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CONSTRUCTING PRODUCTS LIABILITY: REFORMS IN THEORY AND PROCEDURE

FRANK J. VANDALL*

I. INTRODUCTION

RECENT reforms in theory and procedure have changed the way victims’ attorneys view products cases. Once the poster-child for judicial activism, products liability litigation has been dismantled piece by piece. These broad-spectrum reforms dramatically affect practically every facet of a modern products case, from the need for an expert witness to the amount of damages recoverable. Numerous articles have chronicled the 150-year expansion of products theory. The task of this Article is to manifest that large numbers of theoretical and procedural reforms have dramatically affected the value of the case. Today the victim’s attorney must reject all but the largest and most profitable cases.

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1. See generally Mary J. Davis, The Supreme Court and Our Culture of Irresponsibility, 31 Wake Forest L. Rev. 1075 (1996) (noting expansive shifts in products liability theory and acknowledging Supreme Court’s role in these developments); James A. Henderson, Jr. & Aaron D. Twerski, A Proposed Revision of Section 402A of the Restatement (Second) of Torts, 77 Cornell L. Rev. 1512, 1512 (1992) (recognizing that vast amounts of literature have been devoted to field of products liability, focusing specifically on Section 402A of Second Restatement). Professor Davis wrote:

Although the debate over how to resolve product-related injuries heated up in the early 1960s and has continued over the ensuing three decades to this day, the Court did not decide a products liability case until 1986.

In [East River Steamship Corp. v. Transamerica Delaval, Inc.], . . . Davis, supra, at 1081. The editorial summary provides:

In this article, Professor Davis chronicles the Supreme Court’s expansion of the “culture of irresponsibility,” where institutional defendants are freed from tort liability with no check on the abuse of such immunity. Professor Davis describes the Court’s progression toward immunity in products liability decisions of the past decade including East River Steamship, Boyle, Cipollone, and Lohr . . . . Limiting the manufacturer’s duty in such broad terms downplays the effort of the previous twenty years to put products liability into the tort arena, not out of it.


2. See Henderson & Twerski, supra note 1, at 1512-14 (discussing revisions to Section 402A of Second Restatement). Prior to drafting the Restatement (Third) of Products, Professors Henderson and Twerski reflected on recent developments in products law:

(843)
Only rarely do provisions of the American Law Institute’s Restatements of the Law rise to the dignity of holy writ. Even more rarely do individual comments to Restatement sections come to symbolize important, decisive developments that dominate judicial thinking. Nevertheless, Section 402A of the Restatement (Second) of Torts is such a provision. Literally thousands upon thousands of products liability decisions in the past twenty-five years have explicitly referred to, and come to grips with, that section. Among products liability followers one need only identify an issue as presenting “a comment k problem,” or to identify a legislative proposal as “a comment i provision,” to capture instantly the essence of the relevant debate and incorporate nearly thirty years of legal controversy, development and refinement.

Given that Section 402A has achieved the status of sacred scripture, our proposal to replace it with new text and new comments may strike some readers as blasphemous. What prompts such audacity? Quite simply, doctrinal developments in products liability have placed such a heavy gloss on the original text of and comments to Section 402A as to render them anachronistic and at odds with their currently discerned objectives. By changing the relevant language to conform to current understandings—by restating the Restatement—we hope to clarify much of the confusion that has arisen over the years.

Only recently, while working on this Article, we learned that the American Law Institute itself has decided that the products liability sections of the Restatement (Second) of Torts, including Section 402A, needs revision. . . . [W]e have sought to approach the revision of Section 402A cautiously, treating existing language and concepts with considerable respect. Language that has been interpreted by so many courts over such a substantial period of time cannot be cavalierly discarded. At the same time issues that once posed burning questions have now been well settled and new areas of controversy dominate the landscape. We have thus chosen a moderate approach in drafting our suggested revision. We intend to stay as close as possible to shared perceptions of the evolved meanings of the original section and its comments. We do not fancy ourselves as radical reformers, although we express preferences, based on widely recognized normative criteria, where choices are appropriate. Finally, we propose to identify those areas in which true controversy reigns and in which neither predictions nor recommendations are in order.

Id. A recent student note summarized the law by stating:

Over the past thirty years, Section 402A of the Restatement (Second) of Torts has defined American products liability law. Under Section 402A, a manufacturer or distributor is held strictly liable if a product is “unreasonably dangerous” and “defective.” This determination depends upon whether the product is in a “condition not contemplated by the ultimate consumer.” Although most states adopted this formulation either judicially or through legislative enactment, its relevance and application to modern situations has steadily declined. In particular, Section 402A’s failure to distinguish between claims involving manufacturing, design, and warning defects required courts to devise appropriate standards for all three types of defects. This dissonance played a key role in the A.L.I.’s decision to open its Restatement (Third) of Torts with a restatement of products liability law.

Traditionally, determining design fitness has presented the most “agitated and controversial” problems in products liability law. Unlike cases involving manufacturing flaws, where courts can evaluate the challenged product against the manufacturer’s own production standards as manifested by other units in the production line, cases of alleged design defect, where the product is in its intended condition, do not provide a
Products liability law began in 1836 in the case of *Langridge v. Levy.* In *Langridge*, a father purchased a rifle for his son, who was subsequently severely injured while using the gun. The court held the seller of the gun liable in fraud. Later, in 1850, the concept of privity built-in objective standard of comparison. In design cases the courts themselves must provide an external standard or norm of defectiveness, which requires them to weigh various engineering, marketing, and financial factors. In observing the courts' struggle in analyzing such cases, one commentator noted that "it may now be true that [design] defect, like obscenity in Justice Stewart's definition, will be discovered by sense impression. Unfortunately 'I know it when I see it' will not suffice as a judicial standard for products liability."


3. 150 Eng. Rep. 863, 864 (1836). The facts in *Langridge* were as follows: At the trial before Alderson, B., at the Somersetshire Summer Assizes, 1836, it appeared that in June, 1833, the plaintiff's father saw in the shop of the defendant, a gun-maker in Bristol, a double-barrelled gun, to which was attached a ticket in these terms:—"Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty George IV.; cost 60 guineas; only 25 guineas." He went into the shop, and saw the defendant, and examined the gun. The defendant (according to Langridge's statement) said he would warrant the gun to have been made by Nock for King George IV, and that he could produce Nock's invoice. Langridge told the defendant he wanted the gun for the use of himself and his sons, and desired him to send it to his house at Knowle, about two miles from Bristol, that they might see it tried. On the next day, accordingly, the defendant sent the gun to Langridge's house by his shopman, who also on that occasion warranted it to be made by Nock, and charged and fired it off several times. Langridge ultimately bought it of him for 24l, and paid the price down. Langridge the father and his three sons used the gun occasionally; and in the month of December following, the plaintiff, his second son, having taken the gun into a field near his father's house to shoot some birds, putting in an ordinary charge, on firing off the second barrel, it exploded and mutilated his left hand so severely as to render it necessary that it should be amputated. There was conflicting evidence as to the fact of the gun's being an insecure one, or inferior workmanship. Mr. Nock, however, proved that it was not manufactured by him. The defendant also denied that any warranty had been given. The learned Judge left the jury to say, first, whether the defendant had warranted the gun to be made by Nock, and to be a safe and secure one; secondly, whether it was in fact unsafe or of inferior materials or workmanship and exploded in consequence of being so; and thirdly, whether the defendant warranted it to be a safe gun, knowing that it was not so. The jury found a general verdict for the plaintiff, damages 400l.

*Id.* at 864.

4. See *id.* (reciting holding). The court held:
If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been simply delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used by him, with an accompanying representation to him that he might safely so use it, and that repre-
emerged. This meant that in order to bring suit, a plaintiff must be in contract with the defendant and, if the person bringing the suit was not in contract, he or she could not sue. Shortly after privity appeared, the courts began to develop legal fictions in order to skirt the privity concept.

sentation had been false to the defendant's knowledge, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of Pasley v. Freeman (3 T.R. 51); which principle is, that a mere naked falsehood is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, for the purpose of being delivered to and then used by the plaintiff, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply and the plaintiff would have had his remedy for the deceit . . . . We therefore think, that as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.

Id. at 868.

5. See Winterbottom v. Wright, 152 Eng. Rep. 402, 405 (1842) (adopting concept of privity first). In Winterbottom, an injured mailcoach driver sued the person who had a contract to repair the mailcoaches. In rejecting the driver's claim the court reasoned:

The contract in this case was made with the Postmaster-General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favour of the action is, that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract. Then it is urged that it falls within the principle of the case of Levy v. Langridge. But the principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There a distinct fraud was committed on the plaintiff; the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences. How are the facts of that case applicable to those of the present? Where is the allegation of misrepresentation or fraud in this declaration? It shews nothing of the kind. Our judgment must therefore be for the defendant.

Id.

6. See Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 870 (8th Cir. 1903) (relying on legal fictions to avoid privity requirement). In Huset, the court stated three exceptions [fictions] to the privity rule:

The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. . . . The leading case upon this subject is Thomas v.
A fiction is a statement that something is true when, in fact, it is false. These fictions included fraud, invitation, extra-hazardous or extraordinarily dangerous products and abnormally dangerous products. The fiction

WInchester, 6 N.Y. 397, 57 Am. Dec. 455. . . . In all these cases of sale the natural and probable result of the act of negligence—nay, the inevitable result of it—was not an injury to the party to whom the sales were made, but to those who, after the purchasers had disposed of the articles, should consume them. Hence these cases stand upon two well-established principles of law: (1) That every one is bound to avoid acts or omissions imminently dangerous to the lives of others, and (2) that an injury which is the natural and probable result of an act of negligence is actionable. It was the natural and probable result of the negligence in these cases that the vendees would not suffer, but that those who subsequently purchased the deleterious articles would sustain the injuries resulting from the negligence of the manufacturers or dealers who furnished them.

The second exception is that an owner’s act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner’s premises may form the basis of an action against the owner. Coughtry v. Globe Woollen Co., 56 N.Y. 124, 15 Am. Rep. 387. . . .

The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury there from which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. Langridge v. Levy, 2 M. & W. 519, 4 M. & W. 337 . . . .

Id. at 870-71.

7. See Black’s Law Dictionary 894 (7th ed. 1990) (defining legal fiction as “situation contrived by the law to permit a court to dispose of a matter”).

8. See generally Coughtry v. Globe Woollen Co., 56 N.Y. 124 (1874) (noting that owner of building who negligently constructs scaffold which results in injury to contracted employee is example of “invitation exception”); Thomas v. Winchester, 6 N.Y. 397 (1852) (recognizing that druggist who sold deadly poison, which had been mislabeled “extract of dandelion,” was example of “inherently dangerous product exception”); Langridge, 150 Eng. Rep at 834 (stating that gun dealer who sold gun and represented it to be safe, but which resulted in injury to purchaser’s son upon firing, was example of “misrepresentation exception”). The facts of Winchester were as follows:

Action in the supreme court, commenced in August, 1849, against Winchester and Gilbert, for injuries sustained by Mrs. Thomas, from the effects of a quantity of extract of belladonna, administered to her by mistake as extract of dandelion. . . .

RUGGLES, Ch. J. delivered the opinion of the court. This is an action brought to recover damages from the defendant for negligently putting up, labeling and selling as and for the extract of dandelion, which is a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison; by means of which the plaintiff Mary Ann Thomas, to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar, was administered as and for the extract of dandelion, was greatly injured.

The facts proved were briefly these: Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison County, where the plaintiffs reside. . . .

The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of
tions allowed the courts to avoid the concept of privity when they felt that it would accomplish justice. The impact of the fiction was that a person not in privity was able to sue and recover against the seller of the product.

The case of MacPherson v. Buick Motor Co. is a watershed. It marks the end of the doctrine of privity and a shift to the concept of negligence in products litigation. In MacPherson, an individual purchased a Buick

some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label."

The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution?

Winchester, 6 N.Y. at 397, 405-09.

9. See MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (acknowledging legal fictions to arrive at just results). The facts in MacPherson were:

The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted. There is no claim that the defendant knew of the defect and willfully concealed it. The case, in other words, is not brought within the rule of Kuehling v. Lean Mfg. Co., 183 N.Y. 78, 75 N.E. 1098, 2 L.R.A., N.S., 3030, 111 Am.St.Rep. 691, 5 Ann.Cas. 124. The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser.

Id. at 1051. Cardozo, writing for the majority, held:

We hold, then, that the principle of Thomas v. Winchester is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.

Id. at 1053.

10. See Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900-02 (Cal. 1963) (recognizing viability of claim of plaintiff injured while using power tool given to him by his wife).


12. See id. at 1051-3 (discussing concept of negligence as it relates to product liability and noting that manufacturers of dangerous products are under duty of care to make products carefully).
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and was injured when the wooden wheel collapsed. Suit against the manufacturer was barred by privity in the trial court, but the New York Court of Appeals cast aside the doctrine of privity and held that when a product becomes dangerous because it was not made carefully, the injured person may sue the manufacturer. A careful reading of the case makes clear that the fictions had expanded to such an extent that they had consumed the privity rule. MacPherson began a new conceptual level in products liability, a shift from the technical concept of privity and the application of legal fictions, to the more expansive and flexible concept of negligence.

From 1916 through 1942, the courts applied various theories including negligence, fraud, express warranty and implied warranty in products cases. In 1942, the California Supreme Court decided the case of Escola v. Coca-Cola. In Escola, a waitress was getting a bottle of Coca-Cola out of a storeroom when it exploded and injured her hand. The majority rested their decision on res ipsa loquitur, but the critical point of the case was the concurring opinion by Judge Traynor. Res ipsa was sufficient for her to recover against the Coca-Cola bottler but, Judge Traynor stated in a concurring opinion, there was a need for strict liability to avoid the problems of negligence and to more clearly show that the manufacturer owed a duty to the user of the product.

Traynor’s strict liability theory became the rule in Greenman v. Yuba Power, decided by the California Supreme Court in 1963. In that case,

13. See id. at 1051 (reciting facts of case).
14. See id. at 1053-55 (distinguishing facts of case so to expand privity requirements).
15. See Vandall, supra note 1, at 43-49 (acknowledging theories courts have relied on in deciding products liability cases).
16. 150 P.2d 486, 488-40 (Cal. 1944) (stating cause of action by plaintiff, waitress, against Coca-Cola Bottling Company for injuries sustained when bottle containing carbonated beverage exploded).
17. See id. at 438 (describing that when bottle exploded piece of glass “inflicted a deep five-inch cut, severing blood vessels, nerves and muscles of the thumb and palm of the hand”).
18. See id. at 438-40 (noting that majority opinion was based on theory of res ipsa loquitur, where defective product speaks for itself in providing inference of negligence).
19. See id. at 440 (“In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.”) (citing MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916)).
20. 377 P.2d 897, 901 (Cal. 1963) (finding that manufacturer’s liability was governed by strict liability); see also Seeley v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965) (following Greenman by suggesting that imposing strict liability on manufacturers of defective products is equitable because it shifts risk of loss to party better able to bear loss); Vandermark v. Ford Motor Co., 391 P.2d 168, 170-71 (Cal. 1964) (holding retailer strictly liable for putting defective automobiles into stream of commerce).
the stock flew off a defective lathe and hit the plaintiff in the head.21 The user was not in privity with the manufacturer of the product because the lathe had been purchased as a gift by the plaintiff’s wife.22 Nevertheless, the California court adopted the concurring opinion presented by Traynor in Escola over twenty years earlier, and held that the manufacturer of the product was strictly liable to the consumer.23 The plaintiff was thereby relieved of the heavy burden of proving negligence.24

Judge Traynor’s good friend Dean Prosser was, by this time, teaching at Hastings College of the Law located only a block from the California Supreme Court.25 Dean Prosser was the Reporter for the Restatement (Second) Section 402(A) in 1964, and made certain that strict liability, set forth in Greenman, formed the core of the section.26 Section 402(A)’s greatest strength is its ambiguity and breadth. It provides that the seller of a defective product is strictly liable to the consumer or user.27 Section 402(A) precipitated an expansion in the concept of strict liability and protection for the consumer.28 Numerous articles and texts have chronicled this development.29 Section 402(A) is the most cited section of any Restatement.30 Following the adoption of Section 402(A), there were approximately fifteen years of expansion in strict liability and victims’ access to the courts. The pendulum began to swing back, however. The retrenchment in products liability began in the early 1980s with state legis-

22. See id. (discussing facts of case).
23. See id. at 901 (providing court’s holding).
24. See id. (noting that plaintiff need only prove proper use of machine and subsequent injury).
26. See RESTATEMENT (SECOND) OF TORTS § 402(A) cmt. a (1964) (noting that 402A introduced “special” strict liability rule upon sellers).
27. See id. § 402(A) cmt. g (providing that seller would be held strictly liable for injuries resulting from defective product).
29. See, e.g., Charles E. Cantu, The Illusive Meaning of the Term “Product” Under Section 402A of the Restatement (Second) of Torts, 44 OKLA. L. REV. 635, 635-36 (1991) (noting that concept of strict liability has been expanded as cause of action applicable in all cases involving defective products); Steven P. Croley & Jon D. Hanson, What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability, 8 YALE J. ON REG. 1, 3-7 (1991) (denoting development of strict products liability doctrine).
30. See Henderson & Twerski, supra note 1, at 1512-13 (indicating that Section 402(A) has been cited by “thousands upon thousands of product liability decisions”).
latures passing numerous statutes of repose holding that a products cause of action could die before the injury even occurred.\footnote{31}

Numerous limitations and inroads into the concept of strict liability and the proof requirements for a products liability case have led to the death of cases with a modest expected value. Part II will deal with reforms in the fundamental products theories. Part III will suggest the various procedural modifications that impact the presentation of the case in the courtroom, resulting in attorneys refusing to take modest cases. Several proposed solutions for victims of products injuries are presented in the Conclusion.

\section{Constrictions In Legal Theory}

Perhaps the clearest sign of the shift in theory is the novel Restatement (Third), Products Liability, Section 2(b).\footnote{32} This section is important in two respects. First, it practically eliminates strict liability from the products area, and second, it requires the plaintiff to show a reasonable alternative design to the alleged defect in the product.\footnote{33} The theoretical, economic and practical problems with Section 2(b) have been presented in several articles.\footnote{34} In every respect, Section 2(b) is injurious to the consumer and increases the price of products liability suits by the cost of either an expert witness or the presentation of a reasonable alternative design.\footnote{35} My estimate would be that this is an increase of approximately $25,000 or more for each case.

\begin{enumerate}
\item \footnote{32} See Restatement (Third) of Torts § 2(b) (1998) (providing most recent restatement development on strict liability doctrine).
\item \footnote{33} See id. (discussing criteria for design defect).
\item \footnote{34} See Frank J. Vandall, An Examination of the Duty Issue in Health Care Litigation: Should HMOs Be Liable in Tort for "Medical Necessity" Decisions?, 71 Temp. L. Rev. 293, 318 (1998) [hereinafter Vandall, Duty Issue] (indicating that rigid requirements imposed upon consumer in 2(b) are not supported by relevant case law); Frank J. Vandall, Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect, 30 U. Mich. J.L. Reform 261, 269-70 (1997) [hereinafter Vandall, Design Defect] (noting that traditional strict liability principles were ignored in drafting Section 2(b)); Frank J. Vandall, The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement, 61 Tenn. L. Rev. 1407, 1423 (1994) [hereinafter Vandall, Reasonable Alternative Design] (arguing that Section 2(b) contravenes traditional principles of strict liability law).
\item \footnote{35} See Restatement (Third) of Torts § 2(b) (1998) (indicating that in order to prevail in strict liability lawsuit, plaintiff must offer evidence of foregone reasonable design).
\end{enumerate}
There have been numerous recent constrictions in strict liability theory, especially in the fundamental concepts of design defect and warning. The original purpose of strict liability was to benefit the consumer and prevent him or her from having to prove negligence. There are three bases for holding a seller strictly liable. The seller can be held strictly liable if the product contains a manufacturing defect, a design defect or if the manufacturer fails to provide an appropriate warning. In regard to design defect, the courts have moved away from the original concept of strict liability as developed in Escola, Greenman and the Restatement (Second) Section 402(A). Some courts have shifted to a negligence definition of design defect. This shift is exemplified by contrasting Barker v. "

36. See, e.g., Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 553 (Cal. 1991) (following design defect test as laid out in Barker); Barker v. Lul Eng'g Co., 573 P.2d 443, 452-53 (Cal. 1978) (providing that first line of inquiry for design defects cases is whether product performed as safely as ordinary consumer would expect if product were used in intended and reasonably foreseeable manner and second, whether benefits of challenged design outweighed risk of danger inherent in design).

37. See, e.g., Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (“Those who suffer injury from defective products are unprepared to meet its consequences.”). Traynor went on to comment that:

It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.

Id. (Traynor, J., concurring). Traynor’s concurrence found it significant that mass production of most public goods had all but eradicated the close relationship once held between manufacturer and consumer. See id. (Traynor, J., concurring) (“The consumer no longer has means or skills enough to investigate for himself the soundness of a product. . . .”).

38. See McLaughlin v. Michelin Tire Corp., 778 P.2d 59, 82 (Wyo. 1989) (Urbright, J., dissenting) (“A product may be defective in three ways: (1) manufacturing flaw; (2) defective design; (3) absence or inadequacy of warnings regarding the use of the product.”).

39. See, e.g., Chaulk v. Volkswagen of Am., Inc., 808 F.2d 639, 641 (7th Cir. 1986) (relating action for design defect to ordinary negligence). The appellate court in Chaulk reversed the judgment of the district court and held that the plaintiffs were entitled to a new trial on the issue of negligence regarding manufacturer’s faulty design of the latch system on its 1977 Volkswagen Rabbit. See id. at 643 (providing court’s holding). This latch system was designed in a manner which caused it to release on impact from a side collision and, as a result, the plaintiff was ejected from the car. See id. at 640 (discussing facts of case); see also Parke-Davis & Co. v. Stromsodt, 411 F.2d 1390, 1399 (8th Cir. 1969) (holding that drug manufacturer was negligent in giving inadequate warnings about product); Sterling Drug, Inc. v. Yarrow, 408 F.2d 978, 994 (8th Cir. 1969) (finding manufacturer liable for failing to use reasonable efforts to warn consumer); DeRose v. Remington Arms Co., Inc., 509 F. Supp. 762, 766 (E.D.N.Y. 1981) (“[T]he New York Court of Appeals has recently made its recognition . . . of [the] process . . . of a negligence-type balancing into a cause of action in strict liability for design defect”); William L. Prosser & W. Page Keeton, Prosser and Keeton on the Law of Torts § 99, 697 (5th ed. 1984) (noting that negligence is standard for recovery in failure to warn cases). But see Ellen Wertheimer, Unknowable Dangers and the
Lulfr and Anderson v. Owens Corning Fiberglass Corp. 40 The tests for strict liability are all over the map and cover a broad range from pure strict liability to negligence. 42 The scope of the various definitions is discussed in detail in John Vargo's excellent critique of the Restatement (Third) Section 2(b). 43 The impact of this shift toward a negligence test for strict liability is to make it more expensive for a consumer to prove his or her case because the burden of proving negligence is heavier than that for strict liability. 44

In 1981, a New Jersey case held that a failure to provide an adequate warning would support an action in strict liability. 45 A year later, Beshada v. Johns-Manville Products Corp. 46 held that a manufacturer could be strictly liable for failure to provide a warning even if the manufacturer did not know of the defect in the product and the need for a warning. Since 1982, New Jersey, as well as many other states, have tended to move away from strict liability and have adopted a negligence test for warning. 47 Today, a manufacturer is only held liable for failure to provide an appropriate warning if it knew or should have known of the defect in the product and foresaw the need for a warning. 48 Professor Ellen Wertheimer makes

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Death of Strict Products Liability: The Empire Strikes Back, 60 U. Cin. L. Rev. 1183, 1185 (1992) (stating that plaintiff's recovery under strict liability "depends not upon the manufacturer acting negligently, but upon the manufacturer making the product and the product causing injury").

40. 573 P.2d at 455 (finding that plaintiff need not prove negligence, but rather make prima facie showing that injury was caused by defendant's product).

41. 810 P.2d at 558 (holding that manufacturer may present state of art defense in order to defend against strict liability lawsuit).


43. See id. (categorizing various jurisdictional approaches to strict liability interpretations).

44. See id. at 556 (noting that elimination of consumer expectation test will force plaintiff to present evidence of reasonable alternative design, which will drive up cost of case).

45. See, e.g., Freund v. Cellofilm Props., Inc., 432 A.2d 925, 930-31 (N.J. 1981) (explaining that in cases involving strict liability knowledge of dangerousness of product is imputed to defendants, thereby relieving plaintiffs of burden of proving that defendant knew or should have known of dangerousness of product).

46. 447 A.2d 539, 546-47 (N.J. 1982) (holding that manufacturer's state of art defense was not applicable).

47. See, e.g., Richter v. Limax Intern., Inc., 45 F.3d 1464, 1468 (Kan. 1995) ("Kansas applies the same test to whether a manufacturer met his duty to warn under negligence as it does under strict liability.").

48. See, e.g., Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 159 (8th Cir. 1975) (stating that manufacturer is said to possess skills of expert in field and thereby has duty to warn of any dangers); Borel v. Fiberboard Paper Prods. Corp., 493 F.2d 1076, 1106 (5th Cir. 1974) (imposing liability for failure to adequately warn); Balido v. Improved Mach., Inc., 105 Cal. Rptr. 890, 898-901 (Cal. Ct. App. 1972) (indicating that manufacturer's warning regarding product's lack of safety devices or controls may be found to be inadequate if consumer is likely to disregard warnings); Seley v. G.D. Searle Co., 423 N.E.2d 831, 836 (Ohio 1981) (hold-
clear in her outstanding article that this is indeed a negligence test for warning. The exception to the embrace of negligence is Alaska, which breathes new life into a warning cause of action based on strict liability. In the case of Shanks v. Upjohn Co., a pilot committed suicide after taking a prescription calmative that lacked a warning. The court held that the case could go to the jury even though it was not clear whether the manufacturer knew of the facts that called for a warning. The broad adoption of a negligence definition for warning means that fewer manufacturers will be held liable in failure to warn cases.

Products liability has also been limited by the dramatic expansion of the concept of preemption. This theory posits that if there is a federal statute or regulation providing a standard, it preempts and replaces the conflicting state law. The growth in preemption has been so rapid and

49. See Wertheimer, supra note 39, at 1202-05 (arguing that failure to warn doctrine, without imputation of knowledge, is reducible to ordinary negligence on part of manufacturer).


51. See id. at 1200 (finding that jury was entitled to hear plaintiff’s strict liability claim even though plaintiff could not show that defendant knew of danger posed by product).

52. See Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 559 (Cal. 1991) (holding that manufacturer could not be held liable for plaintiff’s injuries unless manufacturer knew at time of manufacture or distribution that its product was harmful and that it failed to warn consumers of such dangers); Wertheimer, supra note 39, at 1208 (noting that failure to warn cases present problem for defendants because “a warning is always feasible”).

53. See Burke v. Dow Chem. Co., 797 F. Supp. 1128, 1132 (E.D.N.Y. 1992) (stating that if court invokes federal preemption, plaintiff may not have recourse); see also Jones v. Rath Packing Co., 430 U.S. 519, 532 (1977) (holding that California law that conflicted with federal regulations regarding packaging and shipment of meat was invalid due to doctrine of preemption); Moss v. Parks Corp., 985 F.2d 736, 740-41 (4th Cir. 1993) (holding that products liability claims against paint thinner manufacturer were expressly preempted when plaintiff was seeking label requirements inconsistent with federal regulations); Barbara L. Atwell, Products Liability and Preemption: A Judicial Framework, 39 BUFF. L. REV. 181, 188-91 (1991) (concluding that there has been compliance with federal regulation such that state law claim is preempted and, “there is generally no basis for compensating the victim...”); Marc S. Klein et al., State Product Liability Law and the “Realpolitik” of Federal Preemption, CA11 ALI-ABA 23, 25 (1995) (“In the past decade, federal preemption has emerged as a very potent limitation on state product liability law.”).

so dramatic that it is possible to suggest to attorneys that practically every
time they find a federal statute or federal regulation that provides a stan-
dard, they may argue, as defense counsel, that this federal standard
preempts any conflicting state statute or common law rule.\textsuperscript{55} An example
of federal preemption is automobile airbags, where the federal courts have
struck down state cases that have held that a manufacturer of an automo-
bile was strictly liable if it failed to provide airbags.\textsuperscript{56} The courts have held
that the federal statute, providing the manufacturer with the choice of
either a mechanical seat belt or airbags, was sufficient and that the manu-
facturer could not be held strictly liable if it selected the mechanical "de-
capitator" approach.\textsuperscript{57} A second area expanding preemption involves
pesticides.\textsuperscript{58} The Federal Insecticide Fungicide and Rodenticide Act
(FIFRA) sets up standards for pesticides, and several decisions have held
that these regulations preempt conflicting state decisions.\textsuperscript{59}

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within the scope of its congressionally delegated authority may pre-empt state reg-
1988) (finding that federal preemption of matter deprives plaintiff from seeking
redress under state law).
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(holding that federal safety requirements for automobiles preempted plaintiff's
design defect lawsuit based on failure of car manufacturer to install driver's side
Medical Device Amendments of 1976 do not preempt plaintiff's common law
claims).

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56. See, e.g., Pokorny v. Ford Motor Co., 902 F.2d 1116, 1123 (3d Cir. 1990)
(holding that state claim that van was defectively designed because it failed to be
equipped with airbags was preempted by federal statute); Schwartz v. Volvo N. Am.
Corp., 554 So. 2d 927, 928 (Ala. 1989) (holding that National Traffic and Motor
Vehicle Safety Act preempted any state claims for failure to install airbags); Boyle v.
Chrysler Corp., 501 N.W.2d 865, 867 (Wis. Ct. App. 1993) (indicating that com-
pliance with federal act preempts state law claims based on absence of airbags).
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1988) (holding that National Traffic and Motor Vehicle Safety Act preempts state
law by giving manufacturers options on how to meet safety requirements). In a

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crash the shoulder strap often decapitated the driver when he or she forgot to
fasten the lap belt. See Miles v. Ford Motor Co., No. 05-99-01258-CV, 2001 WL
727355, at *7 (Tex. App. 2001) (providing factual claims made by plaintiffs that

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their seat belt system had decapitated dummies during institutional motor tests).
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58. See Papas v. Upjohn Co., 926 F.2d 1019, 1024 (11th Cir. 1991), vacated by
505 U.S. 1215 (1992) (holding that Federal Insecticide, Fungicide and Rodenti-
cide Act (FIFRA) preempts any state law claims in regards to warnings); Kennan v.
Dow Chemical Co., 717 F. Supp. 799, 805 (M.D. Fla. 1989) (holding that congres-
sional intent to create comprehensive system for pesticide labeling was adequate to
preempt contradictory state regulations); Fitzgerald v. Mallinckrodt, Inc., 681 F.
Supp. 404, 409 (E.D. Mich. 1987) (denying recovery in tort when federal govern-
ment has preempted state regulation through enactment of FIFRA); Davidson v.
preempts state tort claims based on failure to adequately label pesticide).
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59. See Papas, 926 F.2d at 1023 (providing congressional language banning
contradictory state labeling requirements).
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A third and most important expansion in the concept of preemption is in the tobacco industry. In the famous Cipollone v. Liggett Group, Inc.60 case, Rose Cipollone smoked for over 40 years and finally died of lung cancer. The case spanned seven years of litigation and involved thirteen federal decisions including two appeals to the United States Supreme Court.61 The Supreme Court held that, even though there was no express language in the relevant federal statute, there was express preemption of the plaintiff’s allegation of failure to provide an appropriate warning and several aspects of design defect.62

The plaintiff’s attorney in the Cipollone case is rumored to have expended six million dollars in his suits against the cigarette manufacturers.63 The case stands for the rule that if you sue a large manufacturer, it is going to spend millions of dollars to defend and force you to spend a like amount.64 In the Cipollone case, Rose Cipollone died, her husband (the next plaintiff) died, her son then took over the case and finally voluntarily discharged the suit.65 The point is that presenting a products liability case is often enormously expensive, and if the law is not in the plaintiff’s favor going in (as in Cipollone), the risk of losing is substantial.

In contrast to Cipollone, however, several recent cigarette cases have been brought based on a theory of fraud.66 In these cases, the attorneys argued that the cigarette manufacturers defrauded the consumers by suggesting cigarettes were safe and failing to disclose that they knew cigarettes

62. See Cipollone, 505 U.S. at 524-30 (holding that federal statute disallowed plaintiff to claim defect due to manufacturer’s failure to provide warning on cigarette carton).
64. See Stephen Koepp, Tobacco’s First Loss: A Landmark Verdict Is Likely to Spawn Many More Suits Against the Industry, Time, June 27, 1998, at 50 (reporting that in recent years cigarette manufacturers are estimated to have spent anywhere between six hundred million and three billion dollars).
were addictive and would kill a certain percentage of the consumers if used exactly as intended.67

One of the leading causes of the constricting of products liability theory is the failure of Congress and the state legislatures to deal responsibly with critical issues in the products area. As with Nero, it is as if the federal and state legislatures are fiddling as thousands of consumers die. The two clearest examples of this are tobacco and firearms. In regard to tobacco, Congress has not adopted any meaningful laws holding the tobacco manufacturers liable for providing a lethal product. Just the opposite is true. Congress expressly provided that the Food and Drug Administration and the Consumer Product Safety Commission lacked authority to deal with the deadly aspects of tobacco.68 The most dangerous product in the world is tobacco, and it would seem obvious that the Consumer Product Safety Commission would have jurisdiction over tobacco, but the enabling act expressly provides that the Consumer Product Safety Commission lacks such authority.69

Congress and the state legislatures have also failed to deal with another epidemic, handgun violence.70 Although there are a large number of regulations dealing with firearms, these are only window dressing and deal with the mechanical details of firearms purchase and ownership.71 Even the Brady Bill fails to deal with the major issue, which is the careless saturation of the country with firearms.72 In failing to address this epi-

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67. See Fuld, 94 F. Supp. 2d at 328 (acknowledging argument made by plaintiffs that tobacco manufacturers had actual knowledge of lethal consequences of smoking).


69. See id. at 127-28 (finding that tobacco kills over three million people each year, worldwide; 400,000 in United States alone).


72. See Brendan J. Healey, Plugging the Bullet Holes in U.S. Gun Law: An Ammunition-Based Proposal For Tightening Gun Control, 32 J. MARSHALL L. REV. 1, 21 (1998) (“Perhaps the biggest weakness in Brady is the ease with which it can be circumvented . . . Brady has a negligible effect on those who already own guns, those who purchase their guns using a strawman, those who steal guns and those who purchase guns on the secondary market.”); see also James B. Jacob & Kimberly A. Potter, Keeping Guns Out of the “Wrong” Hands: The Brady Law and the Limits of Regulation, 86 J. CRIM. L. & CRIMINOLOGY 93, 104 (1995) (“Brady supporters may have
demic, the United States Congress and state legislatures have tacitly approved the large number of violent and unnecessary deaths of children, spouses and strangers.73 They have, through omission, substantially contributed to the death of the inner cities, as claimed by Bridgeport, Connecticut, in its suit against the gun manufacturers.74

The almost complete control of the state legislatures by the gun lobby is illustrated by the failure to respond to this epidemic and by the instantaneous reaction of the Georgia legislature in passing an act that forbids cities to sue the manufacturers of firearms in products liability.75 At a Pepperdine Law School symposium, a lawyer for the National Rifle Association (NRA) was proud to state that while attending a gun convention in Atlanta, NRA representatives were able to walk across the street and instantly persuade the Georgia legislature to pass the above-mentioned prohibitive legislation.76

The Brady Bill is a step forward and has allegedly been successful in preventing gun sales to more than 200,000 criminals, but its critical failure is that it allows the sale of firearms to thousands of citizens every day.77 This continues the clear and foreseeable danger of children obtaining firearms and shooting other children or their parents, as well as spouses using handguns to kill each other and the large number of shootings of total strangers in the United States. At present, there are no cases that hold a gun manufacturer liable for gun violence.78

underestimated the ease with which the regulatory scheme can be circumvented and they may have overestimated the ability of government agencies to enforce these regulations.

73. See Vandall, Gun Manufacturers, supra note 70, at 719 (documenting mortality rates due to gun violence).

74. See Vandall, O.K. Corral, supra note 71, at 549 ("The city of Bridgeport, Connecticut, for example, is suing [gun manufacturers] for the cost of deterioration of the city."). Bridgeport ultimately lost in the courts. See Cincinnati Has a Shot, COLUMBUS DISPATCH, June 18, 2002, at 8A (describing Bridgeport case).


76. See Vandall, Gun Manufacturers, supra note 70, at 722 n.53 (reporting that Governor Roy Barnes signed bill into law blocking city of Atlanta's lawsuit against gun manufacturers, potentially bringing end to legislative battle over right of any local government to bring product liability suit against gun manufacturers) (citing Kathy Pruitt, Blocking of Gun Suit Now Law, ATLANTA J. & CONST., Feb. 10, 1999, at B1).

77. See Healey, supra note 72, at 21 (noting ability of gun holders to circumvent system); Timothy D. Lytton, Lawsuits Against The Gun Industry: A Comparative Institutional Analysis, 32 CONN. L. REV. 1247, 1255 (2000) ("Illegal sales at the retail level are quite common.").

78. For a further discussion of cases supporting the fact that no gun manufacturer has yet to be held liable for gun violence, see infra notes 103 and 107.
The American Law Institute (ALI) has played a substantial role in reducing justice for consumers over the past seven years. This began with the Enterprise Liability Project and the flawed Restatement (Third) Section 2(b) of Products Liability in 1993. The most recent constrictive document from the ALI is the Restatement (Third): Apportionment." This position paper was recently critiqued. The theme of the Restatement (Third): Apportionment is that joint and several liability is flawed, and that any approach is better than joint and several liability. The underlying thesis of joint and several liability is that if two defendants cause an indivisible injury, each of these defendants can be held liable for the whole amount of the injured consumer's damages. A recent case involving consumers injured at Disney World caused the ALI to question the concept of joint and several liability. In Walt Disney World Co. v. Wood, a woman was injured when her fiancé ran into her in a bumper car while visiting Disney World. She brought suit against Disney World for designing a defective product and Disney World joined her fiancé as a defendant. The plaintiff married her fiancé, and because of spousal immunity, the husband was dismissed from the suit. This meant under joint liability that although Disney World was only one percent at fault, it was held liable for 85 percent of the damages. The Reporters for the Restatement (Third): Apportionment present a five track system of apportionment implying that there are five separate and equal approaches to the question of apportionment of liability. This track proposal by the Reporters represents a failure to analyze precedent. In fact, joint and several liability is the predominant

79. See Vandall, Design Defect, supra note 34, at 261 (describing Section 2(b) of Restatement (Third) of Torts as "wish list" for manufacturing America).
81. See Frank J. Vandall, A Critique of the Restatement (Third), Apportionment as it Affects Joint and Several Liability, 49 EMORY L.J. 565, 570 (2000) ("ALI has initiated a massive fundamental change in the law of joint and several liability and apportionment . . .").
82. See id. at 566-67 (describing application of joint and several liability).
83. See id. at 569-70 (characterizing ALI's approach to reform of joint and several liability as "extreme overreaction").
84. 515 So. 2d 198 (Fla. 1987).
85. See Wood, 515 So. 2d at 199 (discussing facts of case).
86. See id. at 202 (electing to retain doctrine of joint and several liability).
87. See Vandall, supra note 81, at 570-71 (enumerating track classifications). Track A is joint and several liability, while Track B is complete rejection of joint and several liability. See id. (describing tracks). Next, Track C "allows the plaintiff's recovery to be reduced merely because the judgment cannot be collected from an insolvent defendant" and Track D "introduces a mathematical concept, the threshold, which serves to reduce the plaintiff's recovery in certain cases." Id. Finally, "Track E divides the plaintiff's damages into economic losses and pain and suffering, with different standards of recovery for each." Id.
88. See id. ("The Reporters' radical approach allows them to criticize joint and several liability without acknowledging the common law and underlying policies.").
rule and each one of the tracks proposed by the ALI is a distinct minority rule. The states, when faced with a challenge to their concept of apportionment, should look at their own precedent rather than the Restatement (Third): Apportionment. It is an opinion piece by the authors, not a restatement of the law. If a state adopts one of the ALI's proposed tracks, it will further extend a modest products suit beyond the reach of the victim.

The risk created by the Restatement (Third): Apportionment is that if one of the reform tracks is adopted, it will affect every aspect of a products liability case: whether an attorney should take a case, whether he or she should settle a case and if so for how much, whether following a judgment the plaintiff will be able to recover from joint defendants and if so how much and in applying the concept of comparative fault, how much fault will be allocated to the plaintiff. The conclusion that flows from reading the Restatement (Third): Apportionment is that injured consumers will recover less. The Restatement (Third): Apportionment will reduce the number of modest suits by decreasing the chances that the plaintiff will recover a meaningful verdict.

Several clearly wrong cases in the area of tobacco, firearms and alcohol have brought the expansion of products liability to a halt in these areas. Most importantly, the Cipollone cigarette case was wrongly decided by the Supreme Court. In contrast to the holding, which stated that there was express preemption of design defect, a strong argument could be made that preemption (if any) was implied. The tobacco manufacturers should have been held accountable. The Supreme Court could have decided the Cipollone case with vision rather than creating a technical quagmire. It should have held that with over 400,000 tobacco-caused deaths each year, there was an unprecedented product-induced epidemic in the United States, and the source of the epidemic was clear. It should have concluded the disease was entirely unnecessary and that it was appropriate to hold the cigarette manufacturers liable. The Cipollone case could have been based on design defect, failure to warn or fraud. The Supreme Court should have acknowledged that over three million people, worldwide, die needlessly and, accordingly, should have taken steps to reduce this human carnage.

89. See id. at 619 (classifying approach of Reporters' as illogical minority rule).
90. See id. at 593 ("The purpose of a Restatement is to restate the common law, not the statutory law.").
92. See Cipollone, 789 F.2d at 186 (3d Cir. 1986) (deciding that state law damages claims were pre-empted by Federal Cigarette Labeling and Advertising Act).
The area of firearms is another area where the courts have failed to address the issue of a product-induced epidemic. This epidemic of fear, injury and death exists because of the profusion of firearms in the United States. The Perkins v. F.I.E. Corp. case, also known as the Charter Arms, case was wrongly decided in 1984. In that case a third year medical student was mugged, raped and murdered with a small handgun. The defendant's mother brought suit against Charter Arms, the manufacturer of the handgun, and the lower court permitted recovery based on strict liability. On appeal the Fifth Circuit held that strict liability did not apply to the manufacturer of handguns because of the criminal superceding cause and because every preceding case that applied strict liability had been related to property; a "Saturday Night Special" has no relationship to property. The decision was wrong because the manufacturers foresaw the criminal shootings and the court's restriction of strict liability to land was tortured.

The wrongness of this handgun precedent has recently been addressed. The first important case is Hamilton v. Accu-Tel, a New York case, against the manufacturers of handguns for the negligent oversaturation of the South. The theory was that the manufacturers knew that the guns being sold in great numbers in the South were being transported to New York and Chicago and sold on the black market. Several gun manufacturers were held liable to one of the shooting victims in that case.

94. See Philip J. Cook & Jens Ludwig, Guns in America: National Survey on Private Ownership and Use of Firearms, U.S. DEPT. OF JUSTICE 13 (1997) (estimating that there are 192 million firearms in hands of private American citizens and 65 million of those firearms are handguns). More than one in three households have at least one firearm and about one in four adults in America personally own a firearm. See id.

95. 762 F.2d 1250 (5th Cir. 1985).

96. See Perkins, 762 F.2d at 1268 (5th Cir. 1985) (affirming lower court's grant of summary judgment and stating that guns "fall[ ] far beyond the boundaries . . . of ultra hazardous activities").


98. See Perkins, 762 F.2d at 1268 (holding that injury must "flow directly from the activity itself alleged to be ultra hazardous").


100. See Hamilton, 935 F. Supp. at 1330 (claiming gun manufacturer's marketed handguns such that they could easily be obtained illegally); see also Hamilton v. Beretta U.S.A. Corp., 222 F.3d 36, 45 (2d Cir. 2000) (stating that "availability of the guns . . . was the relevant factor for the perpetrators and victims of shootings").

101. See Hamilton, 222 F.3d at 40 (contending that plaintiffs know their products entered "illegal market[s] and are used to commit crimes").

102. See id. at 40-41 (finding three defendant gun manufacturers liable for permanently disabled victim and his mother).
Unfortunately, the New York Court of Appeals reversed Hamilton.\footnote{103} It held that no duty runs from the gun manufacturer to the victim.

The second important handgun case is Merrill v. Navegar, Inc.\footnote{104} In Merrill, a disgruntled client acquired numerous automatic weapons and went to the office of his attorney, where he wantonly killed eight people and injured many more.\footnote{105} The suit against the manufacturer of the Tech-9, Navegar, argued that the manufacturer was negligent in marketing and promoting the gun because it knew of the rapid fire capacity of the gun and advertised it in publications that would appeal to people who would likely misuse the gun. The California Court of Appeals held the Tech-9 manufacturer liable for negligent marketing.\footnote{106} This decision has since been reversed by the California Supreme Court.\footnote{107} The Court held that it did not matter whether the case was styled in negligence or strict liability. The issue was covered by a California statute that forbid cost-benefit analysis to be used in products suits against gun manufacturers.

The red flag for the product-caused epidemic of handgun violence is being waved by numerous mayors throughout the country. The mayors have brought suits against the gun manufacturers in order to recover for the expenses paid by the cities to respond to the wave of gun violence. The suits are in various stages of litigation and the gun manufacturers, at present, are attempting to settle them.\footnote{108} The goals of the suits are to force the gun manufacturers to take cognizance of the saturation sales, excess promotion of handguns and the fact that they have contributed to the decline of the inner cities, and to hold the manufacturers financially responsible.\footnote{109} These are not suits to ban guns, but rather to shift the loss, as in the tobacco suits, to the manufacturers.

\footnote{103} The New York Court of Appeals held that no duty runs from the gun manufacturers to the victims. See Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 222 (N.Y. 2001) (certifying question against plaintiff).

\footnote{104} 89 Cal. Rptr. 2d 146, 152 (1999), cert. granted, 92 Cal. Rptr. 2d 256 (2000).

\footnote{105} See id. (laying out facts of case).

\footnote{106} See id. at 163 ("Appellants have provided no persuasive reason to conclude that the exercise of care in distribution or marketing would be altogether inefficacious in reducing the danger inherent in distributing the TEC-DC9.").

\footnote{107} See Merrill v. Navegar, Inc., 28 P.3d 116, 139 (Cal. 2001) (holding that state law prevents gun manufacturer liability under these facts). The pro-gun statute relied on in Merrill has recently been superceded by the California legislature.


\footnote{109} See Tania Anderson, Mayor King Goes to Washington to Talk About Gun Settlement, STATES NEWS SERV., January 25, 2000 (noting participation of Gary, Indiana mayor in trip to Washington); Deirdre Shesgreen, Smith & Wesson Will Redesign Guns, Marketing: 30 Cities, Countries Agree to Drop Their Lawsuits, ST. LOUIS POST DISPATCH, March 18, 2000, at 19 (reporting on agreement that changes distribution, production and marketing of guns).
Finally, the third most dangerous product in the country is alcohol.\(^{110}\) The consumption of alcohol is involved in almost every crime, numerous vehicle crashes and deaths and a very large number of domestic violence cases.\(^ {111}\) Alcohol is, in part, responsible for large numbers of people losing their jobs, becoming divorced and committing suicide.\(^ {112}\) The courts have rejected cases brought by victims who have been injured by alcohol, however.\(^ {113}\) One Texas case, brought by the mother of a college girl who died from drinking a large amount of tequila, held that the manufacturers of alcohol had a duty to warn the young woman of the risk of death from the excessive consumption of alcohol.\(^ {114}\) Several years later the Texas Supreme Court reversed, and held that the manufacturer of alcohol had no duty to warn the consumer of the risk of death.\(^ {115}\) The rejection of these alcohol cases by the courts ignores the fact that very few consumers understand the scope of the interaction of alcohol with the human body.\(^ {116}\) The addictive nature of alcohol, its damage to the brain

\(^{110}\) See MADD: Costs of Alcohol-Related Crashes (last visited Jan. 31, 2003) at http://www.korrnet.org/maddwdc/stats.html (citing statistics associated with alcohol use in America). The most dangerous product, however, is tobacco.


\(^{112}\) See, e.g., Pemberton v. Am. Distilled Spirits, 664 S.W.2d 690, 693-94 (Tenn. 1984) (affirming lower courts' dismissal and asserting no duty for alcohol distributors and manufacturers to warn); Desatnik v. Lem Modlow Prop., Inc., 1986 WL 760, at *4 (Ohio App. 7 Dist. Jan. 9, 1986) (affirming summary judgment for manufacturer and disallowing products liability cause of action); Azzarello v. Black Bros. Co., Inc., 391 A.2d 1020, 1023 (Pa. 1978) (imposing strict liability on manufacturer of "unreasonably dangerous" machine); Pemberton, 664 S.W.2d at 693 (stating that manufacturer of grain alcohol does not have duty to adequately warn user of apparent danger).

\(^{113}\) See, e.g., Garrison v. Heublein, Inc., 673 F.2d 189, 192 (7th Cir. 1982) (affirming lower courts' dismissal as to whether tequila "is safe . . . without a warning").

\(^{114}\) See Brune v. Brown Forman Corp. 758 S.W.2d 827, 831 (Tex. App. 1988) (reversing and remanding for determination as to whether tequila "is safe . . . without a warning").

\(^{115}\) See Brown Forman Corp. v. Brune 893 S.W.2d 640, 648 (Tex. App. 1994) (holding tequila distiller did not have duty to warn of safe use of product).

\(^{116}\) See Natalie K. Chetlin, In Support of Hom v. Stroh Brewery Co.: A Brewing Debate Over Extending Liability to Manufacturers of Alcoholic Beverages, 51 U. PRRT. L. REV. 179, 180 (1989) (citing National Council of Alcoholism, A Case for Health Warning Labels on Alcoholic Beverages, to point to national study which demonstrated that even though ordinary consumer realizes that he or she drinks large amounts of alcohol over long period of time that he or she may become dependent or even develop liver disease, he or she does not believe alcohol is dangerous if consumed in moderation); Elizabeth L. Kruger, Mitigating Alcohol Health Hazards Through Health Warning Labels and Public Education, 63 WASH. L. REV. 979, 979 (Oct. 1988) (citing S. 9331.03, 99th Cong. (2d Sess. 1986), which states that Americans are actually less aware of dangers of alcohol consumption than risk of smoking).
and the impact of alcohol on the unborn fetus are also not well-understood by consumers.\textsuperscript{117} There are, of course, many other risks associated with alcohol that consumers do not understand.\textsuperscript{118} Merely because alcohol has been around forever and is well-known to be intoxicating and addictive, does not mean that all of the highly dangerous effects of alcohol are well-known.\textsuperscript{119} One case, however, has held that a manufacturer must give a warning of the risks of alcohol in causing pancreatitis.\textsuperscript{120}

117. See Kruger, \textit{supra} note 116, at 979 (noting lack of awareness by Americans as to "dangers of alcohol").

118. See, e.g., McGuire v. Joseph E. Seagram & Sons, Inc., 790 S.W.2d 842, 845 (Tex. App. 1991), rev'd, 814 S.W.2d 385 (Tex. 1991) (outlining omissions on part of manufacturers and distributors in failing to warn of dangers). The plaintiff provided a detailed list of omissions including:

1. Continued use or excess use of alcohol would cause cirrhosis of the liver.
2. Alcohol is a drug.
3. Alcohol is a depressant.
4. Alcohol causes diseases of the stomach and duodenum.
6. Alcohol is toxic to the brain cells and tissues.
7. Alcohol is toxic to tissues of the stomach, liver and heart.
8. Drinking alcohol for pleasure or recreational purposes may lead to psychological and physical dependency.
9. Alcohol compromises the immune system.
10. Some people are genetically predisposed to alcoholism.
11. Psychological and social factors may predispose a person to alcoholism.
12. Alcohol is harmful to health.
13. Over two (2) drinks per day is harmful to health.
14. They failed to warn of the signs and symptoms of alcoholism.
15. They failed to instruct on the symptoms of alcoholism.
16. They failed to instruct on safe use of the drug.
17. They failed to warn that alcoholism causes marital discord, family problems and financial problems.
18. They failed to warn that alcoholism will deteriorate or destroy conjugal relations.
19. They failed to warn that alcoholism is a lifetime disease and that recovery is impossible.
20. That "denial" prohibits addicts from recognizing an addiction and receiving treatment.
21. That treatment of the addiction is very costly and beyond the economic means of most alcohol addicts.
22. They failed to warn of the latent, hidden and concealed hazards, defects and dangerous effects of the drug alcohol.
23. They failed to warn Ronald McGuire's family and friends of the signs and symptoms of alcoholism [sic].
24. They failed to instruct Ronald McGuire, his family and friends to encourage him to seek help at the first symptoms of alcoholism.

\textit{Id.}

119. See \textit{id.} at 850 (noting that although some dangers are known, extent of associated diseases are not "commonly known").

120. See \textit{Hon v. Stroh Brewery Co.}, 835 F.2d 510, 515.
III. PROCEDURAL RETRENCHMENTS: THE PRESENTATION OF THE PRODUCTS CASE IN THE COURTROOM

The purpose of this part is to manifest that various recent modifications in the law related to discovery, the presentation of evidence, punitive damages and the need for an expert witness have helped to bring about a dramatic increase in the costs of litigating a products liability case.

One of the most costly developments in the litigation of a products liability case is the almost absolute requirement that in every case an expert will be required.\(^{121}\) This was made crystal clear, by the Supreme Court, in the 1993 case *Daubert v. Merrell Dow Pharmaceuticals*.\(^{122}\) *Daubert* involved Bendectin, which was a calmative given to pregnant women.\(^{123}\) The mothers of children who were born with congenital birth defects brought suits, alleging that these birth defects were caused by the administration of Bendectin, during the period when the limbs were being formed in the fetus.\(^{124}\) The children displayed missing and shortened limbs, as well as incomplete neurological development in some cases.\(^{125}\) After many years of intermediate appeals, the Supreme Court held that the trial judge was the gatekeeper and had the power to evaluate the credentials of the expert witness, as well as whether his or her testimony would be of value to the jury.\(^{126}\) Following *Daubert*, numerous cases rejected the plaintiff’s proposed expert witness.\(^{127}\) Some assumed that *Daubert* was limited to scientific and technological cases and would not be applied to non-technical cases.\(^{128}\)

This flawed assumption was corrected by the United States Supreme Court in *Kumho Tire Co., Ltd. v. Carmichael*.\(^{129}\) In 1999, the Supreme Court held that *Daubert* applied to non-technical cases.\(^{130}\) In *Kumho*, a tire on a minivan had exploded and the plaintiff’s expert testified that the tire was defectively designed. The Court held that the gatekeeper function of the trial court applied to non-scientific testimony and that the trial court

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121. See, e.g., 735 Ill. Comp. Stat. 5/2-623 (1997) (requiring certificate of merit from expert in all product liability actions). This statute was held unconstitutional by *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997).


123. See id. at 582 (explaining use of Bendectin)

124. See id. (discussing Bendectin as potential teratogen).

125. See id. (listing various birth defects).

126. See id. (holding that trial judge must determine whether expert’s reasoning or methodology is valid and can be applied to facts at hand).


129. See id. at 152 (granting trial court increased “latitude in deciding how to test an expert’s reliability”).

130. See id. at 151 (declining to limit standards for experts to scientific or technical fields).
could reject the expert witness on the basis that he or she was insufficiently trained or experienced. The significance of the *Kumho* decision is that the expert witness requirement now applies to all cases, scientific as well as non-scientific. *Daubert*, in conjunction with *Kumho*, stands for the idea that the plaintiff's expert will be carefully scrutinized in all products cases. The impact on a products case is that the price of a lawsuit has increased by the cost of the expert witness and his or her preparation for trial. Assuming that the cost of an expert is approximately $25,000, *Daubert* and *Kumho* have arguably increased the cost of presenting a products case by this amount.

One critical development that has constricted the litigation of products liability cases is the broad refusal by the courts to accept the class action concept embodied in the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure provide:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

As illustrated by the language of the rule, small but numerous products liability cases fit the test precisely. For instance, the most obvious product for a class action suit is tobacco. The injured smoker should be able to join with other injured smokers, as a class, and sue the tobacco manufacturers. Tobacco naturally meets the requirements of a class action because there are many victims and common facts. The numerous victims all smoked cigarettes for varying periods of time and all

131. *See id.* at 153 (allowing expert to be rejected based on methodology employed when making decisions and/or qualifications).

132. *See id.* (providing example of expert witness requirement being applied in non-scientific manner).


134. Fed. R. Civ. P. 23(a) (setting forth requirements for class actions in order to ensure fair and adequate representation for all parties).


136. *See id.* at 554 (noting that plaintiffs must have sustained similar injuries to bring class action suit).

137. *See id.* at 555 (indicating unique nature of product makes tobacco amenable to class action).

138. *See id.* (acknowledging that large numbers of victims and similarity of facts are requisites to class action suits).
developed the same four diseases. The same product—tobacco—was involved, and each smoker contracted one of four forms of cancer and is seriously injured or has died. This was the basis of a recent Louisiana class action where the lower court certified the class by holding that the class action provision applied to cigarette smokers. The district court certification was rejected by the Federal Court of Appeals. Judge Smith, quoting Judge Posner, wrote:

One jury . . . will hold the fate of an industry in the palm of its hand . . . That kind of thing can happen in our system of civil justice . . . But it need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting the aggregate a much larger and more diverse sample of decision-makers. That would not be a feasible option if the stakes to each class member were too slight to repay the cost of suit . . . But this is not the case . . . Each plaintiff if successful is apt to receive a judgment in the millions. With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, . . .

What he means by this is clear. Judge Smith means that it is appropriate for an American corporation to take over 400,000 lives a year (over three million world-wide), but it is not appropriate for the consumers who are injured or killed to take these tobacco manufacturers to court in order to shift the loss, raise the price and deter the manufacture of such a product.

One exception to the historical cigarette class action prohibition is the recent case in Florida, brought by numerous airline stewardesses, who argued that the smoke in the airplanes caused lung cancer for the stewardesses, none of whom smoked. The court certified the stewardesses as a class, and they have recovered a small amount. Perhaps the court was motivated to certify the class because the stewardesses had agreed to reject damages based on their physical injury, and instead would only accept punitive damages and those who would go toward research and prevention.

139. See id. (citing common injury cause of action as cigarette addiction).
140. See id. at 548 (noting that smoker must have suffered serious injury or death to be in class and recognizing that widow of smoker may serve as plaintiff).
141. See id. at 561 (certifying class action pursuant to Federal Rules 23(b) and 23(c)(4)).
142. Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) (quoting directly from Judge Posner’s decision regarding fee or loss shifting).
143. See id. at 752 (reversing and remanding district court’s decision to certify class with instructions that district court dismiss class complaint).
144. See Broin v. Philip Morris Cos., Inc., 641 So. 2d 888, 892 (Fla. App. 1994) (reasserting class action allegations).
Another class action brought by thousands of Florida smokers reached a jury verdict of 145 billion dollars in the summer of 2000. The lawsuit was brought on behalf of 500,000 Floridians against five of the nation’s largest cigarette manufacturers. The suit was brought by a Miami pediatrician who stated that smoking was the cause of his emphysema. The tobacco manufacturers responded to those claims by stating that no scientific proof exists that smoking causes any particular illness and that the public is well aware that smoking is risky. The jury, however, rejected the industry’s claims and found for the smokers on all counts.

One of the most important factors affecting the cost of litigating a products liability suit is the wealth of the defendant. Most products liability suits involve defendants who are large American or foreign corporations. No suit against such a defendant is going to be inexpensive. A preferred tactic used by well-asseted opponents is to force the victim to spend large amounts of money in litigation. The defendant manufacturer forces the plaintiff’s attorney to spend a huge amount in prosecuting the case. Perhaps the best example of this is the Cipollone tobacco case, where it is estimated that the plaintiff’s attorney spent approximately six million dollars presenting the case. In Cipollone, it became clear that the defendants’ goal was to “paper the plaintiff to death.” The defendants used the discovery process to drag-out the case and increase the cost of litigation. Large corporate defendants often adopt the posture that

that called for $300 million for medical research and $49 million for legal fees and expenses).

146. See News Service Wire, Re B&W Statement, Reg. News Serv., July 17, 2000, available in 2000 WL 24184584 (reporting that jury award was ten times net worth of companies being sued).

147. The suit was brought against R.J. Reynolds, Brown & Williamson, Lorillard Tobacco, Philip Morris and Ligget Group, Inc. See id. (referring to defendants in case).

148. See id. (relating that jury’s decision was exclusively in favor of class of smokers and included total judgment of $272.11 billion against tobacco companies).

149. See Bogus, supra note 63, at 57 (discussing barriers to tobacco suits).

150. See id. (noting many tactical weapons used by large corporate defendants in product liability cases).

151. See id. (recognizing that financial burdens of litigation may prevent plaintiffs from bringing and sustaining suits).

152. See, e.g., Cipollone v. Ligget Group, Inc., 505 U.S. 504, 506 (1992) (acknowledging some obstacles that may be present in class actions brought against large corporations).

153. See id. (providing example of how timely and expensive product liability cases can be).

154. See id. (setting forth types of strategic delays defendants in product liability cases may employ); see also Bogus, supra note 63, at 58 (noting that exhaustion is powerful weapon for large corporate defendants).

155. See Cipollone, 505 U.S. at 506 (recognizing that over nine years of litigation had passed since original complaint had been filed).
the victim must "prove everything," which is enormously expensive.\textsuperscript{156} These tactics were victorious in \textit{Cipollone} because, after the plaintiff died, her husband died and the surviving son voluntarily discontinued the case.\textsuperscript{157} This dismissal followed multiple federal \textit{Cipollone} cases, including two before the Supreme Court.\textsuperscript{158}

During the past twenty years numerous states have adopted statutes of repose.\textsuperscript{159} Under these statutes the cause of action may expire before it occurs.\textsuperscript{160} Statutes of repose provide that there is a certain time period after the date of sale of the product within which the cause of action must be brought.\textsuperscript{161} For example, some provide that the claim must be filed within ten years of the sale of the product. If the injury occurs twelve years after the sale of the product, there is no cause of action because the statute of repose has run. These statutes have been challenged on the basis they violate the equal protection clause and the access to court provisions of the state constitutions.\textsuperscript{162} Fortunately the statutes of repose are only important in a small number of cases—those relating to heavy equipment such as bulldozers and presses, which last for more than ten years—and have little effect on most consumer products, which generally cause injury within the first three years of ownership.\textsuperscript{163}

Protracted discovery in products cases has helped to expand the cost of litigation. A recent article by Professors George Shepherd and Morgan Cloud argues that discovery is the reason for the explosion in the costs of

\textsuperscript{156} See Elizabeth Gleick, \textit{Tobacco Blues: The Tobacco Industry Has Never Lost a Lawsuit but a New Billion Dollar Legal Assault and a High-Ranking Defector May Change That}, \textit{Time}, Mar. 11, 1996, at 54 (noting that Liggett Group has already spent \$75 million defending lawsuit and was prepared to spend even more).

\textsuperscript{157} See Bogus, supra note 63, at 58 (quoting Henry J. Reske, \textit{Cigarette Suit Dropped}, A.B.A.J., Feb. 1993, at 30 and noting that, after death of parents, neither son nor attorneys "wanted to continue the fight").

\textsuperscript{158} See, e.g., \textit{Cipollone}, 505 U.S. at 506 (providing history of case). A Florida attorney, Woody Wilner, has discovered a way to dramatically reduce the costs of litigating a tobacco suit; he does not attend the tobacco manufacturers depositions of the plaintiff. See Howard Ericson, \textit{Informal Aggregation: Procedural and Ethical Implication of Coordination Among Counsel in Related Law Suits}, 50 DUKE L.J. 381, 390 (2000) (noting strategies employed by successful plaintiff's attorney).

\textsuperscript{159} See Berry \textit{ex rel. Berry v. Beech Aircraft Corp.}, 717 P.2d 670, 677 (Utah 1985) (commenting that "[a] number of states have enacted . . . statutes of repose"). But see \textit{Lankford v. Sullivan, Long & Hagerty}, 416 So. 2d 996, 1003 (Ala. 1982) (striking down statute as being "arbitrary and capricious").

\textsuperscript{160} See Vandal, supra note 31, at 680 (noting harshness of criminal rule).

\textsuperscript{161} See \textit{id.} (examining procedural complexities of statute of repose requirements).

\textsuperscript{162} See \textit{Lankford}, 416 So. 2d at 1001 (challenging statute under Alabama's equal protection clause); see also \textit{Kennedy v. Cumberland Eng'g Co.}, 471 A.2d 195, 197 (R.I. 1984) (examining challenge of statute under state and federal equal protection grounds).

\textsuperscript{163} See Vandal, supra note 31, at 682-83 (discussing radical changes caused by statute of repose).
litigating all cases—including products cases. The authors reason that, since it is risky for either side to avoid lengthy discovery, many cases have now become prohibitively expensive. They conclude that discovery has "weighted the scales of justice against some of society’s most vulnerable groups" and that this increased financial burden of discovery has made litigation unaffordable for many people.

The plaintiff in a products liability suit must face the risk that if he or she is successful in winning punitive damages, large portions of the award may be taken away from him or her. In a recent case, BMW v. Gore involving fraud on the part of BMW in failing to inform consumers that the manufacturer had repainted portions of brand-new BMWs, the plaintiff recovered a two million dollar punitive damage award in the state court. On appeal the United States Supreme Court held that the award violated the Fourteenth Amendment. In deciding whether a punitive damage award is excessive and in violation of the Fourteenth Amendment, the Court will look at three factors. One is the nature of the injury. Is it based on economic loss or personal injury? The value of the BMW was decreased because of the new paint job. This is an economic loss. Because many products liability cases involve personal injury, a victim may be able to argue that the holding in BMW, resting on economic loss, does not apply. The second factor to be considered by the Court in deciding whether the punitive award is excessive is the ratio of punitive damages to out-of-pocket losses. The Court suggested that a ratio of four to one, or perhaps in extreme cases ten to one, might be appropriate, but anything larger is suspect. Finally, the Court suggested that the amount of punitive damages should bear some relationship to the criminal penalty for that type of conduct, and in the BMW case the most that could be awarded


165. See id. at 98 (theorizing that uncertainty of discovery costs has increased stakes and forced litigants to cover all bases).

166. Id. (postulating that rising cost of discovery effectively precludes poorer segments from suits).


168. See id. at 568-71 (imposing punitive damages to further states’ legitimate interests in punishing unlawful conduct and deterring repetition).

169. See id. at 573-75 (stating punitive damages may not be “granted disproportionate]ly” under Fourteenth Amendment).

170. See id. at 576-85 (defining generally three aggravating factors that must be present for punitive damages award).

171. See id. at 575 (stating that “some wrongs are more blameworthy than others”).

172. See id. at 580-81 (declaring that “exemplary damages must bear a reasonable relationship to compensating damages”).

173. See id. (endorsing various “reasonable” ratios).
as a fine was $10,000. Recent cases suggest that BMW will not be applied to products cases.

Several states including Georgia, have statutes that return a large percentage of the punitive damages obtained in a products liability case to the state. The Georgia statute provides that 75% of the punitive damage award goes to the state rather than the victim. Instead of slapping the hands of the defendant for producing a defective product that maims or kills, the hands of the victim's attorney are slapped for obtaining justice for his or her client. The message from the legislature to Georgia attorneys is clear: Do not take products cases, do not represent injured consumers.

IV. CONCLUSION

Numerous factors affect the calculations by the plaintiff's attorney in deciding whether to accept a products case. The impact of the theoretical and procedural reforms since 1980 is that the plaintiff's attorney will likely refuse to accept many modest products liability cases because he or she believes he or she will lose the case or that if he or she wins, the victory will not cover his or her out-of-pocket expenses. There are several possible solutions to this virtual closing of the courthouse doors to modest products cases.

First, follow the "superfund" model for toxic spills and assess the corporations that produce the largest amount of recurring damage and the most severe losses in products cases. The money would be used to fund a program that would provide justice in modest products cases. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) has become widely referred to as "superfund" because it "establishes a multi-billion dollar 'hazardous substance response trust fund'" as a means of financing governmental cleanups of hazardous chemical waste spills and sites. CERCLA is funded in part by the

174. See id. at 582-83 (rejecting impulse for categorical approach but precluding awards which "raise a suspicious judicial eyebrow").


176. See GA. CODE ANN. § 51-12-5.1 (e) (2) (2002) (stating "seventy-five percent of . . . punitive damages, less . . . costs . . . shall be paid into" state's treasury).

177. See id. (stating Georgia law with respect to punitive damages).


ment’s ability to recover the costs of any response or remedial actions taken when there is an actual or threatened release of a hazardous or toxic substance at a disposal site. CERCLA, under section 107(a), allows the government to name as parties to the cleanup, the owner or operator of the facility, the persons who arranged for the disposal, the persons in charge of the treatment or transportation of the toxic materials and the transporters of such hazardous wastes. This provision places ultimate liability on the chemical manufacturers. Congress, through CERCLA, has provided a means by which the financial burdens of hazardous waste cleanups rest on the responsible chemical industry.

The second approach might be modeled after the “Black Lung” act, which reimburses expenses for coal miners who have developed black lung disease. The trigger for payment is a certification by a doctor that the damage the miner suffered was caused by inhalation of coal dust. The purpose of the “Black Lung” act of 1972 is to provide compensation for claimants who became disabled due to pneumoconiosis contracted while mining. The act requires proof of three things for a claimant to recover: first, the claimant must prove disease or pneumoconiosis; second, causation; and third, total disability, defined as an inability to engage in coal mine employment, or its functional equivalent, caused by pneumoconiosis. The “Black Lung” act suggests that there could be a legislatively developed threshold and compensation for modest products injuries.

180. See id. (citing United States v. A & F Materials Co., Inc., 582 F. Supp. 842, 845 (S.D. Ill. 1984)) (restating test of liability); see also United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985) (providing interpretation of CERCLA statute). The general test for whether a defendant is liable under section 107(a) is whether the defendant(s) decided to put the waste into the hands of a facility that contains hazardous wastes. See id. (acknowledging CERCLA statute to hold generators of hazardous waste strictly liable for disposal of by-products).

181. See Ward, 618 F. Supp. at 895 (citing 42 U.S.C. § 9607(a)(3) (1982)) (stating that generators of hazardous material cannot escape liability by disregarding method by which their products were disposed).


184. See Timothy F. Cogan, Is the Doctor Hostile? Obstructive Impairments and the Hostility Rule in Federal Black Lung Claims, 97 W. Va. L. Rev. 1003, 1006 (1995) (explaining that to be covered under Black Lung Act claimant must show that inability to perform coal mine employment was due to pneumoconiosis).


187. See id. (providing that detrimental condition must have been caused by coal mine employment).

188. See id. (stating definition of total liability).
A third possible solution is to enact a special victim-of-products court, that would provide simplified procedures such as limitations on discovery and a restriction on damages to less than $100,000. This could be modeled after the popular small claims courts. These courts developed in the early 1900s in response to the expense and insufficiencies of the regular courts. Proponents of the movement believed that a society should have an accessible and effective forum for asserting legal rights. The formal procedures in the regular courts were often unreasonably time consuming and expensive. Thus, the courthouse doors were often closed to many injured persons.

Small claims courts were developed to solve these problems by opening the courthouse doors to the injured citizen. These courts serve three purposes: (1) fair resolution of civil disputes; (2) deterrence of violent self-help by disputants; and (3) identification of recurring social problems that might be proper subjects for legislative or administrative action. Small claims courts do not require the parties to have legal expertise. Claimants are able to resolve their legal problems for a small fee in a trial that lasts a few minutes. Many of the procedures and details of the small claims court would have to be redesigned for products cases, of course.

The conclusion is inescapable that the multi-faceted tort reforms over the last twenty years have been extremely successful. The constrictions in tort theory and civil procedure have left victims with substantial, but not

189. See, e.g., CA. CIV. PRO. CODE § 116.120 (West 2003) (providing general provisions on small claims divisions); COLO. REV. STAT. ANN. § 13-6-401 (West 2002) (setting forth procedures and requirements of small claims divisions).


191. See id. at 347 (citing Roscoe Pound, Administration of Justice in the Modern City, 26 Harv. L. Rev. 302 (1913)) (advocating heightened accessibility of courts to promote social justice).


193. See Best et al., supra note 190, at 347 (intending small claims court to be solution which created greater access to court system).

194. See id. at 344 (discussing function of small claims court).

195. See id. (citing ARTHUR BEST, WHEN CONSUMERS COMPLAIN 10 (1981)) (recognizing that small claims courts serve valuable purpose by not requiring petitioners to have legal expertise).

196. See Best et al., supra note 190, at 349 (citing Committee Hearings on S.B. 52 before Senate Committee on Judiciary (Feb. 9, 1976)).

197. There never was a demonstrated need for these retrenchments and reforms. See Thomas A. Eaton & Susette M. Talarico, A Profile of Tort Litigation in Georgia and Reflections on Tort Reform, 30 Ga. L. Rev. 627, 654 (1996) (pointing to success of Georgia's multifaceted tort reforms); see also Mark Curriden, Juries on Trial, DALLAS MORNING NEWS, May 7, 2000, (acknowledging effect of tort reform on juries).
litigable, damages with no forum for relief. It has resulted in huge windfall profits for manufacturers to the extent of injuries multiplied by the number of occurrences. A solution for the millennium is needed that will provide a venue to compensate the injured consumers and deter the manufacture of defective products.