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PRODUCTS LIABILITY—AN ANALYSIS OF THE LAW CONCERNING DESIGN AND WARNING DEFECTS IN WORKPLACE PRODUCTS

CHARLES E. CARPENTER, JR.*

I. INTRODUCTION

Product defects can generally be divided into two types: defective manufacture or assembly resulting in a physical flaw in an individual product; and defective design or warnings where the entire product line is inadequate and there need be no physical flaw. The fact that the entire product line is at risk is an important distinction, because of the larger scope of potential risk and the larger scope of potential liability when compared with a case of mismanufacture affecting only a single unit or group. The fact that no physical flaw is necessary is also important, because it makes it easier to allege a cause of action when an injured party cannot point to a demonstrated manufacturing defect that is associated with the injury.

Product-related accidents can also be divided into workplace accidents and consumer accidents. Work-related injuries represent a substantial portion of all products liability litigation. According to the Interagency Task Force on Products Liability, during the years 1965-70, forty-six percent of the products cases surveyed were work-related; and the figure increased to fifty percent during the years 1971-76.¹ An Insurance Services Office survey of more than 24,000 products liability claims closed between July 1, 1976 and March 15, 1977 found that workplace injuries resulted in average claims payments much higher than the com-

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1. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY vol. III, at 78 (1977).

bined average of claims payments for workplace injuries and consumer injuries.²

Workplace accidents have unique features when compared with consumer accidents. In a workplace accident, the purchaser-employer is often knowledgeable, frequently alters the product, and almost always controls the environment in which the product is used. When an employee is injured on the job, the employer must pay compensation benefits without regard to fault.³ These benefits generally include medical expenses⁴ and some fraction of the employee's weekly wage for a defined period of time. If the injury to the employee is the result of some actionable conduct by a third party, a suit may be brought in the name of the employee,⁵ and the employer is ordinarily reimbursed out of any proceeds.⁶ Even if the primary responsibility for the injury rests with the employer, the employee's opportunity for recovery from the employer is usually restricted to workmen's compensation benefits.⁷ Because the amount of workmen's compensation benefits is limited, the employee may feel

2. INSURANCE SERVICES OFFICE, PRODUCTS LIABILITY CLOSE CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS—HIGHLIGHTS 1 (1977), cited by Weisgall, *Products Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties*, 1977 WISC. L. REV. 1035, 1038-39 n. 13. The Interagency Task Force used "work-related" injuries as the basis for its report. The Insurance Services Office, on the other hand, based its survey on "workplace injuries." Accordingly, the Insurance Services Office Survey "found that, although workplace injuries account for only eleven (11%) percent of the products liability accidents which result in claims payments, these incidents account for forty-two (42%) percent of total bodily injuries payments, with an average claim of \$97,884." Although the precise definition of the terms "work-related" and "workplace" are not clear, under either criterion work-related injuries represent a substantial portion of all products liability litigation.

3. See S.C. CODE ANN. §§ 42-9-10, -20 (Supp. 1980). But see S.C. CODE ANN. §§ 42-9-70 (1976)(allowing a ten percent increase in compensation when the injury or death is due to the fault of the employer), -50 (1976)(allowing a ten percent reduction in compensation when the injury or death is due to the fault of the employee), -60 (1976)(allowing no compensation when the injury or death of the employee is caused by the intoxication or willfulness of the employee).

4. See S.C. CODE ANN. §§ 42-15-70 (1976)(medical expenses), -10 (1976)(amount of compensation for total disability); § 42-9-20 (Supp. 1980) (amount of compensation for partial disability).

5. See S.C. CODE ANN. § 42-1-560 (Supp. 1980)(rights and remedies against third party).

6. *Id.*

7. See S.C. CODE ANN. § 42-1-540 (1976)(employee's rights and remedies under workmen's compensation exclude all others against the employer).

compelled to bring suit against a third party.⁸ Action against a third party is in the interest of the employer, who may have contributed in large part to the accident, because even the limited exposure of the employer may be recouped through subrogation against the manufacturer of the product.⁹

When manufacturers sell products to employers, they presumably have no desire to be sued by injured employees; and they presumably want to make products as safe as the state of the art permits, provided the marketplace demands and will pay for safe products. Manufacturers, however, do not control the manner in which products are used, the safety procedures that are observed on the job, or the environment in which the product is used. These conditions are controlled by employers. Moreover, the economic burden of products liability losses does not fall as strongly on employers, and employers' decisions are governed by an economic incentive to keep the cost of products down. When an injury occurs, an employer can pay an injured employee the exclusive remedy of workmen's compensation benefits and then attempt to recoup this payment by participating in an action against the manufacturer.¹⁰ It comes as no surprise that both the employee and the manufacturer of the product emerge from this process less than satisfied.

The difficulties that emerge are reflected in the voluminous amount of both litigation and legislation in South Carolina and across the nation during recent years. South Carolina has enacted section 402A of the *Restatement (Second) of Torts*¹¹ and

8. Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. L. REV. 351, 419-20 (1970).

9. See S.C. CODE ANN. § 42-1-560 (Supp. 1980).

10. See note 5 *supra*.

11. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides as follows:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm, thereby caused to the ultimate user, or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. Section 402A has been codified in South Carolina at S.C. CODE ANN. § 15-73-10

the state supreme court has recently had several opportunities to consider the question of when the absence of a safety device or warning is an unreasonably dangerous defect.¹² These cases have presented difficult questions associated with the allegation that a product is defective when a safety device or warning is not provided. The decisions examine the question of liability by addressing such issues as whether the defect was the proximate cause of the injury,¹³ whether the injury to the plaintiff was reasonably foreseeable,¹⁴ whether the defendant manufacturer was under a duty to the injured plaintiff,¹⁵ how an open and obvious danger should affect the manufacturer's duty to give warnings,¹⁶ what knowledge will be expected of a reasonable user,¹⁷ what knowledge the particular user had,¹⁸ to whom warnings should have been directed,¹⁹ and whether there is a distinction between the liability of a seller and of a manufacturer.²⁰

The Uniform Products Liability Act (U.P.L.A.)²¹ has given particular attention to the basis of liability and standards of responsibility for manufacturers in design and warning cases²² and has afforded special treatment to the relationship between products liability and workmen's compensation in workplace injuries.²³ In addition, the U.P.L.A. provides for a number of other specific reforms in products liability law.²⁴

This article attempts to outline the law of South Carolina concerning liability for design and warning defects in workplace

(1976). See note 132 and accompanying text *infra*.

12. See *Marchant v. Lorain Div. of Koehring* (Marchant II), 272 S.C. 243, 251 S.E.2d 189 (1979); *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 246 S.E.2d 176 (1978); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978); *Marchant v. Mitchell Distrib. Co.* (Marchant I), 270 S.C. 29, 240 S.E.2d 511 (1977).

13. *E.g.*, 270 S.C. 453, 242 S.E.2d 671 (1978).

14. *E.g.*, *id.* at 471-72, 242 S.E.2d at 680; 271 S.C. 171, 246 S.E.2d 176 (1978).

15. *E.g.*, *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974).

16. *E.g.*, 270 S.C. at 462, 242 S.E.2d at 675.

17. *E.g.*, *id.* at 462, 242 S.E.2d at 675; 271 S.C. 171, 246 S.E.2d 176.

18. 271 S.C. at 176, 246 S.E.2d at 178.

19. *E.g.*, 272 S.C. at 248, 251 S.E.2d at 192; 270 S.C. 29, 240 S.E.2d 511 (1977). See text accompanying note 113 *infra*.

20. *E.g.*, 272 S.C. at 246, 251 S.E.2d at 191; 270 S.C. at 37, 240 S.E.2d at 514.

21. Uniform Products Liability Act, 44 Fed. Reg. 62,714 (1979) [hereinafter cited as U.P.L.A.]. See notes 106-131 and accompanying text *infra*.

22. *Id.* §§ 104(B),(C), at 62,721.

23. *Id.* § 114, at 62,740.

24. See text accompanying notes 118-21 *infra*.

products and to compare South Carolina law to the U.P.L.A. It will explore problems that arise from the overlap of the statutory workmen's compensation system, in which benefits are based on a relationship, and the tort recovery system, in which benefits are based on fault. Finally, the article will suggest ways in which those problems may be reduced or eliminated.

II. THE DIFFICULTY OF DEFINING DEFECT IN DESIGN AND WARNING CASES

The search for a sound test for determining if a product is defective has been perhaps the most difficult analytical problem in the field of products liability,²⁵ and it has yet to be resolved by any consensus among the courts. The varied formulations offered by courts and commentators to analyze products liability cases can generally be categorized as either consumer expectations tests or risk-benefit tests.

The consumer expectations test may be stated broadly as follows: If a consumer reasonably expects that a product may be safely used for a particular purpose, the product is defective if it fails to meet those expectations.²⁶ The consumer expectations test has been criticized for creating a barrier to recovery; in the case of obvious hazards, a consumer's expectations could never be frustrated.²⁷ Moreover, the test may be too elusive when consumer attitudes are not sufficiently crystallized to define an expected standard or when a product's technology is beyond the understanding of the consumer.²⁸

The word "consumer" is troublesome because employees or bystanders are not the purchasers of products used in the workplace and probably are not consumers within the common mean-

25. See P. KEETON, D. OWEN, & J. MONTGOMERY, *CASES & MATERIALS ON PRODUCTS LIABILITY AND SAFETY*, 224-69 (1980)[hereinafter cited as P. KEETON]; Owen, *Restructuring Products Liability Law*, 16 TRIAL 58 (1980).

26. See P. KEETON, *supra* note 25, at 225-38.

27. *Id.* at 228. See generally Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301 (1969); Fischer, *Products Liability-The Meaning of Defect*, 39 Mo. L. REV. 339, 348-52 (1974); Hubbard, *Reasonable Human Expectation: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465 (1978); Rheingold, *What are the Consumer's Reasonable Expectations?*, 22 BUS. L. 589 (1976); Shappo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1302-16 (1974).

28. Dickerson, *supra* note 27, at 307.

ing of the term.²⁹ The word "expectations" is troublesome because it is subjective, and its meaning may vary among consumers and triers of fact. Although objectivity may be enhanced by requiring the expectation to be that of a reasonable consumer, the concept nevertheless remains elusive. "Expectations" also loses power in the realm of sophisticated products that are purchased by employers and used by employees, each of whom may have different expectations. Employees' expectations of a safe workplace are directed primarily toward the environment controlled by employers rather than products provided by manufacturers. Employers may be knowledgeable about available design choices and may have sufficient understanding to put products in their workplace in a safe manner. Employers, however, are unlikely to be injured and may not have the same personal incentive for achieving safety that individual consumers have for themselves. Thus, both employees' expectations of a safe workplace and manufacturers' expectations that products will be used safely in the workplace may be frustrated by an employer's lack of incentive to insure that a product is used in a safe manner.

Recognizing weaknesses in the consumer expectations test, the drafters of the U.P.L.A. did not adopt the test in design cases and made it only one component of the analysis for determining defectiveness in warning cases.³⁰ The most important objections of the drafters were that the consumer does not know what to expect, each trier of fact is likely to have a different abstract view of consumer expectations, most consumers cannot evaluate conscious design choices, and the consumer expectations test is therefore too subjective to be practicable.³¹

The second test for defectiveness is the risk-benefit test. Although many elements might be included, the basic determination is whether a product meets society's standards of acceptability given the risks, benefits, costs, and possible alternatives.³²

29. The word "consumer" refers to "individuals who purchase, use, maintain, and dispose of products or services." BLACK'S LAW DICTIONARY 286 (5th ed. 1979).

30. U.P.L.A. §§ 104(B)(design defects), (C)(warning defects), 44 Fed. Reg. at 62,721.

31. *Id.*, analysis, at 62,724.

32. Several formulations have been proposed in addition to those found in the U.P.L.A. One list of considerations proposed by Dean Wade is as follows:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

The balancing of risks, benefits, and costs is a familiar and natural decision model for individuals, corporations, and governments. It has the advantages of rewarding efficiency and providing an economic incentive to manufacture safe products while avoiding pricing products out of existence with requirements for greater safety than the products' use warrants. Risk-benefit analysis from the legal viewpoint is analogous to the cost-benefit analysis that manufacturers use when making design choices. The risk-benefit test would seem, therefore, to be the more useful analysis in design cases.³³

When the analysis shifts to warning cases, however, the risk-benefit test becomes less useful. The very nature of selecting an effective warning requires consideration of users' understanding and expectations about a product. Because warnings

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, *On the Nature of Strict Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973). Another interesting proposal is found in Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. Rev. 803, 818 (1976):

(1) The cost of injuries attributable to the condition of the product about which the plaintiff complains—the pertinent accident costs.

(2) The incremental cost of marketing the product without the offending condition—the manufacturer's safety cost.

(3) The loss of functional and psychological utility occasioned by the elimination of the offending condition—the public's safety cost.

(4) The respective abilities of the manufacturer and the consumer to

(a) recognize the risks of the condition,

(b) reduce such risks and

(c) absorb or insure against such risks—the allocation of risk awareness and control between the manufacturer and the consumer.

Id. See P. KEETON, *supra* note 25, at 247-48.

33. See P. KEETON, *supra* note 25, at 238-40.

are designed to create or alter expectations and knowledge, foreseeing expectations is essential to choosing good warnings. Too many warnings on products may create the impression of a false cry of alarm that predictably results in complacency and failure to heed; too few warnings may allow danger to go undisclosed. The level of technological sophistication may also make it difficult to achieve a meaningful warning. A further problem arises concerning who should be warned. The employer, the employee who uses the product, and the employee who is injured are frequently different individuals with different levels of understanding and different expectations. The U.P.L.A.'s analysis attempts to resolve these difficulties in warnings by combining concepts of risk-balancing, foreseeability, expectations, and technological feasibility.³⁴

The level of product safety is frequently a blend of warning and design,³⁵ and neither the consumer expectations test nor the risk-benefit test offers a satisfactory solution in every instance. Frequently, a particular risk may be eliminated either by designing a safety device or by issuing a warning or by adopting some combination of both. These options complicate the selection of the appropriate U.P.L.A. test—the design test, the warning test, or a combination of the two—for application in specific cases. Moreover, the difficulty is compounded when one takes products liability law into the workplace where it overlaps with the workmen's compensation system.

III. PROBLEMS IN THE OVERLAP BETWEEN PRODUCTS LIABILITY AND WORKMEN'S COMPENSATION

The problems of overlap between products liability law and

34. U.P.L.A. § 104, analysis, 44 Fed. Reg. at 62,721. This section is set forth in the text accompanying note 116 *infra*.

35. *Barker v. Lull Eng'r. Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). See Calabresi & Hirschhoff, *Tort—A Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439 (1969); Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974); Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969); Phillips, *A Standard for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101 (1977); Traynor, *The Ways & Meanings of Defective Products & Strict Liability*, 32 TENN. L. REV. 363 n.1 (1965); Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825 (1973); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

workmen's compensation legislation have been clearly described by Professor Larson:

Perhaps the most evenly balanced controversy in all of workmen's compensation law is the question whether a third party in an action by the employee can recover over against the employer, when the employer's fault has caused or contributed to the injury.³⁶

Each side to this controversy has an argument in its favor which, considered alone, sounds irresistible. The employer complains with considerable cogency that the net result is that [money] has been put in the employee's pocket and has left the employer's pocket, all because of the compensable injury—in spite of the plain statement in the workmen's compensation act that the employer's liability for such an injury shall be limited to compensation payments.³⁷

Yet, if the third party were made to bear the entire [money] damages, he would argue with equal cogency that it is unfair to subject him, the lesser of two wrongdoers, to a staggering liability which he would not have had to bear but for the sheer chance that the other parties involved happen to be under a compensation system. Why should he, a stranger to the compensation system, subsidize that system by assuming liabilities that he could normally shift to, or share with, the employer?³⁸

In an industrial setting, employers may be at fault in creating a dangerous working environment for a correctly made product. They sometimes fail to pass along appropriate warnings or instructions and often modify products, rendering them unsafe.³⁹ Even when employers are at fault, they are permitted through subrogation to assert claims against manufacturers who may be free from fault or very marginally at fault;⁴⁰ they have a strong economic incentive to assert even questionable claims against manufacturers. Employees have the same economic incentives to assert questionable claims against manufacturers but

36. Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. L. REV. 351 (1970).

37. *Id.* at 352. What seems to support this irresistible argument is the existence of the workmen's compensation statutory scheme of compensation. If the statute is changed, it is possible to make the argument disappear. *Id.*

38. *Id.* at 352.

39. See U.S. DEP'T OF COMMERCE, *supra* note 1, at 48.

40. See generally S.C. CODE ANN. § 42-1-560 (Supp. 1980).

have no similar incentive to assert claims against their employers.⁴¹ The argument against recovery over by third-party manufacturers against employers recognizes that it indirectly evades the underlying spirit of workmen's compensation law that the employee has bargained with the employer to exchange common-law rights for limited but assured statutory benefits.⁴²

The overlap between products liability law and workmen's compensation legislation has created several undesirable results. First, because workmen's compensation benefits are often inadequate, injured parties frequently feel compelled to seek adequate tort recoveries from sympathetic juries in cases of serious injury.⁴³ Second, shifting the compensation burden to manufacturers may leave manufacturers with burdens under which they cannot continue to function.⁴⁴

Courts, realizing that the plaintiff was without an adequate remedy against his employer, have stretched the law to provide an action against the manufacturer. Whether this is desirable or not is a matter of opinion. The phenomenon is very real and must give the reader pause when attempting to extrapolate principles from industrial accident cases to consumer products cases.⁴⁵

Still other problems arise. For example, in warning cases, the statutory immunity of employers may reduce their incentive to transmit warnings. Employers are the usual recipients of all warnings and directions from the manufacturer, but even adequate warnings are ineffective when employers fail to pass them on to their employees. Nevertheless, even when the manufacturer has properly attempted to avoid danger, the injured employee must sue the manufacturer to recover in tort.⁴⁶ Finally, the societal interest in deterring irresponsible behavior is frustrated when a negligent employer avoids responsibility by standing behind the exclusive remedy shield of the workmen's com-

41. Mitchell, *Products Liability, Workmen's Compensation, and the Industrial Accident*, 14 Duq. L. Rev. 349, 381 (1976).

42. Larson, *supra* note 36, at 419-20.

43. Mitchell, *supra* note 41, at 381.

44. *Id.* at 382-83.

45. A. WEINSTEIN, A. TWERSKI, H. PIEHLER & W. DONAHER, *PRODUCTS LIABILITY & A REASONABLY SAFE PRODUCT* 108 (1978).

46. Mitchell, *supra* note 41, at 379.

pensation statute.⁴⁷ Judge Traynor, quoting a North Carolina decision, has illustrated this point as follows:

[W]hen the employee or his estate has been satisfied, and the employer seeks to recover the amount paid by him, from such third party, his hands ought not to have the blood of the dead or injured workman upon them, when he thus invokes the impartial powers and processes of the law.⁴⁸

A. *Divergent Historical Development of Workmen's Compensation and Products Liability*

In large measure, the inconsistent overlap between the statutory benefits system of workmen's compensation and the tort recovery system of products liability stems from their distinct historical roots.

1. *The History of Products Liability.*—The common law has moved very rapidly. Professor White points out that the emergence of the separate branch of law known as torts occurred as recently as the late nineteenth century⁴⁹ with the first American treatise appearing in 1859⁵⁰ and the first casebook in 1874.⁵¹ The merger of tort and contract principles in the field of products liability began in England with *Wright v. Winterbottom*⁵² and in the United States with *Thomas v. Winchester*,⁵³ *Devlin v. Smith*,⁵⁴ and *McPherson v. Buick Motor Co.*,⁵⁵ a decision frequently credited as the origin of American products liability.

The citadel of privity of contract has fallen,⁵⁶ and the South

47. *Id.* at 383.

48. *Witt v. Jackson*, 57 Cal.2d 57, 71, 366 P.2d 641, 649, 17 Cal. Rptr. 369, 377 (1961)(citing *Brown v. Southern Ry.*, 204 N.C., 668, 669, 169 S.E. 419, 420 (1933)). See Mitchell, *supra* note 41, at 367-68.

49. G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 3 (1980); White, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671 (1977). See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 1-27 (4th ed. 1971).

50. F. HILLIARD, *THE LAW OF TORTS* (1859). See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409 (1973).

51. J. AMES, *A SELECTION OF CASES ON LAW OF TORTS* (1874). See Rothenburg, *Book Review*, 23 U.C.L.A. L. REV. 373, 377 (1975).

52. 10 M & W 109, 152 Eng. Rep. 402 (1842).

53. 6 N.Y. 397, 57 Am. Dec. 455 (1852).

54. 89 N.Y. 470, 42 Am. Rep. 311 (1882).

55. 217 N.Y. 382, 111 N.E. 1050 (1916).

56. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

Carolina Supreme Court has recently sought "to still all whispers of its continued existence."⁵⁷ With the elimination of the privity of contract issue, the expansion of recovery has continued. This expansion was justified in *Henningsen v. Bloomfield Motors, Inc.*⁵⁸ on the ground that the manufacturers or sponsors of a product are usually in a better position to absorb the economic burden of losses.⁵⁹ In *Greenman v. Yuba Power Products, Inc.*,⁶⁰ the California Supreme Court held that

[t]o establish the manufacturer's liability, it [is] sufficient that plaintiff [prove] that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.⁶¹

The most dramatic growth of products liability has occurred since the publication in 1965 of section 402A of the *Restatement (Second) of Torts*.⁶² A sample of eight states taken by the Inter-agency Task Force on Products Liability showed that the number of reported products liability cases doubled between the 1965-70 period and the 1971-76 period.⁶³ As a reflection of this trend, sections on products liability appeared for the first time in *American Jurisprudence 2d* in 1972⁶⁴ and in the 1976 supplement to *Corpus Juris Secundum*.⁶⁵

It has been observed that the distinctions between the various doctrines of products liability are more theoretical than practical.⁶⁶ The three theories of negligence, breach of warranty, and strict liability have merged through the development of case law after the publication of section 402A.⁶⁷ Each theory requires that the plaintiff's injury be the result of some defect in the product. For that reason, the most difficult and basic question

57. *JKT Co. v. Hardwick*, 274 S.C. 413, 419, 265 S.E.2d 510, 513 (1980).

58. 32 N.J. 358, 161 A.2d 69 (1960).

59. *Id.* at 360, 161 A.2d at 72.

60. 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

61. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

62. See note 11 *supra*.

63. See U.S. DEP'T OF COMMERCE, *supra* note 1.

64. 63 AM. JUR. 2D *Products Liability* §§ 1-227 (1972).

65. 72 C.J.S. *Products Liability* § 77 (Supp. 1976).

66. *Brown v. Ford Motor Co.*, 282 F. Supp. 906, 908 n.1 (D.S.C. 1968); *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307, 309 (Fla. 1968).

67. For the text of section 402A, see note 11 *supra*.

confronting courts is the meaning of "defect." One commentator has asserted that the courts are not properly equipped to make technologically sophisticated determinations about a product's condition and are being strained to the breaking point.⁶⁸ The most important controversy, however, concerns the manner in which the courts should resolve two divergent points of view. One view holds that the plaintiff should only be required to prove that he has been injured and that some product was involved.⁶⁹ On the other hand, some argue strongly that manufacturers' liability has already been extended to the point that the capital goods industry is endangered and retraction is necessary.⁷⁰

The contention that safety is given too little emphasis has been expressed as follows:

Unfortunately, the notion held by many outside the engineering profession, that the product design process always involves a sophisticated fine tuning of carefully articulated and quantified parameters, is a myth. As we have indicated elsewhere, every product is a compromise between quantifiable aspects of design and the uncertainties of actual performance of the product in the environment of its use. This gap is usually closed by the safety factor (really a factor of ignorance) which is a substantive judgmental response to the inherent uncertainties in any design. This response to the technological uncertainties endemic in the design process, when joined with the pressures from marketing efforts, production costs, and competing products, serves to dispel the notion that a sacrosanct product will necessarily emerge from these competing pressures. Safety is often a stepchild in the design process and is usually addressed as an afterthought.⁷¹

Yet the point of view that courts have gone too far in reducing the plaintiff's burden in litigation also has its adherents:

68. Henderson, *Design Defect Litigation Revisited*, 61 CORNELL L. REV. 541, 556-57 (1976).

69. Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability-Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976).

70. Twerski & Weinstein, *A Critique of the Uniform Products Liability Law - A Rush to Judgment*, 28 DRAKE L. REV. 221 (1977-78). See Uniform Products Liability Law §§ 106(D), (E), 107(B), 109(B)(2), 44 Fed. Reg. 2,999-3,000 (1979).

71. Twerski, *supra* note 69, at 528.

A note of blunt truthfulness is in order. What we fear with the consumer expectation test is that the court will turn over to the jury borderline cases that have little merit. Once these cases enter into the grist of jury decision-making, there is a reluctance by appellate courts to reverse jury verdicts. This problem lurks behind the establishment of a clear and convincing standard of proof for several issues raised within the U.P.L.A.⁷²

The drafters of the U.P.L.A. share the latter concern over expanded recovery. Because they were concerned with the efficacy of the strict liability system as a mechanism for distributing the cost of product-related injuries in all cases,⁷³ the drafters abandoned strict liability in both design cases and warning cases and established separate tests for each of these two categories.⁷⁴

2. The Historical Development of Workmen's Compensation Law.—The fault basis that has been the theme of tort law stands in sharp contrast to the compensation system that has developed around workplace accidents. Pursuant to workmen's compensation legislation, the test of liability is based on the employment relationship rather than on conduct. The test is whether a work-connected injury has taken place, and fault is not an issue.⁷⁵ In return for speedy adjudication of claims and diminished proof of eligibility under a workmen's compensation statute, employees waive their common-law right to sue employers and accept a reduced but more secure form of recovery.⁷⁶ While the widespread assertion of products liability claims is of relatively recent vintage, workmen's compensation has been a strong force in the workplace since the late 1800s. It does not have direct common-law roots, nor has there been any chance for the common law to shape employer-employee litigation in the manner that it has shaped the development of products liability law. Workmen's compensation legislation originated in nineteenth century Germany with a plan set out by Bismarck for compulsory insurance in the workplace.⁷⁷ The plan was a politi-

72. Twerski & Weinstein, *supra* note 70, at 232-33.

73. U.P.L.A. § 104, analysis, 44 Fed. Reg. at 62,722.

74. See notes 112 & 113 and accompanying text *infra*. See also text accompanying notes 31-36 *supra* & 148 *infra*.

75. A. LARSON, WORKMEN'S COMPENSATION LAW § 5.10, at 5 (1978).

76. Mitchell, *supra* note 41, at 352-53.

77. A. LARSON, *supra* note 75, § 5.00 at 33.

cal effort by the practical Socialists to counter the increasing political strength of Marxian-type Socialists.⁷⁸

During the nineteenth century in England, the fear of an adverse impact on the development of business resulted in the creation of the fellow servant exception to the common-law principle of vicarious liability of the master for the torts of his servant.⁷⁹ The fellow servant rule, contributory negligence, and voluntary assumption of risk doctrines shifted losses resulting from injuries to employees from the employer to the injured workman, who was unable to sustain such a loss.⁸⁰ In the United States, by the end of the nineteenth century, an increasing volume of uncompensated injuries forced a change.⁸¹ In 1910, the New York Commission made a report based on a study of the German plan, which was the basis for New York's Compensation Act.⁸² From these beginnings, the evolution of workmen's compensation has resulted in a present concern about inadequacy of recovery in certain instances, lack of incentive for claims against culpable employers, and the unfair shifting of burdens from the employers' enterprises to third-party enterprises in accidents concerning products.⁸³

The rash of products liability claims by injured workmen who have already received compensation benefits is indicative of the inadequacy of the benefits in cases with major injuries.⁸⁴ The struggle in the courts to find an acceptable manner by which to apportion the economic burden of the injury among culpable enterprises is indicative of the inequities in the exclusive remedy feature of the workmen's compensation system, which bars third party contribution or indemnification over against an employer by a manufacturer.⁸⁵ The struggle over contribution and indemnity and the existence of statutory provisions in some workmen's compensation systems for increased benefits upon proof of moral

78. *Id.* § 5.10, at 34.

79. *Priestley v. Fowler*, 3 M & W 1, 150 Eng. Rep. 1030 (1837).

80. A. WEINSTEIN, *supra* note 45, at 104-05.

81. *Id.* at 105; A. LARSON, *supra* note 75, § 5.20, at 37.

82. A. LARSON, *supra* note 75, § 5.10, at 36.

83. A. WEINSTEIN, *supra* note 45, at 106-08; Mitchell, *supra* note 41, at 355.

84. See generally U.S. DEP'T OF COMMERCE, *supra* note 1.

85. See S.C. CODE ANN. § 42-1-580 (1976)(detailing the rights of a third party against employer or employee's recovery).

fault by the employer⁸⁶ are indicative of the inadequacy and unfairness of incentives to assert claims against the employer.

B. *Evaluation of the Law of Products Liability and the Law of Workmen's Compensation*

1. *The Tort Law System.*—In the few years since the appearance of section 402A of the *Restatement (Second) of Torts*,⁸⁷ the common law of torts has moved dramatically. Evaluation of the success of the tort recovery system following the introduction of section 402A must be based on an appraisal of the system's effectiveness in meeting its goals. The goals of the tort law system have been summarized as follows:⁸⁸

It is believed that the objectives of tort law can be summed up, both historically and sociologically, under four fairly simple heads, as follows:

(1) A punitive objective, closely allied to traditional ideas of morality which have been manifested in criminal law: the punishment of bad actors for their bad acts.

(2) A deterrence objective, the law being designed either to produce fear of sanctions, thus deterring tortious activity, or otherwise to make such activity so obviously disadvantageous that people will not engage in it. Under this head "accident prevention" is what the law seeks.

(3) A distribution of losses objective, calling for a system that will reasonably compensate those who suffer injuries and will impose the cost of compensation equitably upon those who should reasonably and without undue hardship bear that cost.

(4) A negative objective, of not unduly discouraging socially desirable enterprise and activity by imposing upon them financial or regulatory burdens that will stifle or substantially inhibit them.⁸⁹

In the context of industrial accidents, it would seem that these objectives of tort law are not well served. At a minimum, the employee recovers his workmen's compensation benefits

86. Mitchell, *supra* note 41, at 355-56. See S.C. CODE ANN. § 42-9-70 (1976).

87. For the text of section 402A, see note 11 *supra*.

88. R. LEFLAR, APPELLATE JUDICIAL OPINIONS 16 (1974).

89. *Id.* A similar list of goals is given by Dean Prosser: (1) moral aspects of defendant's conduct; (2) historical development; (3) convenience of administration; (4) capacity to bear loss; and (5) prevention of punishment. W. PROSSER, *supra* note 49, at 16-23 (4th ed. 1971).

from the employer. In instances when either the employer or the employee or both are at fault, neither is punished. The employee receives the same, and the employer pays the same regardless of their respective conduct. In those instances where the employer and sometimes the employee engage in dangerous conduct, there is no strong deterrent against such conduct. The distribution of loss objective may be fulfilled if the worker can recover from a third party, but this depends entirely on the fortuitous circumstances of the accident. A worker who is injured as a result of a defective product wins extra tort recovery, but another worker who is injured as a result of some other cause does not get the extra tort recovery; their compensation is unequal, and this result is difficult to justify. The development of products liability law has now reached the point at which it may discourage some socially desirable enterprises by imposing potentially stifling burdens on manufacturers that should be reduced and shared by employers of injured workers.⁹⁰

Products liability litigation has been strongly criticized not only by the manufacturing industry but also by those who support more recovery for claimants. One critic has said that products liability litigation and the entire common-law liability system are cumbersome, wasteful, and cruel, resulting in delayed payments and the consumption of a large portion of the available funds in administrative and investigative costs and legal fees for plaintiffs and defendants.⁹¹ To the extent that such criticism is justified, the goals of the tort law system in the context of products liability in the workplace are not being well served at the present time.

2. *The Workmen's Compensation System.*—The workmen's compensation system does not purport to distribute losses in the same manner as the tort recovery system. Instead, it gives the claimant a sum that, when added to his remaining earning capacity, will prevent his being a burden to others:⁹²

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most

90. See P. KEETON, *supra* note 25, at 996.

91. O'Connell, *Bargaining for Waivers of Third Party Torts Claims: An Answer to Products Liability Woes for Employers & Their Employees & Suppliers*, 2 L. REFORM 435, 436-37 (1976).

92. A. LARSON, *supra* note 75, § 2.50, at 11.

dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.⁹³

Furthermore, unlike the tort system, the compensation system provides recovery only for injuries that produce a disability or an effect on earning power.⁹⁴ Certain disfigurements, destruction of sexual potency, loss of child-bearing capacity, pain and suffering, and loss of consortium are not recoverable in the compensation system.⁹⁵

There is no intent that workmen's compensation benefits should equal the actual amount of the loss. Aside from any consideration of whether such benefits are affordable, it might be expected that full pay for no work would encourage malingering.⁹⁶ The compensation system has goals of loss distribution, security for work-connected injuries in a dignified manner, and presumably some incentive for the employer to provide safe working conditions because he must initially bear the cost of workmen's compensation insurance.⁹⁷ An ancillary goal of the workmen's compensation system is its elimination of friction that occurs between adversaries in a traditional lawsuit.⁹⁸

Evaluation of the success of the workmen's compensation system must be based on an examination of what the system accomplishes. Most statutes award between one-half and two-thirds of average weekly wages,⁹⁹ and virtually all of the acts set a maximum award, which is usually sufficient to maintain the

93. *Id.* § 2.20, at 5.

94. For relevant South Carolina Code sections, see note 4 *supra*.

95. A. LARSON, *supra* note 75, § 2.40, at 10-11. See S.C. CODE ANN. § 42-9-30(21)(1976)(disfigurement compensation); *Lowery v. Wade Hampton Co.*, 270 S.C. 194, 241 S.E.2d 556 (1978)(barring action by husband for loss of consortium); *Workmen's Compensation, Annual Survey of South Carolina Law*, 31 S.C.L. REV. 153, 158 (1979).

96. A. LARSON, *supra* note 75, § 2.50, at 12. This does not seem to be a consideration in the tort system even when collateral sources of recovery exist.

97. *Id.* § 3.20, at 17-18.

98. A. WEINSTEIN, *supra* note 45, at 106.

99. Section 42-9-10 of the South Carolina Code provides, in pertinent part: "When the incapacity for work resulting in an injury is total, the employer shall pay . . . weekly compensation to equal sixty-six and two-thirds % of his weekly wages, but not less than twenty-five dollars a week . . ." S.C. CODE ANN. § 42-9-10 (Supp. 1980).

claimant at only a subsistence level.¹⁰⁰ Furthermore, settlements are often paid in a lump sum,¹⁰¹ permitting employees to spend the benefits quickly and imprudently. Evidence of the ineffectiveness of this system of recovery in some instances is the already mentioned plethora of products liability cases by injured workmen against third-party manufacturers.¹⁰² In cases with major injuries, if workmen's compensation awards were adequate and paid out periodically like wages, an employee would have little incentive to bring an independent action against a third-party manufacturer because the employee would already have a substantially adequate remedy. In addition, most of the damages recovered would simply go to reimburse the employer.¹⁰³ In cases with minor injuries, however, few employers could be persuaded on the basis of the number and amounts of awards in cases with minor injuries that the compensation system today offers any meaningful incentive against malingering. On the contrary, the nuisance of defense costs and the inconvenience to the employer encourage overpayment of small claims.

With respect to loss distribution, the workmen's compensation system has been accused of failing to meet its goals.¹⁰⁴ In theory, liability under the compensation system should provide assistance to the employee without hurting the employer who can pass the loss to the consumer.¹⁰⁵ However, when the shift is made from theory to practice, it is clear that in some instances, the employer's enterprise is not assuming the loss and passing it on to its consumers. Rather, the employer and the employee can join forces to impose a severe loss on a third-party manufacturer who cannot pass all of the loss on to its own consumers. An example of the potentially severe consequences is found in the aftermath of the leading case of *Bexiga v. Havir Manufacturing*

100. A. LARSON, *supra* note 75, § 2.50 at 11. See S.C. CODE ANN. § 42-9-100 (1976, repealed 1978)(providing that the total compensation payable under this title shall in no case exceed forty thousand dollars).

101. See S.C. CODE ANN. § 42-9-100 (Supp. 1980). See *Administrative Law, Annual Survey of South Carolina Law*, 29 S.C.L. REV. 11 (1978).

102. See U.S. DEP'T OF COMMERCE, *supra* note 1.

103. See S.C. CODE ANN. § 42-1-50 (Supp. 1980) ("[T]he carrier [employer] shall have a lien on the proceeds from any recovery from the third party . . . to the extent of the total amount of compensation. . .").

104. Mitchell, *supra* note 41, at 354-55.

105. A. LARSON, *supra* note 75, § 2.70, at 13.

Corp.¹⁰⁶ As a result of products liability litigation, the defendant manufacturer decided to go out of business.¹⁰⁷ Although going out of business may be unusual, the inability of third-party manufacturers to pass on all of the loss is not unusual; substantial losses and employment cutbacks may be expected. It is regrettable when other employees lose jobs and when stockholders—frequently employee pension plans—lose their investments.

There is a more important problem that arises. The third party manufacturer may be able to bear the loss but should not because the real ability to control the safety of the work environment rests with the employer. This is one of the most critical faults of the present overlap between products liability and workmen's compensation. If injury is to be prevented, the one who is in fact able to prevent the loss must have an incentive to prevent it, and frequently this is the employer rather than the manufacturer or seller.

Finally, problems may arise when different jurisdictions offer different levels of compensation. Professor Larson notes the example of Wisconsin's having increased its compensation benefits for silicosis before neighboring states did, with the result that its granite and monument works were forced out of business.¹⁰⁸ In that instance, it seems that the employees of the granite and monument works in Wisconsin might well have preferred reduced workmen's compensation benefits to unemployment or forced relocation to a neighboring state that had lower compensation benefits but a healthy granite and monument industry.

In summary, it appears that the present workmen's compensation system is not effectively meeting its goals. The loss distribution mechanism is inequitable, the system provides no proper incentive pattern to induce a safe working environment, overpayment commonly occurs in cases with minor injuries, and, in cases with major injuries, awards may not permit employees to maintain themselves with reasonable dignity.¹⁰⁹

106. 60 N.J. 402, 290 A.2d 281 (1972).

107. P. KEETON, *supra* note 25, at 996.

108. A. LARSON, *supra* note 75, § 2.70, at 14 n.18.

109. It may be noted that in addition to the inadequacy of the compensation provided, awards are frequently paid in a lump sum that may be quickly dissipated, leaving the former employee in difficult financial circumstances and allowing him to become a ward of the state.

IV. SOLUTION PROPOSED BY THE UNIFORM PRODUCTS LIABILITY ACT¹¹⁰

The Department of Commerce has recently published the model Uniform Products Liability Act.¹¹¹ The goals of the Act include the following:

(1) To ensure that persons injured by unreasonably unsafe products receive reasonable compensation for their injuries.

(2) To ensure the availability of affordable products liability insurance with adequate coverage to product sellers that engage in reasonably safe manufacturing practices.

(3) To place the incentive for loss prevention on the party or parties who are best able to accomplish that goal.

(4) To expedite the reparations process from the time of injury to the time the claim is paid.

(5) To minimize the sum of accident costs, prevention costs, and transactions costs.¹¹²

A. U.P.L.A. Provisions Applicable to Design and Warning Cases

Section 104 of the U.P.L.A., entitled "Basic Standards of Responsibility for Manufacturers," provides that a product manufacturer is subject to liability if the product that caused harm was defective.¹¹³ It provides further that, among other things, a product is defective if it is unreasonably unsafe in design or unreasonably unsafe because adequate warnings or instructions were not provided.¹¹⁴

In the context of design and warning cases, the drafters of the Act were concerned with the difficulty of analysis and the potential for overkill against a manufacturer and, therefore,

110. See note 21 *supra*. There have been a variety of writings both criticizing and supporting various features of the U.P.L.A. See, e.g., Twerski & Weinstein, *supra* note 68; Henderson, *Manufacturer's Liability for Defective Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625 (1978). It is beyond the scope of this article to analyze all of the proposals that have been offered. The author's purpose is a comparative analysis of the U.P.L.A. and South Carolina law.

111. U.P.L.A., 44 Fed. Reg. at 62,713.

112. *Id.* at 62,714-15.

113. *Id.* at 62,721.

114. In cases that do not concern design or warning problems, a product is defective if "[i]t was unreasonably unsafe in construction; . . . [i]t was unreasonably unsafe because it did not conform to the product sellers express warranty. . . ." *Id.* § 104 at 62,721.

placed both design and warning cases on a "fault" basis, albeit a rather tepid version of fault.¹¹⁵ With respect to design cases, section 104(B)(1) of the U.P.L.A. provides as follows:

In order to determine that the product was unreasonably unsafe in design, the trier of fact must find that, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms outweighed the burden on the manufacturer to design a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product.¹¹⁶

With respect to warnings, section 104(C)(1) of the Act provides as follows:

In order to determine that the product was unreasonably unsafe because adequate warnings or instructions were not provided about a danger connected with the product or its proper use, the trier of fact must find that, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms rendered the manufacturer's instructions inadequate and that the manufacturer should and could have provided the instructions or warnings which claimant alleges would have been adequate.¹¹⁷

115. *Id.*

116. *Id.* § 104, analysis, at 62,722. Section 104(B)(2) of the Act suggests consideration of the following examples of evidence when making determinations of design defectiveness:

- (a) Any warnings and instructions provided with the product;
- (b) The technological and practical feasibility of a product designed and manufactured so as to have prevented claimant's harm while substantially serving the likely user's expected needs;
- (c) The effect of any proposed alternative design on the usefulness of the product;
- (d) The comparative cost of producing, distributing, selling, using, and maintaining the product as designed and as alternatively designed;
- (e) The new or additional harms that might have resulted if the product had been so alternatively designed.

Id. § 104(B)(2) at 62,721.

117. *Id.* § 104(C) at 62,721. Section 104(C)(2) of the Act suggests consideration of the following examples of evidence when making determinations about the adequacy of warnings:

- (a) The manufacturer's ability at the time of manufacture, to be aware of the product's danger and the nature of the potential harm;
- (b) The manufacturer's ability to anticipate that the likely product user

cept underlying the workmen's compensation system and would increase transactions costs.¹²⁴ Nevertheless, the Analysis suggests that the Interagency Task Force¹²⁵ was dissatisfied with the solution offered by the U.P.L.A. by noting that the present system dulls employer incentives to keep workplace products safe and that workmen's compensation as a sole source of recovery in product-related workplace accidents would be the best solution to the entire problem, but only if benefits are revised and increased.¹²⁶

B. Miscellaneous Reforms Under the U.P.L.A. for Products Liability Cases

A number of specific reforms in the U.P.L.A. are not unique to design and warning cases and do not have a special relationship to workplace accidents. They may be adopted or rejected piecemeal by either statute or decision, and they apply to manufacturing, design, and warning defects and to both workplace and consumer accidents. Although analysis of these reforms is beyond the scope of this article, brief reference to the more significant provisions will illuminate the overall scheme developed by the Interagency Task Force and demonstrate a felt need to place limits on recovery.

Because the drafters did not wish to introduce hindsight by juries into risk-benefit analysis,¹²⁷ the Act provides for an initial screening by the court before cases reach a jury.¹²⁸ The drafters recognized that parties to lawsuits advance claims and defenses that are sometimes frivolous and sanctions against such claims are therefore incorporated in the Act.¹²⁹ The U.P.L.A. shifts to the claimant the burden to prove that a reasonably prudent product seller would have taken additional precautions if the injury-causing aspect of a product was, at the time of manufacture, in compliance with legislative or administrative regulatory safety standards relating to design or performance.¹³⁰ Compli-

124. *Id.* § 114, analysis, at 62,740-41.

125. See note 1 and accompanying text *supra*.

126. U.P.L.A. § 114, analysis, 44 Fed. Reg. at 62,740-41.

127. *Id.* § 104(B), analysis, at 62,723.

128. *Id.* § 104, at 62,721.

129. *Id.* § 115, at 62,741.

130. *Id.* § 108(A), at 62,730.

ance, at the time of manufacture, with mandatory government contract specifications is an absolute defense.¹³¹

In an effort to reduce transaction costs, the U.P.L.A. provides for arbitration in certain instances.¹³² The Act permits courts to screen nonpecuniary damages¹³³ and provides an exception to the collateral source rule for any compensation from a public source.¹³⁴ Further, the Act gives courts the duty to determine the amount of punitive damages once the trier of fact has determined that punitive damages should be awarded.¹³⁵ Finally, the Act prescribes statutes of limitation and repose.¹³⁶

V. THE CURRENT STATE OF SOUTH CAROLINA LAW IN DESIGN AND WARNING CASES

In 1974, South Carolina adopted section 402A of the *Restatement (Second) of Torts* and the accompanying comments as the interpretative basis for strict liability.¹³⁷ Because the drafters of section 402A focused primarily on mismanufacture or construction defects in products¹³⁸ and were particularly concerned with the relationship between manufacturers and consumers, design and warning cases have caused the South Carolina Supreme Court substantial difficulty.¹³⁹

Successful analysis of design and warning cases requires constant awareness of the basic elements of proof. In any tort

131. *Id.* § 108(C), at 62,730.

132. *Id.* § 116, at 62,742-43. See generally, Ribstein, *Model Uniform Product Liability Act: An Analysis of Arbitration Claims Under Section 116*, 46 J. AIR L. 359 (1981).

133. U.P.L.A. § 118, 44 Fed. Reg. at 62,746.

134. *Id.* § 119, at 62,747.

135. *Id.* § 120, at 62,748.

136. *Id.* § 110, at 62,732. See generally, Ribstein, *The Counter Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability*, 46 J. AIR L. 449 (1981).

137. For the text of section 402A, see footnote 11 *supra*. Section 402A is now codified at S.C. CODE ANN. § 15-73-10 (1976).

138. U.P.L.A. § 104, analysis, 44 Fed. Reg. at 62,722.

139. South Carolina has had a long-arm statute in effect for several years. S.C. CODE ANN. §§ 36-2-802, -803 (1976). The requirement of privity was eliminated by S.C. CODE ANN. § 36-2-318 (1976), and with respect to corporations, the court has made clear its intention to "still any whisper" of privity in South Carolina. *JKT Co. v. Hardwick*, 274 S.C. 413, 265 S.E.2d 510 (1980). The result is that the *Restatement (Second) of Torts* strict liability theory and the Uniform Commercial Code warranty theories are in full force with one exception. The court hesitated to decide whether the enactment of section 402A was retroactive. Recently, however, the court has determined that section 402A is not retroactive. *Hatfield v. Atlas Enterprises, Inc.*, 274 S.C. 247, 262 S.E.2d 900 (1980).

action, a plaintiff must prove a breach of some duty and that the breach of duty was the proximate or reasonably foreseeable cause of some injury.¹⁴⁰ When examining any of the facts that have been suggested by courts or commentators, a determination of whether the particular fact is relevant to the issue of breach of duty or to the issue of proximate cause is critical. Relevance only to the question of liability is not sufficient. Because liability comprises both breach of duty and proximate cause, a fact relevant to one may not be relevant to the other; therefore, no single fact can respond with final authority to both issues.

The concept of foreseeability has probably caused more difficulty in this area than any other concept. Although it is frequently argued that foreseeability should be the final test of liability, this argument raises a question of whether a duty exists to guard against everything that is foreseeable when, in fact, every event is foreseeable. One who wishes to permit recovery may say with the benefit of hindsight that a certain injury was foreseeable and that the failure to design a warning or device to guard against it creates liability. One who wishes to limit recovery may argue that there is no duty to design warnings or devices for known dangers and no duty to protect another from his own carelessness. These positions offer no help in determining the standard of responsibility to be placed on manufacturers.

Whether or not a manufacturer has an obligation to provide a particular design or warning must be established in terms of whether, as a matter of policy, the law wishes to impose such a duty. Once a duty has been established, the analysis must shift to determine whether the breach of duty resulted in an injury that was reasonably foreseeable; that is, whether or not the breach of duty was the proximate cause of the injury. This difference was very clearly discerned in a leading case¹⁴¹ cited by the drafters of the U.P.L.A. in which the Fourth Circuit Court of Appeals said:

Foreseeability alone, however, creates no duty. If such were the case, a manufacturer of hammers, foreseeing injured fingers and thumbs, would be liable for every such injury. Thus, duty is established as a matter of social policy—as a means to an

140. *E.g.*, W. PROSSER, *supra* note 49, at 324-27.

141. *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974).

end.¹⁴²

Defect is defined as a failure to design a safety device or warning that renders a product "unreasonably dangerous to the user or consumer or to his property."¹⁴³ To determine whether a product is defective, the inquiry should focus on both the nature of the product and the conduct of the manufacturer. To determine whether a particular condition of a product is the proximate cause of some injury, on the other hand, inquiry should focus on the environment in which the product is used, the conduct of the injured party, and the conduct of other persons who may have caused or contributed to the injury.

In design and warning cases, the South Carolina Supreme Court, in a manner consistent with the provisions of the U.P.L.A., apparently continues to apply a fault standard. The court has considered the concepts of breach of duty and proximate cause in four significant recent decisions: *Marchant v. Mitchell Distributing Co. (Marchant I)*,¹⁴⁴ *Marchant v. Lorain Division of Koehring (Marchant II)*,¹⁴⁵ *Young v. Tide Craft, Inc.*,¹⁴⁶ and *Kennedy v. Custom Ice Equipment Co.*¹⁴⁷

In *Marchant I* and *Marchant II*, a cement plant employee injured in a crane accident sued Mitchell Distributing Company, the seller of an allegedly defective crane, and Koehring, the crane's manufacturer. Plaintiff's injury resulted from a phenomenon known as "double-blocking", which occurs when the extendable boom of a crane is extended beyond the length of "played out" cable, causing the cable to snap. Koehring manufactured cranes with safety devices to prevent "double-blocking", and cranes with this device were displayed by Mitchell. Plaintiff's employer, after purchasing a crane without the optional safety device, permitted operation of the crane by an employee who had not been trained to operate it and had never operated it, despite the fact that Mitchell had trained five other

142. *Id.* at 1070 n.9 (quoting *Recent Decision*, 42 NOTRE DAME LAW. 111, 115 (1966)).

143. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 471, 242 S.E.2d 671, 679 (1978) (quoting *Skyhook Corp. v. Jasper*, 90 N.M. 143, 147, 560 P.2d 934, 939 (1977)).

144. 270 S.C. 29, 240 S.E.2d 511 (1977).

145. 272 S.C. 243, 251 S.E.2d 189 (1979).

146. 270 S.C. 453, 242 S.E.2d 671 (1978).

147. 271 S.C. 171, 246 S.E.2d 176 (1978).

employees in the crane's operation. Furthermore, the plaintiff and a co-worker were instructed to get into a bucket that was not designed for personnel and had no manual override switch.¹⁴⁸

In *Marchant I*, the supreme court affirmed a summary judgment in favor of the crane distributor.¹⁴⁹ The decision seemed to say that the crane was not defective as a matter of law and thereby offered some clarification of the meaning of defect in the context of design and warning cases. The fact that the risk was observable by anyone and was specifically known by the crane's operator was considered in determining whether the retail seller had a duty to guard against a known risk.¹⁵⁰ The specific result that a seller of a crane is not under a legal duty to provide a safety device against a known risk was a step toward defining the scope of the seller's duty, even though the decision was limited to a particular device for a particular risk of an extendable boom crane. In *Marchant II*, however, when the same issue was raised with respect to the manufacturer of the crane rather than its seller, the supreme court reversed a summary judgment in favor of the manufacturer,¹⁵¹ and progress in discerning the meaning of defectiveness evaporated.

Perhaps the most helpful South Carolina decision to date is *Young v. Tide Craft, Inc.*,¹⁵² in which a boatowner was fatally injured after he and a repairman decided to splice the boat's broken steering cable, knowing that this was a highly dangerous practice. When the owner then used the boat, the spliced cable separated, the boat jerked into a turn, and the owner was thrown from the boat and drowned. In a manner that is very difficult to reconcile with any conceivable jury instruction, the jury absolved the boat dealer and the repairman, but returned a verdict against the manufacturer. The supreme court rejected the plaintiff's contention that lack of a kill switch supported the jury verdict against the manufacturer and held that the absence of the device did not constitute a defect.¹⁵³ In a decision that is

148. 270 S.C. at 33-34, 240 S.E.2d at 512.

149. *Id.* at 33, 240 S.E.2d at 512.

150. *Id.* at 37, 240 S.E.2d at 514.

151. 272 S.C. at 245, 251 S.E.2d at 190.

152. 270 S.C. 453, 242 S.E.2d 671 (1978).

153. *Id.* at 458, 242 S.E.2d at 673.

particularly useful in outlining the distinction between breach of duty and proximate cause, the court in *Young*, as in *Marchant I*, relied on the test that the failure to install a safety device constitutes a defect if the product, absent such feature or device, is unreasonably dangerous to the user or consumer or to his property.¹⁵⁴ Although *Young* is not particularly helpful in determining the meaning of defect beyond this broad statement of the test, the court's extended discussion of foreseeability illuminates the basis of liability in South Carolina with respect to the proximate cause component. The court makes it clear that foreseeability is the test not of defectiveness but of proximate cause.¹⁵⁵ The court looked from the vantage point of the manufacturer under an objective test to determine whether the absence of a kill switch rendered the boat defective¹⁵⁶ and employed a subjective test to determine whether the absence of any warning was a proximate cause of the accident.¹⁵⁷ The court then found as a matter of law that, under an objective test of common knowledge, the boat was not defective¹⁵⁸ and further found that, because the owner's subjective knowledge was such that he had encountered the risk knowingly, the absence of a kill switch was not the proximate cause of the accident.¹⁵⁹

In *Kennedy v. Custom Ice Equipment Co.*,¹⁶⁰ a fifteen year old boy was injured three days after beginning his first job. The injury occurred while the boy was standing on a catwalk attempting to dislodge ice jammed in his employer's ice storage bins. Defendant Custom Ice Equipment Company had designed and installed the ice-making equipment, but the employer had constructed the catwalk that enabled employees to reach into the storage bins. The plaintiff alleged that the absence of a protective shield over the conveyor rendered it defective and introduced evidence that ice-jamming was a common problem and

154. *Id.* at 471, 242 S.E.2d at 679.

155. *Id.* at 462, 242 S.E.2d at 675.

156. *Id.* at 470-71, 242 S.E.2d at 680. The court applied the consumer expectation test expressed in comment i to the *Restatement (Second) of Torts*, sec. 402A and stated that "[i]t is common knowledge that a normal risk of boating is that of being thrown overboard. . . . [T]he test set out is an objective one and . . . must be attributed to *Young*. . . ." *Id.* at 470-71, 242 S.E.2d at 680 (emphasis added).

157. *Id.* at 471-72, 242 S.E.2d at 680.

158. *Id.* at 472, 242 S.E.2d at 680.

159. *Id.* at 466, 242 S.E.2d at 677.

160. 271 S.C. 171, 246 S.E.2d 176 (1978).

that the defendant manufacturer knew that ice plant employees commonly reached into storage bins to dislodge blockages. The supreme court held that these facts were susceptible of the inference that the product was defective or unreasonably dangerous, and it was then proper to submit the question of proximate cause to the jury.¹⁶¹ The court pointed out that it was known by manufacturers of ice-making equipment that ice blockages occur and must be physically dislodged and, furthermore, that this manufacturer knew "that it was a common practice in other ice plants to reach into ice storage bins with a garden hoe to dislodge the frozen ice."¹⁶² The decision in *Kennedy* appears to apply to the manufacturer an objective test of defectiveness based on the manufacturer's knowledge of common practice in the industry, adequate proof of which would establish a breach of duty. The subjective test of proximate cause was met because the jury was free to determine that a fifteen year old boy beginning his first job would not have been aware of the risk with which plaintiff had been confronted and would not have engaged in conduct that contributed to his own injury.¹⁶³

The objective standard of a reasonable person's knowledge addresses the question of whether a product is defective. When the nature of the product is viewed from the position of a reasonable manufacturer and a reasonable consumer, considering the particular market, an objective focus on whether or not the manufacturer has breached a duty to design and warn against danger is possible. Subjective analysis of an injured party's knowledge addresses not the character of the product but the question of whether the design defect was the proximate cause of the accident or whether in fact the plaintiff's knowing conduct was either an independent proximate cause or an intervening or contributing cause of the accident.

The South Carolina Supreme Court, emphasizing the risk-benefit concept, has also held that the inquiry into whether or not a product is defective necessarily requires analysis of the feasibility from both an economic and functional standpoint of modifying a product's design.¹⁶⁴ This risk-benefit test is quite

161. *Id.* at 173, 246 S.E.2d at 177.

162. *Id.* at 175, 246 S.E.2d at 178.

163. *Id.* at 176, 246 S.E.2d at 178.

164. *Sanders v. Western Auto Supply Co.*, 256 S.C. 490, 495, 183 S.E.2d 321, 324

similar to the five-element tests incorporated in section 104 of the U.P.L.A.¹⁶⁵

Perhaps the greatest significance of recent South Carolina decisions lies in the distinction the supreme court has drawn between product sellers and product manufacturers. These decisions have brought South Carolina closer than many jurisdictions to the related provisions of the U.P.L.A. The U.P.L.A. does not impose liability on a seller unless the seller is directly at fault¹⁶⁶ or the manufacturer is unavailable to the claimant.¹⁶⁷ In *Marchant I*, the South Carolina Supreme Court held as a matter of law that the seller of the crane could not be held liable because of the absence of a safety device referred to as an antiblocking device and specifically stated, "Our opinion deals solely with the action against Mitchell [the seller]. The claim against Lorain Division of Koehring [the manufacturer] is not here involved."¹⁶⁸ In *Marchant II*, the court pointed out that "[c]ritical to our decision in [Marchant I] was the fact that the distributor of the crane was not responsible for its design or assembly"¹⁶⁹ and reached a different result on the same facts by denying summary judgment to the manufacturer.¹⁷⁰ Because the manufacturer rather than the seller is responsible for design, South Carolina law recognizes a difference between the posture of a manufacturer and that of a seller in design and warning cases, as does the U.P.L.A., and places accountability with responsibility.

South Carolina has not adopted comparative responsibility or apportionment of damages¹⁷¹ and has made no provision for contribution or implied indemnity among joint tortfeasors.¹⁷² In

(1971). *Accord*, *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969).

165. See notes 115 & 117 *supra*. See also text accompanying notes 32-35.

166. U.P.L.A. §§ 105(A), (B), 44 Fed. Reg. at 62,726.

167. *Id.* § 105(C), at 62,726.

168. 270 S.C. at 32, 240 S.E.2d at 511.

169. 272 S.C. at 246, 251 S.E.2d at 191.

170. *Id.* at 245, 251 S.E.2d at 190.

171. *Marley v. Kirby*, 271 S.C. 122, 245 S.E.2d 606 (1978). See Phillips, *The Case for Judicial Adoption of Comparative Fault in South Carolina*, 32 S.C.L. REV. 295 (1980).

172. *Adcox v. American Home Assurance Co.*, 258 S.C. 331, 337, 188 S.E.2d 785, 788 (1972); *Atlantic Coastline R.R. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963). The lengthy dissent by Justice Brailsford in *Whetstone*, for example, contended that although the majority recognized exceptions to the rule denying indemnity between joint tortfeasors, the court had, in effect, dismissed the plaintiff's claim without a trial. 243

South Carolina, a third party defendant manufacturer may enforce a limited contribution or indemnification against a culpable employer¹⁷³ and may assert an employer's contributory negligence as a defense when the employer claims a right to subrogation.¹⁷⁴

The South Carolina Supreme Court has not directly addressed the problem of overlap between products liability and workmen's compensation, although the records in *Marchant I & II* clearly illustrate virtually all of the problems that potentially exist. In those cases, the employer had total control over the circumstances under which the accident took place: the employer purchased the crane without an antiblocking device and directed an untrained employee to operate the crane with personnel riding in a bucket not designed for that purpose.¹⁷⁵ Neither the distributor nor the manufacturer had any control over these circumstances, and the plaintiff probably had no realistic choice about engaging in the dangerous activity. Nevertheless, the plaintiff received serious injuries for which workmen's compensation benefits may have been inadequate. On the other hand, funds available to the plaintiff from collateral sources would not have been admissible for jury consideration and would not have been offset against a verdict.¹⁷⁶

As a matter of law, the plaintiff was not permitted to recover against the distributor but was granted the right to a jury trial against the manufacturer.¹⁷⁷ Because the parties reached a settlement, it is not known how a jury would have reacted to these facts. Potentially, a jury might have shifted the plaintiff's loss to the manufacturer despite any funds the plaintiff received from collateral sources. Furthermore, the employer may have had its workmen's compensation benefits reimbursed out of any

S.C. at 71, 132 S.E.2d at 177 (Brailsford, J., dissenting)(quoting Builders Supply Co. v. McCabe, 366 Pa. 322, 327-28, 77 A.2d 368, 370-71 (1951)).

173. S.C. CODE ANN. § 42-1-580 (1976); Burns v. Carolina Power & Light, 88 F. Supp. 769, 774 (E.D.S.C. 1950).

174. American Cas. Co. v. South Carolina Gas Co., 124 F. Supp. 30, 32 (W.D.S.C. 1954); Indemnity Ins. Co. v. Odom, 237 S.C. 167, 176, 177, 116 S.E.2d 22, 27 (1960).

175. 270 S.C. at 33-34, 240 S.E.2d at 512.

176. See, e.g., New Foundation Baptist Church v. Davis, 257 S.C. 443, 446, 186 S.E.2d 247, 249 (1972). See also U.P.L.A. § 119, 44 Fed. Reg. at 62,747, which provides that "the claimant's recovery . . . shall be reduced by any compensation from a public source which claimant has received. . . ." *Id.*

177. 270 S.C. at 33, 240 S.E.2d at 512; 272 S.C. at 245, 251 S.E.2d at 190.

recovery or settlement the plaintiff received. Meanwhile, the employer had every right to continue to use the crane in the same manner without modification.

South Carolina law as illustrated in *Marchant I & II* fails to accomplish the goals of either the tort system or the workmen's compensation system when the two overlap in design and warning cases. The burden is frequently not placed on the party best able to prevent the accident, and accident prevention is the only result that will accomplish all the goals of both systems.

Thus far, South Carolina has not accepted any of the general products liability reforms that are incorporated in the U.P.L.A. The supreme court neither screens nonpecuniary damages¹⁷⁸ nor determines the amount of punitive damages.¹⁷⁹ The collateral source rule is applied very strictly,¹⁸⁰ and statutes of limitation and repose are very open.¹⁸¹ South Carolina does not have any absolute bars to recovery based on governmental standards prescribed by statute, regulation, or mandatory contract specifications but does consider these circumstances when determining liability.¹⁸²

VI. ALTERNATIVE SOLUTIONS TO THE OVERLAP BETWEEN WORKMEN'S COMPENSATION AND PRODUCTS LIABILITY

The problems and shortcomings caused by overlap between products liability and workmen's compensation have prompted a number of tentative solutions. As long as workmen's compensation remains a nonexclusive remedy, proposed reforms will focus on the allocation of economic loss resulting from employee injuries between employers and third party manufacturers of prod-

178. U.P.L.A. § 120, 44 Fed. Reg. at 62,748.

179. *Id.* § 119, at 62,747.

180. *See id.* § 119, at 62,747 ("[T]he claimant's recovery . . . shall be reduced by any compensation from a public source which claimant has received. . . ."). *See, e.g.,* New Foundation Baptist Church v. Davis, 257 S.C. 443, 446, 186 S.E.2d 247, 249 (1972).

181. *See, e.g.,* S.C. CODE ANN. § 15-3-530 (1976), which provides *inter alia*, for a six-year statute of limitations for actions upon a contract, liability created by statute, and actions for personal injury. *See* U.P.L.A. § 110(B), (C), 44 Fed. Reg. at 62,731.

182. In South Carolina, the applicability in a products liability context of the standard set in the Occupational Safety and Health Act, S.C. CODE ANN. §§ 41-15-10 to -520 (1976 & Supp. 1980) remains unclear. The supreme court, in *Kennedy v. Custom Ice Equipment Co.*, declined to rule for procedural reasons on the exceptions raised to the applicability of the Act and its standard. 271 S.C. at 177, 246 S.E.2d at 178-79. *See also* U.P.L.A. § 108, 44 Fed. Reg. at 62,730.

ucts used in the workplace. One proposal promotes the tort goal of deterring wrongdoing¹⁸³ by permitting a product manufacturer the right to seek full indemnification against an employer.¹⁸⁴ This proposal, however, is inconsistent with the legislative theory underlying workmen's compensation legislation: the employer provides a guaranteed recovery in exchange for a limit on the amount of recovery.

Some states that follow a less stringent version of the same proposal permit product manufacturers to seek indemnification against employers, but the right of indemnification may not exceed the amount for which an employer may be held liable to an employee under the statutory workmen's compensation system.¹⁸⁵ Although this scheme gives a manufacturer some relief when an employer is at fault, it is a weak deterrent for the employer.

A few states deny product manufacturers the right to seek indemnity against employers but also deny employers any proceeds of employees' tort suits against product manufacturers.¹⁸⁶ Although this scheme has the advantage of reducing the amount of litigation between manufacturers and employers, it does not provide a deterrent to employers' wrongdoing and may also result in windfalls to claimants. Furthermore, it may result in inequitable recovery by injured workers, some of whom can recover only in the compensation system, while others may recover in both the compensation and tort systems.

Other possibilities have been suggested but have not yet been adopted. At least one commentator has called for a determination by the United States Supreme Court that equal protection requires comparative negligence in a multiple-party suit if a state has adopted comparative negligence in two-party suits.¹⁸⁷ Alternatively, Congress might resolve the conflict in a

183. *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 150, 282 N.E.2d 288, 293, 331 N.Y.S.2d 382, 389 (1972)(quoting *Werner, Contribution and Indemnity*, 57 CAL. L. REV. 490, 516 (1969)).

184. *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d 391-92.

185. *Soule, Toward An Equitable and Rational Allocation of Employee Injury Losses in Cases With Third Party Liability*, 46 INS. COUNSEL J. 201, 208 (1979).

186. *Id.* at 211.

187. *Davis, Third Party Tortfeasors' Rights Where Compensation-Covered Employers are Negligent—Where Did Dole & Sunspan Lead?*, 4 HOFSTRA L. REV. 571, 577 (1976). See Phillips, *supra* note 35.

legislative package of workmen's compensation reform.¹⁸⁸ State legislative or judicial creation of benefit equality in the products liability and workmen's compensation systems offers yet another option.¹⁸⁹ Finally, courts and legislatures might adopt comparative negligence theories and apply them between the two systems, apportioning recoveries between the two systems by applying the degree of fault in each system to that system's benefit levels.¹⁹⁰

Overemphasis of loss distribution and underemphasis of loss prevention are the major weaknesses of the systems that are presently being used. Wide loss distribution does not recapture a loss but only shifts it. Perhaps what is becoming apparent in other areas of social policy will be recognized with respect to industrial accidents: there is a limit to the amount of social engineering that is economically affordable. Once a net loss has occurred, it may be shifted in any desired direction. Nevertheless, there is no guarantee that the loss can be distributed successfully, and someone may have to sustain an unbearable burden. This burden may fall upon an injured employee, the employees of a business forced to slow down or cease operations, an employer, or consumers of the employer's product. An entire geographic area may be affected as in the case of the Wisconsin granite works.¹⁹¹

The only equivalent of loss recapture is prevention of loss in the first place. Although a large recovery may be financially rewarding, injured workers would presumably prefer to avoid injury, and incentives must be structured to encourage a safer workplace and safer work practices. Prevention of workplace injuries would meet every goal of both the tort and the workmen's compensation systems—workers would remain whole, they would not burden society, inequitable distribution would be avoided, transaction costs including attorney's fees would be eliminated, and the judicial system would be unburdened.

Nevertheless, provision must be made for those losses that inevitably occur under any system. The drafters of the U.P.L.A. would prefer reform of workmen's compensation benefits to ex-

188. Davis, *supra* note 187, at 578.

189. *Id.*

190. *Id.* at 579.

191. A. LARSON, *supra* note 75, § 2.70 at 14 n.18.

clusion of any other action by employees.¹⁹² Upgraded workmen's compensation benefits would become the exclusive remedy for any industrial accident. Unfortunately, because the drafters concluded that alterations of workmen's compensation law would be inappropriate in a model products liability law, they proposed what they considered to be the next best solution:¹⁹³ reduction of any products liability award to an employee by the present value of any amount paid or to be paid as workmen's compensation benefits for the same injury.¹⁹⁴ The proposed solution also abolishes the employer's rights of subrogation, contribution, or indemnity against the product seller.¹⁹⁵

VII. CONCLUSION

The need for independent reform both in the workmen's compensation system and the tort system is implicit in the struggle of the courts and the writings of various scholars. The willingness of the courts to allow tort law to be stretched beyond its limits into an absolute liability or social insurance status indicates a desire for a more adequate and certain recovery in workplace accidents than is presently provided under the workmen's compensation system. Court decisions and legislative efforts in the areas of exceptions to exclusive remedy, contribution and indemnity by employers to third parties, comparative negligence, limits on awards for pain and suffering, limits on punitive damages, and statutory penalties on employers for particularly egregious conduct all indicate a recognition of the need to impose loss shifting in some pattern consistent with fault and a need to control both recovery and costs in the tort system.

Perhaps the best overall solution to the problem—an improved workmen's compensation system as the sole source of recovery in product-related workplace accidents—was abandoned by the drafters of the U.P.L.A. Comprehensive reform of the workmen's compensation system is needed, and, with respect to nonwork-related injuries, courts and legislatures should continue to consider and adopt the specific provisions of the U.P.L.A. These proposals would eliminate the overlap between the work-

192. U.P.L.A. § 114, analysis, 44 Fed. Reg. at 62,740-41.

193. *Id.*

194. *Id.* § 114, at 62,740.

195. *Id.*

men's compensation system and the tort recovery system and would resolve many of the problems resulting from the present overlap.

The rigidity imposed by a statutory scheme, when contrasted with the flexibility of the common law, is a potential source of trouble. The law can more easily resume a proper course after a single bad decision than after the adoption of an ill-considered statutory scheme. We have been reminded that "the ability of the law of torts to respond to individual fact situations, to sense injustice, and balance the needs of society against the compensatory demands of the plaintiff is a value not easily dismissed."¹⁹⁶ Had a statutory workmen's compensation system never been implemented, the common law might well have eliminated the restrictive recovery elements of tort law that led to the enactment of workmen's compensation legislation.

The evolution of the tort recovery system in the area of products liability merits careful review. The explosion of products liability in the 1960s accompanied a number of other social policy expansions during that decade. These innovations were based to a great extent on consideration of desired results rather than on judgments about what society could afford. Individuals were seen as victims rather than as causes of events, and the idea that risk and responsibility should be spread throughout society was seductive. Today, it is becoming increasingly clear that greater emphasis on accountability for one's actions engenders more responsible action, and, in the area of products liability, more emphasis must be allocated to loss prevention than to loss-shifting.

Professor Seavey has identified two significant interests that tort law attempts to balance:

In determining whether there is tort liability when harm has been caused, the focal point of conflict has been whether one should be liable for harm irrespective of fault. The law has been in a state of flux in its desire to protect the two basic interests of individuals — the interest in security and the interest in freedom of action. The protection of the first requires that a person who has been harmed as a result of the activity of another should be compensated by the other irrespective of his fault; the protection of the second requires that a person

196. Twerski & Weinstein, *supra* note 70, at 256.

who harms another should be required to compensate the other only when his activity was intentionally wrongful or indicated an undue lack of consideration for the interests of others. At any given time and place, the law is the resultant derived from the competition between these two basic concepts.¹⁹⁷

Freedom and security must balance; too much of either destroys the other. In recent years, the law has emphasized the interest individuals have in security, but perhaps the time has come for greater emphasis on freedom of action.

197. Seavey, *Principles of Tort Law*, 56 HARV. L. REV. 72, 73 (1942), reprinted in *LANDMARKS OF THE LAW*, 377, 378 (Henson ed. 1960).