liability Act, H.R. 5626, 96th Cong., 1st Sess. § 5(b)(3), 125 Cong. Rec. H9332 (daily ed. Oct. 17, 1979). Professor Henderson worked on the drafting of this legislation and testified in its favor. *Product Liability: Legislative Hearings on H.R. 5571, H.R. 5258 (identical bills), H.R. 1061, H.R. 2891, H.R. 4204 (identical bills), H.R. 1675, H.R. 1676, H.R. 2964, H.R. 5626 (similar bills) Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 818-30 (1979) (statement of James A. Henderson).*

In addition to the reservations expressed in the text concerning the proposed legislation, we question whether juries are more capable of handling a standard that enjoins them to consider increases in costs and decreases in marketability or utility of a product unless they are "significantly outweighed" by added safety benefits. Does the solution to the problem of polycentricity lie in the phrase "significantly outweighed"? We are doubtful that Professor Henderson can evade the polycentricity question even if the sole standard would be that set forth in the quoted section of his proposed statute, which allows for the finding of a defect if the alternative design would have avoided harm without increasing the costs of buying, using, and consuming the product. See Henderson, *Critique*, *supra* note 1, at 587.

Suppose that a defendant demonstrates that although the suggested alternative might have prevented the plaintiff's injury, additional hazards are introduced into the product by such an alternative, hazards that were not present in the product as originally designed. Suppose too, that although the cost of the altered product might not be "greater," the maintainability, performance, or useful life are also eroded by such an alternative. Can Professor Henderson really believe that the polycentricity he abhors has been magically removed by his "manageable" standard? In fact, we are back to square one, again assessing the polycentric trade-offs, but in a vacuum. If Professor Henderson were to respond that the "costs" that must be considered are not only dollar costs but the kind of costs we have described, then he has mandated a standard that

We would suggest that the solution commentators, legislators, and even Professor Henderson have really been looking for is a method and a rationale for accomplishing greater judicial control of design defect cases through directed verdict practice. That is what motivates us as well. All of us who clamor for some change share a deep concern that too many marginal (close-call) cases have been making their way to juries. That they do so is the inevitable consequence of focusing design defect litigation on the reasonableness of a particular design. The reasonableness standard is one that traditionally belongs to juries and is rarely subject to significant judicial oversight. This standard is sufficient for dealing with the single-incident negligence cases. Issues such as "should the landlord have changed the bulb in the hallway" or "should the homeowner have repaired his picket fence" are fact-sensitive and do not have a significant impact on the whole of society. Design defect litigation is different. It speaks not only to the one case, but to the entirety of a product line and may speak to the safety practices of an industry. There are justifiable grounds for seeking some assurance that only bona fide design defect cases find their way to the jury.

The real question is what kind of trade-offs are to be made for the relinquishment of jury control of the defect issue. Professor Henderson, who views the world through polycentric glasses, sees no need for trade-offs. He is satisfied with establishing a standard that provides for greater specificity and that cuts down on the open-endedness of the litigation. We believe that together with greater judicial control over the issue of defect must come greater judicial responsibility to determine that safety considerations permeated the design process. We are thus unwilling to cut back on the reasonableness standard (vague as it may be) unless there is a judicial inquiry into the design safety review process.

We come now to the question whether our alternative evidentiary standard, which is to be utilized if a court is satisfied that the safety review process has been exhaustive, is suitable for design defect litigation. Professor Henderson contends that a clear and convincing evidence burden will not do as a standard because it does not adequately address the polycentricity of design cases. He thus prefers a "barely reasonable" standard couched in the "significantly outweighed" language set forth above.<sup>8</sup>

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would prevent the consideration of any alternative design. It is simply not probable that any design alternative will not bring into play advantages and disadvantages in utility, safety, repairability, and maintenance. We thus believe that even the more radical part of the statute merely papers over process problems that must be considered.

<sup>8</sup> If indeed the suggested language would accomplish the desired goal of conferring on trial courts greater directed verdict power, we would be inclined to accept the Henderson amend-

We disagree. Professor Henderson ignores the reason we advocate imposition of this higher burden—the belief that a showing of adequate process should lead to a presumption that a product is not defective. This presumption should be overcome only in “instances in which the industry has clearly erred.”<sup>9</sup> The clear and convincing standard has a long tradition as the standard utilized in cases in which courts seek to assure themselves that the evidence is truly persuasive.<sup>10</sup> It is a standard addressed to the directed verdict power of a trial court and is intended as a rigorous standard both at the trial level and at the appellate review stage. It will, in our opinion, more effectively accomplish the goal of creating a higher judicial profile in these cases.

We assume that Professor Henderson would disagree with our rejoinder. He has made it clear that he believes that the problem is not the quality of the evidence, but rather the typology of the case. In fact, he suggests that the more extensive the evidence, the more polycentric and unmanageable the case becomes. Since Professor Henderson has convinced himself that we have become converted to this view of design defect litigation, he finds our solution not equal to the problem.

The short answer to Professor Henderson is that we have yet to see the light. He has convinced us that polycentricity creates some litigation problems that deserve careful attention in the more extreme cases. We remain firm in our opinion that the highly focused nature of products liability litigation in which safety is the central question permits the inquiry to go forward in a sensible fashion. Polycentricity contributes to the phenomenon that design defect questions tend to be “close-call” questions, but only in part. It is beyond the scope of this paper to explore the close-call phenomenon in depth.<sup>11</sup> We have already noted one aspect of design litigation that contributes significantly to the closeness of the question. The mere fact that every design case speaks to an entire product line or an entire industry makes the decision more difficult. The impact of design litigation is so significant that it perforce makes what Professor Henderson would call the “lin-

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ment to our proposal. It is our guess, however, that a change in the substantive standard is less likely to accomplish the result. The changed substantive standard is more likely to find its way to a jury who will now have to ponder the meaning of “significantly outweighed.”

<sup>9</sup> Twerski, Weinstein, Donaher & Piehler, *supra* note 2, at 358.

<sup>10</sup> *Id.* at 375 n.75.

<sup>11</sup> One of the authors (Professor Twerski) intends to explore this problem in depth in an article to be published in 1982. It is tentatively entitled *The New Product Liability No-Duty Rules: Advancing the Art of Judicial Rulemaking*. The article has not yet been committed to any law review.

ear" decision hard to make. We would expect a pilot on a bombing mission to seek greater assurance that he has the appropriate target when he is dropping an atomic bomb than when he is dropping a conventional bomb. Design defect litigation is the atom bomb of tort law. In short, our concern is primarily with linear close-call questions. However, we would suggest that even given Professor Henderson's view, our solution is more likely to address the most pressing need, that of creating greater judicial control through directed verdict practice.

Given that our stated goal is to accomplish greater judicial control over design litigation with some assurance that safety considerations have played a significant part in the design review process, it is understandable that we have structured our test for "good process" as we did. Professor Henderson is quite right that our test is a subjective one. It is indeed a "good faith/comprehensive inquiry" standard.<sup>12</sup> Professor Henderson perceptively notes that we avoided use of the word "reasonable" to define "process." It could not have been a more intentional omission.

We debated among ourselves as to whether "reasonableness" should be used to describe the standard for the safety review process. Professor Henderson concludes that we struck reasonableness from the process definition because to include it would involve the courts in a polycentric balancing question.<sup>13</sup> As we noted, polycentricity was not the problem central to our deliberations.

Why did we avoid describing the desired standard for the safety review process as "reasonable"? First, as noted above, we sought a test that would place decisionmaking responsibility in the hands of the judiciary. The reasonableness question is traditionally for the jury. Second, reasonableness connotes a minimum standard of societal acceptability. We were intent on establishing a test that would require an exhaustive, rigorous, and well-documented approach to safety review. The reasonableness concept has a long and checkered history. Far better to avoid its use when one is seeking to impose a high standard of responsibility. Third, by creating a test administered by the court, we were focusing on classic duty doctrine within the law of torts. By placing its imprimatur on the design safety review process, a court will be telling American industry how exhaustive the process must be before it passes muster. This is a high-level policy decision to be made by a court and can only be made at a subjective level. Many

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<sup>12</sup> See Henderson, Critique, *supra* note 1, at 593 nn.43, 45.

<sup>13</sup> *Id.* at 590-91.

years ago Dean Prosser expressed the opinion that it would not be easy to determine when a duty of reasonable care came into being. He said:

It should be understood at the outset that there is no magic in "duty." It is merely a word with which the court states its conclusion that there is no liability; and it means whatever the court wants it to mean in the particular case. No general formula ever has been devised to state when there is, and when there is not, a duty in negligence cases; and it is very likely that none ever will be. This is because considerations of social policy vary depending on the precise issue before the court and social policy questions always underlie the duty issue.<sup>14</sup>

Fourth, and perhaps most important under our process defense, a judge is not simply charged with identifying good process. The question is whether, in the judge's opinion, the process is sufficiently exhaustive to warrant removing the case from the reasonableness standard and subjecting it to a clear and convincing standard. The court is thus not asking the process question in a vacuum. It is making a choice between standards.

We believe that this last factor has great significance with regard to Professor Henderson's concern that the subjective process standard is nonverifiable. A manufacturer is not guaranteed a free ride if he meets the process standard. Since the manufacturer has documented his choices, he will now have to defend them against the clear and convincing standard. The insurance policy against a "paper" safety review process is that the substantive decision of the manufacturer must be defended.<sup>15</sup>

Professor Henderson, we believe, would conclude that we have created a Catch-22. If the clear and convincing test is honestly applied, then almost all design defect cases are doomed to failure. He believes that polycentric cases, by definition, are too close to call. The closeness will render the process test nonverifiable. On the other hand, if the test is not rigorously applied, we would simply slip back to polycentric decisionmaking.

We disagree. A defendant who identifies a hazard or an alternative design disregards that information at his peril. His protection

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<sup>14</sup> W. Prosser, J. Wade & V. Schwartz, *Cases and Materials on Torts* 405 (6th ed. 1976).

<sup>15</sup> The fact that our proposal holds the defendant accountable for design decisions that are clearly not defensible differentiates this proposal from the NEPA aspirational mandates described by Professor Henderson, Henderson, *Critique*, *supra* note 1, at 597-98. Unlike the environmental situation, a manufacturer must be concerned about a substantive decision that is perceived to be clearly wrong *after the fact*.

against recovery is a higher evidentiary standard. That protection is meaningful because it lies in the hands of a trial judge who seeks to protect manufacturers against legitimate close-call cases. Admittedly, that protection is only as strong as the resolve of the trial judge to direct verdicts honestly. But, dependence on the judge remains whether the method for judicial control is substantively oriented (as Professor Henderson would have it) or procedurally oriented (under our proposal). If, however, Professor Henderson would agree that a test can be fashioned that sharpens the definition of defect so that it is less polycentric, then has he not answered his own question with regard to the nonverifiability of the design safety review process?

Professor Henderson also has expressed concern that the process defense is dangerous to a defendant because, by exposing its process, it provides the plaintiff with the ammunition to defeat it should it fail to establish the defense.<sup>16</sup> By the same token, the defendant provides this same ammunition if it establishes the process defense. A higher or more specific evidentiary standard helps protect the defendant. Once the specific danger of the product has been identified and the alternatives have been examined at trial, the defendant will likely have produced sufficient proof of having seriously "considered" the problem. This focus will provide the plaintiff with hard evidence of the risk-utility balance engaged in by the manufacturer. It thus may enable the plaintiff to establish defect by the clear and convincing standard. Professor Henderson cannot argue simultaneously that the process defense is both impenetrable by the plaintiff and also dangerous to the defendant. We believe we have set the proper balance between plaintiff and defendant.

The final question that Professor Henderson poses is a pragmatic one. Will manufacturers adopt the kind of documentation necessary to make out the defense? He is right that a manufacturer will be taking a serious risk. If he loses on the process defense, he has handed the plaintiff the data to destroy him in the ensuing design defect litigation. Our question to Professor Henderson is a simple one. What are the alternatives? Are we to continue to try product liability cases with the knowledge that the true facts are known only to the paper shredder? Are we to look forward to several decades of dishonest design defect litigation? This problem dwarfs polycentricity in terms of its impact on the judicial system. Ultimately, if this information is not voluntarily delivered, it will be mandated in some form by government. Our suggestion is that manufacturers be offered the enticement of the process defense. We expect that courts will take the

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<sup>16</sup> *Id.* at 607-11.



defense seriously and direct verdicts unless the higher burden for defect is established. We hope that courts that are attuned to the jeopardy of the manufacturers will be careful not to kill the goose that laid the golden egg. If that care is not taken, we shall all be in deep trouble because we shall have to admit that a Watergate mentality governs products liability litigation.

#### CONCLUSION

We share many of Professor Henderson's concerns. They were reflected in great measure in our proposal. We remain to be convinced that a substantive standard of greater specificity for design litigation is superior to the evidentiary standard that we have offered. However, we are quite ready to incorporate Professor Henderson's suggestion into the process defense.<sup>17</sup> We remain firmly convinced that our proposal has merit. It directs legal inquiry, for the first time, to the nature of the decisionmaking process, rather than to the substantive decision that emanates from the process. We suggest that the law ought to direct its attention to those aspects of product design process to which the manufacturer can intelligently respond. We can tell designers how to make good decisions much more easily than we can convey to them that their marginally bad decisions do not meet our approval. We have said it before and we will say it again: Good process promotes good design decisions.

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<sup>17</sup> We urge legislatures to consider combining into one legislative package Professor Henderson's proposed legislation with our process defense.