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## Panel Discussion of Section 402A

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## PANEL DISCUSSION OF SECTION 402A

*Hon. George C. Pratt:*

Professor Zablotzky has emphasized what has always been a major part of the litigation process, that is, the inherent interaction between substance and procedure. When he began to discuss the burden of proof regarding misuse, whether it should be a part of the defendant's affirmative defense or plaintiff's prima facie case,<sup>1</sup> I made a note to compare that with the disaster that the courts have made out of shifting burdens in the employment discrimination area. Soon afterwards, he turned around and used that very same example to prove how right he was. I only hope, as this area moves ahead in the law, that we do not get into the handling of a prima facie case, defendant's burden, and plaintiff's burden. The burden shifts at this point, in the same way that the employment discrimination area has shifted. What we have done is taken what were originally trial concepts and moved them back into the litigation process. In other words, like everything

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1. See *Ellsworth v. Shermie Lingerie*, 495 A.2d 348, 354-55 (Md. 1985); Christopher H. Toll, *The Burden of Proving Misuse in Products Liability Cases*, 20 COLO. LAW. 2307, 2308-11 (1991) (noting that "strict liability focuses on the product rather than on the manufacturer's conduct," unlike in negligence); see also *Marchese v. Warner Communications, Inc.*, 670 P.2d 113, 116 (N.M. 1983) (stating that "[d]efendants have the burden of proving [their] affirmative defenses . . ." and that misuse is one of those "defenses previously allowed to be raised in [that] jurisdiction . . ."); *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1366 (Okla. 1974) (suggesting that misuse may "as a matter of proof be an affirmative matter . . ."); *Jackson v. Standard Oil Co.*, 505 P.2d 139, 149 (Wash. Ct. App. 1972) (holding that misuse is an affirmative defense and the burden falls on defendant). But see *Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 381 (7th Cir. 1983) (stating that "[t]he absence of misuse is part of plaintiff's proof of an unreasonably dangerous condition or of proximate cause . . ."); *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 548 (Iowa 1980) (holding that "misuse is not to be treated in jury instructions as an affirmative defense . . ." but rather the "burden of proof [is] on [the plaintiff] . . ."); *Rogers v. Toro Mfg. Co.*, 522 S.W.2d 632, 637 (Mo. Ct. App. 1975) (holding that misuse "is not properly a defense but a necessary element of plaintiff's cause of action . . .").

else, we have turned the trial concept into motions and rules of law. It is a field day for defense lawyers. A defendant can win on a motion and need not have to face a jury at all with anything that can be made a rule of law.

In the products liability area, where there is sufficient facts in the affidavits to make out a *prima facie* case, but it has failed to have been shown, the defendant still has to go forward. The defendant must establish or articulate some legitimate, non-discriminatory reason for what was done. If a defendant could establish such reason, then the burden would go back to the plaintiff, or maybe it was always on the plaintiff from the beginning. These issues are resolved, not in the context of a trial, but in the context of motions and this generates a lot of paper and a lot of billing for clients.

I have noted from experience that when it comes down to the ultimate question like plaintiff misuse, defective product, or comparative negligence, when you try to charge a jury so it can understand the law, it does not give two hoots about burden of proof. Both sides have presented evidence as to what happened. Now the jury has to decide from that evidence what really happened and how it will apportion responsibility. I cannot imagine that any jury would say, "well, the plaintiff has the burden of proof and has established it to the extent of forty-eight and a half percent, and on the other side the defendant has established the following percentages, and so on." Rather, it will simply come to a conclusion. It looks at the whole thing and says so much here, so much there, "let's go home."

*Professor James Henderson:*

I have always wanted the "law of the jungle"<sup>2</sup> to return. First, let me tell Professor Zablotzky, and the rest of you, how the Committee thinks it will handle misuse.<sup>3</sup> I had not planned to di-

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2. "As usually understood . . . the law of the jungle is the law of might over right." THE MACMILLAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES 1368 (Burton Stevenson ed. 1948).

3. See generally 6 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 18:158 (1989). The authors stated:

vulge as much of this as I have, and the rest of the Committee is going to get me for it, but here I go. I will not show the draft, but I will say that it does not have misuse as a separate doctrine nor will it exist anywhere else in the law; we are blasting it to the moon. Let me tell you what is going to take place. I do not think it will upset you as much as you might expect. Additionally, I would distinguish between the burden of production<sup>4</sup> and the burden of persuasion.<sup>5</sup> The burden of persuasion will be on the plaintiff in the revised section 402A. However, as I wrote when I was untenured at Boston University, as a practical matter, the burden of production or the proximate causation issue should be on the defendant.<sup>6</sup> If the plaintiff can show but-for cause and ef-

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Misuse has been variously defined as a use of a product not intended and/or not reasonably foreseeable; a use of a product for an abnormal purpose; a use or handling so unusual that the average consumer could not reasonably have expected a product to be designed and manufactured to withstand it—a use that the seller, therefore, need not anticipate and provide for; or a use of the product that constitutes willful or reckless misconduct or an invitation of injury. Moreover, product misuse may consist of a change in design so that the product is not in the same condition as it was in when it was manufactured.

*Id.*

4. See BLACK'S LAW DICTIONARY 196 (6th ed. 1990). The burden of production is:

The obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue . . . . Such burden is met when one with the burden of proof has introduced sufficient evidence to make out a prima facie case, though the cogency of the evidence may fall short of convincing the trier of fact to find for him. The burden of introducing some evidence on all the required elements of the crime or tort or contract to avoid the direction of a verdict against the party with the burden of proof.

*Id.*

5. *Id.* The burden of persuasion is when "the onus [is] on the party with the burden of proof to convince the trier of fact of all elements of his case."

*Id.*

6. See James A. Henderson, Jr., *Coping With the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 955 (1981):

The plaintiff should . . . be required to show that the purchaser's commitment to the old technology was the proximate cause of his injury. The recovery should be denied when the defendant shows that a cost-effective switch to the newer, safer technology was available to,

fect, which a plaintiff can do in most of the cases that are bothersome, then it is the defendant that has to bring in proof to refute causation.

This result was beyond the risk, which is the way Prosser explained it in his treatise.<sup>7</sup> He cited two cases, each in which a child drowned in a swimming pool without a lifeguard.<sup>8</sup> The respective families brought lawsuits which asked, as their main legal questions, whether their respective children would have drowned if there had been a lifeguard on duty.<sup>9</sup> Prosser said, practically speaking, that the defendants ought to have the burden of suggesting, based on credible evidence, that a lifeguard would have saved the child.<sup>10</sup> Put differently, there should be a presumption which favors the plaintiffs on the second proximate cause issue about the lifeguard saving the drowning child. Thus, when the plaintiff has proven breach, causation, and affirmative defenses, the defendant should have a one fourth bite at the apple. The Committee is making this very explicit in the comments of the revision and in the reporter's notes.

Moving right along, I want to chastise Professor Madden for his statement about the Washington case, *Ayers v. Johnson & Johnson Baby Products Co.*<sup>11</sup> He mentioned the ingestion of

and refused by, the person in control of the product when the risk avoidance measures became available.

7. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS.

8. See *id.* at § 41, at 270 n.55 (5th ed. 1984) (citing *Rovegno v. San Jose Knights of Columbus Hall Ass'n*, 291 P.2d 848 (Cal. 1930) (holding that it is a matter of speculation for the jury as to what would have happened had a lifeguard been present) and *R.A. Blacka v. James*, 139 S.E.2d 47, 50 (Va. 1964) (holding that "[t]he negligence of the defendant must have a causal connection with the drowning, and in the absence of a showing that a defendant's negligence was the proximate cause of the death there can be no recovery . . . .")).

9. *Rovegno*, 291 P.2d at 849; *R.A. Blacka*, 139 S.E.2d at 48.

10. See KEETON ET AL., *supra* note 7, at 270.

11. 797 P.2d 527 (Wash. 1990). The *Ayers* court reasoned that the manufacturer of baby oil, who did not place a warning on the label about the oil being dangerous if inhaled into a person's lungs, could be found liable based on failure to warn if the family testified that they would have kept the baby oil out of reach had such a warning been included. *Id.* at 529.

baby oil, implying to some of you that the baby “chug-a-lugged” a pint of the stuff and went brain dead. I will briefly discuss the facts of this case. Laurie Ayers, the older sister of 5-year-old toddler David Ayers, put some baby oil in a little bottle in her purse, which she intended to rub on her hands after gym class.<sup>12</sup> She left the purse on the floor in her bedroom.<sup>13</sup> David found the purse, opened it, and took out the bottle of baby oil.<sup>14</sup> Just as David began to drink the baby oil, his mother entered the room<sup>15</sup> and yelled at David to stop.<sup>16</sup> Because he was startled, the child may have inhaled quickly and sucked the baby oil into his lungs.<sup>17</sup> Mrs. Ayers was relieved when she realized it was baby oil.<sup>18</sup> She thought the only effect would be diarrhea.<sup>19</sup> She read the bottle and there was no warning.<sup>20</sup> She told her two other children to call her at work if David seemed to be getting ill.<sup>21</sup>

When a person sucks any oil or viscous fluid into his or her lungs, that person cannot breathe.<sup>22</sup> The person appears to be breathing, but the air is not getting through the capillaries to the body.<sup>23</sup> However, the person will not collapse immediately.<sup>24</sup>

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. See J.C. Cunningham et al., *Lipoid Pneumonia Secondary to Baby Oil Aspiration: A Case Report and Review of the Literature*, PEDIATRIC EMERGENCY CARE, June 1985, at 76.

The severity of the acute phase of the condition, progressive deterioration, and compromised oxygenation of the patient can be explained on the basis of pathophysiologic changes in airways, alveoli, and interstitial tissues produced by the oil. These changes, which are responsible for a ventilation-perfusion imbalance and decreased lung compliance, resulted in severe hypoxemia and prolonged need for supplemental oxygen.

*Id.*

23. *Id.*

It was not until later that evening when the child was having trouble breathing that the family rushed him to the hospital.<sup>25</sup> There is a special machine for the purpose of cleaning the inside of lungs when viscous fluid gets into them.<sup>26</sup> The hospital tried to clear out his lungs, however the child suffered severe and permanent side effects.<sup>27</sup> This heartbroken family brought an action against Johnson & Johnson, the manufacturer of the baby oil.<sup>28</sup>

In this case there is neither a long latency problem<sup>29</sup> nor a limit of knowledge problem.<sup>30</sup> The hospital had a machine to clean the lungs.<sup>31</sup> In my view, the legal problem was that Johnson & John-

24. Paul M. Wax, *Hydrocarbons*, in EMERGENCY MEDICINE A COMPREHENSIVE STUDY GUIDE 601, 602 (Judith E. Tintinalli et al. eds., 3d ed. 1992) ("Most fatalities from these complications occur within 24 h[ours].").

25. *Ayers*, 797 P.2d at 529.

26. *Id.* This procedure is called ECMO therapy. It is a "special procedure that involves pumping the patient's blood outside his body and mechanically enriching it with oxygen." *Id.*

27. *Id.* David suffered "cardiac arrest" which "led to brain damage. David cannot now move his arms or legs, cannot speak, suffers seizures, and is mentally retarded." *Id.*

28. *Id.*

29. See Amy B. Blumenberg, *The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661 (1992). "The latency period is the time between exposure and the appearance of symptoms." *Id.* at 668 n.32. Certain injuries such as toxic tort injuries go undetected for years due to long latency periods during which time the ailment cannot be "clinically diagnosed." *Id.* at 661. As a result of a long latency period, a victim who has been exposed to a toxic substance may not bring an action until termination of the latency period. *Id.* In *Ayers*, the parents learned of the baby's ingestion of the baby oil within several hours; therefore, no long latency problem existed in this case. *Ayers*, 797 P.2d at 529.

30. See 5 SPEISER ET AL., THE AMERICAN LAW OF TORTS §18.25, at 685-86 (1988) (In certain cases a manufacturer has no duty to warn if the "product's dangerous propensity" was unknown and incapable of being known based on "the present state of human knowledge."). There is no limit of knowledge problem here because the dangers associated with the ingestion of mineral oil are known. "One of the most serious of mineral oils properties is its capacity to destroy the process by which lungs rid themselves of foreign materials." *Ayers*, 797 P.2d at 532.

31. *Ayers*, 797 P.2d at 529.

son did not have a warning on the bottle of baby oil which would have informed the mother that ingestion of this substance would be dangerous.<sup>32</sup> The mother testified at trial that if there had been a warning on the bottle of baby oil by the company that she would have kept it out of reach of her children.<sup>33</sup> However, the problem with the argument, from a proximate cause standpoint, is that the sister intervened.<sup>34</sup> Therefore, an action of failure to warn will not be successful.

These cases do not arise very often and will not put companies out of business.<sup>35</sup> My estimate is that this type of situation probably occurs, in major cities, twelve times a year. Additionally, there are strange types of medical emergencies that occur, ones that are surprising. For example, there is a machine in most emergency rooms which is designed to take pool balls out of mouths. No kidding. In bars, after people have had a few beers, they make bets like, "I bet I can put this pool ball in my mouth." When the ball gets into the mouth, the jaws clench up and the ball gets stuck. It happens often enough in New York City that there is a machine which removes the ball from the mouth. Without this machine, in order to remove the ball, the teeth have to be pulled.

What happened to the child in *Ayers* was not only foreseeable, the industry, itself, saw it coming.<sup>36</sup> If the company had checked

32. *Id.* at 530. In fact, that was the problem. The court stated that "because the product was without a warning, the family members did not know it was dangerous and so did not treat it as such." *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 533 (Reed, J., dissenting) ("Beyond cavil, the risk in this case was exceedingly remote: from 1932 to the time of the accident in 1985, Johnson & Johnson had sold over 500 million bottles of baby oil without a single report of aspiration.").

36. *Id.* at 532. Johnson & Johnson knew that if baby oil was inhaled the result would be serious. The court stated:

One of the most serious of mineral oil's properties is its capacity to destroy the process by which the lungs rid themselves of foreign particles. Cells called macrophages surround a foreign substance in the lung whether it is milk, water, oil, or some solid substance, and carry it away from the lungs. The Ayerses produced testimony based on the literature concerning oils in the lungs that showed these macrophages



the records, it would have known that children do inhale baby oil, not with regularity, but it is not a once-in-a-lifetime occurrence. What was not foreseeable were all the facts of failure to warn.<sup>37</sup>

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cannot rid the lungs of oil. While the macrophages initially surround the oil, they cannot absorb it. The macrophages give up and release the oil back into the lungs. Given this potential for serious harm, the burden on Johnson & Johnson, essentially the cost of printing and affixing a warning label, seems light indeed.

*Id.* The analysis by the court culminated with the conclusion that it was a foreseeable risk for Johnson & Johnson. The court stated:

First the focus is on the product, and the question is whether the product is 'not *reasonably* safe.' The answer is found by balancing the likelihood that the product would cause the harm complained of (and the seriousness of that harm must be taken into account here) against the burden on the manufacturer in providing an adequate warning. In this case, that balancing involves the following factors: the product is called baby oil; it is for use on babies; it is described as 'pure and gentle'; and it bears a label suggestion that it be used on baby's scalp, which, of course is near both the mouth and nose. Although it may be unlikely that the product will cause harm of the gravity experienced here, nevertheless the seriousness of the risk is extremely great considering what mineral oil can do when aspirated.

*Id.* The court then considered, as a second step for the foreseeability question, "whether the product was unsafe beyond the expectations of the ordinary consumer." *Id.* The court stated that it believed:

[O]nly two factors need be considered in a failure to warn case: (1) nature of the product, and (2) deficiency of the warning. Here, the product was composed of an oil that has the potential for great harm if it gets into the lungs, but is nevertheless promoted for use on and around babies. The warning was not merely deficient, it was nonexistent.

*Id.* at 532-33.

37. This statement reflects the view of the dissent. The dissent framed the problem by stating:

Was the likelihood of aspiration together with the gravity of the harm sufficient to impose a duty on the defendant to guard against that danger? . . . I would hold that the risk of harm in this case was insufficient to impose a duty upon Johnson & Johnson [to include any warning about the dangers of aspiration].

*Id.* at 535-36 (Reed, J., dissenting); *see also* Michael S. Jacobs, *Toward A Process-Based Approach to Failure-to-Warn Law*, 71 N.C. L. REV. 121, 127 (1992) ("The conventional formulation of failure-to-warn law requires that a

When I teach this case in class, I look around the room. The students know that I am a middle-of-the-roader, and I say that the facts in *Ayers* do not show a defective design.<sup>38</sup> We do not want the companies to redesign baby oil to make it safe to breathe in your lungs. However, I think this defers on kind of a social insurance basis. This will not put the company down.

There are other cases where children ingest. What is your reaction to this situation? A child is eating a sandwich at supper. It is buttered on one side and there is peanut butter on the other side. He is young enough that all of a sudden the peanut butter gets stuck in his throat. He does a number, sort of like the plaintiff in *Ayers*.<sup>39</sup> Well, when the grief stricken mother comes in she claims she should have been warned about the danger of the peanut butter. Does this mean that there needs to be a warning on peanut butter jars?

*Professor M. Stuart Madden:*

I appreciate the facts in *Ayers*. That is surely true. However, I had not meant to cite *Ayers* as an example of a case that fell into

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manufacturer provide consumers with an adequate warning of risks associated with the use of its product.”).

38. See KEETON ET AL., *supra* note 7, § 99, at 698-99:

Much of the difficulty related to products liability litigation centers around the meaning of defect in the kind of way that makes a product unreasonably dangerous in relation to design hazards. There are essentially two different approaches that have been utilized in evaluating design hazards - a consumer-purchaser or consumer-user contemplation test and a risk-utility test . . . . Under the consumer-contemplation test . . . a product is defectively dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product's characteristics . . . . Under [the danger-utility test], a product is defective as designed if, but only if, the magnitude of the danger outweighs the utility of the product.

*Id.*

39. See *supra* notes 11-36 and accompanying text.

the category for which I proposed a reverse of strict products liability.<sup>40</sup>

*Professor James Henderson:*

Everything about the accident in *Ayers* was scientifically knowable, but who would have thought the child would swallow the baby oil? I do not want to clutter baby oil bottles with warnings like "do not let your child breathe this in."

*Hon. George C. Pratt:*

Does the audience have any questions?

*Audience Member:*

Baby oil is a baby product that is going to be in a baby's room, nursery, or bathroom. Most baby products do have a label like "do not ingest," "do not let baby ingest," or "not for oral consumption." Baby oil should have some warning on it.

*Professor James Henderson:*

Then what about causation? I am pro-plaintiff in this instance with all of you, alright? This type of lawsuit will not put Johnson & Johnson out of business because a situation like this happens so rarely. Additionally, are you going to call it a flaw? It is not a technical flaw, and at most it may have been a mismatch of product and user in a tragic way. I cannot believe that if there was a

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40. See generally M. Stuart Madden, *Section 402A: "Don't Throw the Baby Out With the Bathwater"* 10 TOURO L. REV. 123 (1993). The author stated:

For products that cause long latency personal physical injuries, by . . . ingestion, [or] inhalation . . . elimination of the state-of-the-art defense or the state of scientific knowledge defense, and imposition of true strict tort liability, would preserve the progress of section 402A where anything less would not adequately protect injured individuals  
*Id.* at 147.

warning on the baby oil bottle saying "do not let baby ingest," that Mrs. Ayers would have either not bought the baby oil or would have put it in a secret place like it was poison. Additionally, Laurie put it in her purse.<sup>41</sup> Would she have known about the warning anyway?<sup>42</sup>

*Audience Member:*

The bottle of baby oil should say "call a paramedic or poison control if ingested." Most baby products do say "call poison control or a paramedic immediately if ingested."

*Professor James Henderson:*

The other argument which could have been made by the plaintiffs in *Ayers* was a post-trauma argument, which is different from a pre-trauma warning which would initially prevent the children from going near the product.<sup>43</sup> The plaintiffs could have argued that the company could have added a warning to bottles of baby oil stating that if the consumer has any reason to think a child has ingested it, to seek immediate medical attention. You see, the plaintiffs sat around all afternoon and into the evening with no idea that there was any risk to their child other than diarrhea.<sup>44</sup> There is a time of sale decision and a post-trauma decision. That post-trauma branch of failure to warn is one which I think would have been successful in *Ayers*.

41. *Ayers*, 797 P.2d at 529.

42. *Id.* at 530. The court stated that Mrs. Ayers testified that "she was a label reader and that had she known of the risks of aspiration, everyone else in the family would have known also." *Id.* Mr. Ayers testified that "products known to be dangerous were kept up on a top shelf out of reach [and that if the] product carried a warning of the risks, they would not have had it in the house." *Id.* In fact, Laurie testified that "Mrs. Ayers told all the family members to keep items known to be dangerous away from [David]." *Id.*

43. *Id.* The Ayerses argued that they would have either put the baby oil out of reach or not bought it at all if there had been a warning on the label which stated the risks which resulted to their son David. *Id.*

44. *Id.* at 529.

*Professor M. Stuart Madden:*

The antidote syndrome.

*Audience Member:*

In the case you are talking about, how often does the oil go into the lungs, as opposed to going into the stomach? Was that a rare occurrence?

*Professor James Henderson:*

To be honest, if you had one hundred children, each with a little bottle of baby oil, and each child put the bottle in his mouth, ninety-nine point nine percent of the time the baby oil would go into the stomach.<sup>45</sup> There has to be perfect timing.<sup>46</sup> The child has a bottle to his lips, the mother screams at him, and then the child sucks it up and boom. It could not be replicated if you tried, and it would be a gruesome experiment.

*Audience Member:*

This is not foreseeable and this would not be foreseeable.

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45. See Cunningham, *supra* note 22, at 75 (presenting aspiration of baby oil as an unusual cause of acute respiratory distress in children); Wax, *supra* note 24, at 601 ("Viscosity is measured in Saybolt Seconds Universal (SSU). Patients ingesting substances with viscosities less than 60 SSU are at greater risk for aspiration than those ingesting substances with viscosities greater than 100 SSU."); Anthony J. Scalzo et al., *Extracorporeal Membrane Oxygenation for Hydrocarbon Aspiration*, AM. J. DISEASES OF CHILDREN, Aug. 1990, at 867 ("A 15-month-old male infant who aspirated baby oil (light mineral oil) is particularly unusual owing to the generally expected low risk of aspiration with a hydrocarbon of such viscosity ([greater than] 60 Saybolt Universal Seconds).").

46. See generally Scalzo et al., *supra* note 44.

*Professor James Henderson:*

That is the point. I agree with Professor Madden. We are not far apart on this, but I disagree with him for citing *Ayers* for the proposition of an unknowable risk.

*Audience Member:*

One more thing. You are talking about social insurance. I get the feeling you are saying that, because the companies are able to afford it, we should shift this cost onto them. Is that what you are saying?

*Professor James Henderson:*

There are more reasons than that. When you tell me there is an unknowable risk, whether it is either a risk related to the use of drugs or toxins, then I see a picture where companies cannot insure. However, what will occur after the fact is that the companies will be dismantled and will pay only ten cents on the dollar to the victims. One hundred cents on the dollar will be paid to the first few plaintiffs that get a reward and nothing else to the rest. This puts the company down. However, it will not, in my view, insure.

If I were the corporate counsel and there was such a rule, I would begin to organize companies with subsidiaries to handle the risky stuff. However, it would be difficult for drug companies to do that because they would not know which drug would be the next disaster. Maybe I should get out of the business of counseling corporations, but there are ways around it.

*Audience Member:*

I can see how, in the scenario you have given us, product misuse would be inappropriate and unfair. You were equitable to the plaintiff. Would product misuse be appropriate in a situation where a defendant who uses a car battery to power some small toy, electrocutes himself?

*Professor James Henderson:*

You are talking about a car battery he is using to what?

*Audience Member:*

For something other than putting it in a car.

*Professor James Henderson:*

I would first ask myself, "is the battery defective because it can do this?" Should there be a warning against this? If there should be a warning, then, the next consideration should be proximate cause. After that, there is the consideration of but-for causation.<sup>47</sup> The defendant must persuade the judge that there is enough evidence to make out a prima facie case and get to the jury.<sup>48</sup> If misuse is used as an independent defense, my sense is that some courts will be lured into going all the way through the trial, and the plaintiff will succeed, and now what about this new defense? It is four bites at three apples.

*Hon. George C. Pratt:*

In the interest of ultimately bringing this to a conclusion, I would like to invite each panel member, in turn, for any final comments they might have. Mr. Crofton, I will start with you. Do you have anything you wish to add to what has been said?

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47. KEETON ET AL., *supra* note 7, § 41, at 266 ("[Under the 'but for' rule] [t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.").

48. KEETON ET AL., *supra* note 7, at 269-70 ("The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result . . . . The plaintiff is not, however, required to prove the case beyond a reasonable doubt.").

*Michael Crofton, Esq.:*

I would just like to second what Professor Henderson had to say about the social insurance question,<sup>49</sup> and I think this is something that needs to be clearly understood. The questioner in the back raised the issue.

Ultimately, and I have indicated this during my talk, somebody has got to pay the price of giving coverage in circumstances where it just does not make sense to impose coverage or compensation responsibilities on insurance companies and corporations. When Professor Henderson mentioned you get ten cents on the dollar, that is essentially what has occurred in certain circumstances today. Johns-Manville<sup>50</sup> and the various Dalkon Shield cases<sup>51</sup> have let the solvency of major corporations go.<sup>52</sup> What

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49. See James A. Henderson, Jr., *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 *TOURO L. REV.* 107, 119-20 (1993). Professor Henderson feels that the tort system does not work as a social insurance system as it is more pro-lawyer than pro-consumer. He feels that payments are made on a "random, unfair, speculative basis," and that costs should be contained by lowering the price of insurance. *Id.*

50. See *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992) (class action complaint seeking review of obligation payment procedures under settlement trust created pursuant to the Johns-Manville Corporation's confirmed Chapter 11 plan); *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988) (action by asbestos manufacturer seeking indemnification from United States for liability to shipyard workers exposed to United States sold asbestos), *cert. denied*, 489 U.S. 1066 (1989); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.) (movement by manufacturer for approval of proposed settlement with insurers and for order enjoining all future suits against insurers pertaining to settled policies), *cert. denied*, 488 U.S. 868 (1988); *In re Johns-Manville Corp.*, 40 B.R. 219 (Bankr. S.D.N.Y. 1984) (affirming bankruptcy court's order of automatic stay prohibiting a co-defendant of the Johns-Manville Corporation from obtaining pre-trial discovery documents for its own use in suits from which debtor was severed); *In re Johns-Manville Corp.*, 32 B.R. 728 (Bankr. S.D.N.Y. 1983) (holding that fact that debtor petitioned for Chapter 11 does not per se prohibit debtor from lobbying for proposed legislation for resolving damage claims of asbestos litigants).

51. See *In re A. H. Robins Co.*, 880 F.2d 709 (4th Cir. 1988) (allowing class certification and settlement where products liability plaintiff brought action against manufacturer's insurer as joint tortfeasor), *cert. denied sub*



you have got is the residual matter of unprotected groups. At that point, society has got to bite the bullet and say, "Are we going to make the compensation of certain injured consumers a matter of general taxpayer responsibility?" Of course, once you start doing that, you throw the question into the political arena and the democratic process must make the decision as to how much we care about these people. What Professor Henderson was saying is that if you are a Hillary Clinton supporter, you would like to see society bite the bullet and pay the cost for that type of coverage.

If, however, you chose not to go that route, and say the tort system must provide coverage in every circumstance, you must understand some realities. That is, the tort system is extremely inefficient in the way it utilizes dollars to compensate people.<sup>53</sup>

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*nom.*, *Anderson v. Aetna Casualty & Sur. Co.*, 493 U.S. 959 (1989); *Hawkinson v. A. H. Robins Co.*, 595 F. Supp. 1290 (D. Colo. 1984) (consolidated action for injuries resulting from use of Dalkon Shield manufactured by defendant); *Lebeda v. A. H. Robins Co.*, 101 F.R.D. 689 (D. Me. 1984) (suit brought against defendant under various theories of liability, such as negligence and strict liability, for injuries resulting from use of the Dalkon Shield); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981) (permitting suit by thousands of women injured by allegedly defective Dalkon Shield), *vacated*, 693 F.2d 847 (9th Cir. 1982); *Palmer v. A. H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (approving jury award of \$6.2 million in punitive damages to woman harmed by Dalkon Shield).

52. On August 21, 1985, A. H. Robins Co., the manufacturer of the Dalkon Shield, filed a petition for re-organization relief under Chapter 11 of the Bankruptcy Act, 11 U.S.C. §§ 1101-1174 (1988). For an explanation of the details surrounding the bankruptcy proceedings, see *In re A. H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988). Furthermore, Aetna Casualty & Surety Company, A. H. Robins' insurance company, had to make "\$70,000,000.00 available to Robins beyond the face value of the Aetna policies" to cover Robins' debts. *In re A. H. Robins Co.*, 846 F.2d 267, 268 (4th Cir. 1988). Additionally, the Johns-Manville Corporation, the world's largest manufacturer of asbestos, filed a voluntary petition in bankruptcy under Chapter 11 on August 26, 1982, as a result of claims from current and future injuries estimated at two billion dollars. For a full explanation of the proceedings, see *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721. See also Robert Rice, *Reinsurers Reeling from Red-Line Entries*, FIN. TIMES, Oct. 15, 1993, at 6 (noting the bankruptcies of Johns-Manville and A.H. Robins).

53. See Tillinghast, *Tort Cost Trends: An International Perspective* 8 (1992). The Tillinghast survey is an update of prior surveys done on the

Out of each dollar the tort system costs in the United States, the defense bar gets eighteen cents.<sup>54</sup> Plaintiffs' bar gets fifteen cents,<sup>55</sup> various other costs are twenty-four cents,<sup>56</sup> and the plaintiff gets forty-three cents.<sup>57</sup> It is a ridiculous way to use money to compensate people. It just does not make any sense. I am trying to give you a flavor of what we are talking about, whereas a properly run social insurance system that puts myself and plaintiffs' lawyers out of business can actually end up giving the plaintiffs ninety or eighty-five cents on the dollar. That is a vast improvement. Therefore, I endorse what Professor Henderson said in that regard.<sup>58</sup>

*Hon. George C. Pratt:*

Professor Phillips, do you have any comment?

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United States tort system. The survey encompasses the years 1933 through 1991. The key findings of the survey include: the United States tort system cost \$132 billion in 1991; in the past 58 years tort costs have risen four times faster than the United States economy; the United States tort system is the most expensive in the industrialized world; and, "[w]hen viewed as a method of compensating claimants, the U.S. tort system is highly inefficient, returning less than 50 cents on the dollar to the people it is designed to help . . . ." *Id.* at 3; see also Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 127 (1993) (stating that a national health insurance system "might prove preferable to the current system's dependency on the vagaries of the private liability insurance market . . . and the inefficient and unequally allocated . . . insurance system"); Robert Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 591-96 (1985) (criticizing the current tort compensation system for its arbitrariness, its excessive compensation to certain victims, as well as its failure to compensate altogether, or under compensate, victims of certain torts).

54. Tillinghast, *supra* note 53, at 8.

55. Tillinghast, *supra* note 53, at 8.

56. Tillinghast, *supra* note 53, at 8.

57. Tillinghast, *supra* note 53, at 8.

58. See Henderson, *supra* note 49.

*Professor Jerry Phillips:*

In general, I would like to make one comment, and it is a question to Professor Henderson. Going back to the consumer expectation test, which I think, on the whole, works better than the risk-utility test as the standard informed by presumed seller knowledge. This test has been criticized because the consumer has no expectation of safety for obvious dangers.<sup>59</sup> I do not think that is true, particularly since we have eliminated obvious dangers as a bar to recovery as a matter of law in the New York case, *Micallef v. Miehle Co.*<sup>60</sup> A consumer certainly expects the product to be safe and to be usable in the workplace, even though he knows he is confronted with danger everyday. In many of the complicated design cases, the consumer has no expectation until he is informed by expert testimony.<sup>61</sup> This is exactly the same as in a negligence case. The negligence jury, which represents the ordinary consumer or the ordinary reasonable person, has no expectation of what a doctor, for example, can do, until it is informed by expert testimony.<sup>62</sup> Likewise, in consumer product

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59. See *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1389 (5th Cir. 1992) (holding that "an open and obvious danger to an ordinary user precludes recovery against product manufacturer under negligence and strict liability in tort."); *Toney v. Kawasaki Heavy Indus.*, 975 F.2d 162, 166 (5th Cir. 1992) (stating that if product defects were open and obvious, then plaintiff is barred from recovery); *Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208, 214 (Mich. 1992) (stating that there is no duty to warn of product risks that are open and obvious).

60. 39 N.Y.2d 376, 379, 348 N.E.2d 571, 573, 348 N.Y.S.2d 115, 117 (1976) (stating that "[t]he time has come to depart from the patent danger rule . . .").

61. See generally *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033, 1034 (Or. 1974). At least one court has suggested that a "knowledgeable seller test" be substituted for the consumer expectations test under such circumstances. *Id.* The court in *Phillips* defined a dangerously defective product as "one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character." *Id.* at 1036 (emphasis in original).

62. *Lutz v. Foran*, 427 S.E.2d 248, 250 (Ga. 1993) (stating that in medical malpractice actions, plaintiff must present expert testimony so that jury can determine acceptable professional conduct); *Benison v. Silverman*,

cases, the jury can also be informed by the testimony of experts.<sup>63</sup>

As Professor Twerski mentioned again this morning, Professor Henderson spoke about the area of conscious design decision as an area in which the courts and the juries should practice a hands-off policy. If we have the time, and if you care to reply, Professor Henderson, I would be curious to hear you explain what your position is on the conscious design decision today, and how it should be treated in products law.

*Professor James Henderson:*

In 1973, just as strict products liability began to be used in design defect cases, I wrote an article in the *Columbia Law Review*,<sup>64</sup> urging courts to stay away from such cases.<sup>65</sup> The only type of cases which I thought were worthy of review were what I called "inadvertent design cases."<sup>66</sup> Those are similar to the case

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599 N.E.2d 1101, 1104 (Ill. App. 3d 1992) (explaining that expert testimony is needed in "malpractice because jurors are not skilled in the practice of medicine"); *Fabio v. Bellomo*, No. C6-91-2542, 1993 Minn. LEXIS 558, at \*8 (Aug. 20, 1993) (stating that in medical malpractice action, plaintiff must present expert testimony to establish standard of care applicable to defendant).

63. *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1100 (10th Cir. 1991) (stating that for technical aspects of case, expert testimony was necessary to assist jury in reaching its decision) (citing *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1459 (10th Cir. 1987)).

64. See James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

65. *Id.* "[A] significant problem area . . . in products liability law . . . involves the judicial handling of cases concerning conscious design choice." *Id.* at 1552. "Courts should resist the pressures to adjudicate the reasonableness of conscious design choices, and give in only in those few cases where the polycentricity of the question can be narrowed and a judicial resolution appears preferable to no solution at all." *Id.* at 1577.

66. *Id.* at 1548-52. Inadvertent design errors are errors where the design engineers inadvertently fail to "appreciate adequately the implications of the various elements of [the] design, or to employ commonly understood and universally accepted engineering techniques to achieve the ends intended without regard to the product." *Id.* at 1548. These cases are worthy of review

that Mr. Vargo discussed which involved the handlebar.<sup>67</sup> The product in that case did not do what it was intended to do.<sup>68</sup> At first it seemed like it was a flaw. That is why I said, when he asked me what type of defect it was, that it did not matter. The cases I label conscious design choice cases are the ones where the product did what it was intended to do.<sup>69</sup> The question is, should it have done more? They are the difficult design cases.

While I was indeed very skeptical of the use of judicial intervention in product design cases, in 1979, I wrote an article in the *Minnesota Law Review*<sup>70</sup> where I began to embrace that idea.<sup>71</sup> The new Restatement is certainly going to embrace that wholeheartedly.

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because all that must be done in determining liability is to "determin[e] what caused the products to fail in the first place." *Id.* at 1552.

67. *Harley-Davidson Motor Co. v. Wisniewski*, 437 A.2d 700 (Md. 1981). The plaintiff bought a motorcycle and "[t]he alleged defect . . . was stated as an improper assembly of the throttle control clamp causing a clamp screw to suddenly fracture. This, it [wa]s contended, permitted the throttle control mechanism to come off the handlebar while the appellee was operating his motorcycle." *Id.* at 703.

68. *Id.* at 703-04.

69. See Henderson, *supra* note 64, at 1549 (These design choices are "consciously intended and, for that reason, the risks that they generate are not so likely to interfere directly with the products' intended functions. Most often the risks of harm are associated with other unintended patterns of use.").

70. See James A. Henderson, Jr., *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773 (1978-79).

71. See Henderson, *supra* note 70, at 806 ("[T]he gradual formulation of a consensus favoring cost-benefit analysis [by judges] has been accompanied in some jurisdictions by a lamentable tendency of courts to routinely address problems beyond their inherent competence.").

*Hon. George C. Pratt:*

Mr. Vargo, do you have anything to add?

*Mr. John Vargo, Esq.:*

Very well. I started all of this. I agree with Stuart Madden, Jerry Phillips, Oscar Gray and Peter Zablotsky. Thank you.

*Professor Oscar S. Gray:*

I agree with a great deal of what has been said by my colleagues. I am very much encouraged, in particular, by much that Professors Twerski and Henderson have said regarding the changes that will be forthcoming, as stated in the proposed revision that was published in the *Cornell Law Review*.<sup>72</sup> Until I see those changes, I cannot really comment on them, but I expect I should agree with a good number of them.

I also agree with a great deal that was said by Professors Madden and Phillips. However, I must insert one nit-pick with regard to Professor Phillips' remarks. I do not think it is quite fair to say that the American Law Institute (A.L.I.) has taken a particular position on items that are discussed in the recent Reporters' Study on Enterprise Responsibility for Personal Injury (Reporters' Study).<sup>73</sup> The fact of the matter is that the A.L.I. went to con-

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72. James A. Henderson, Jr. & Aaron D. Twerski, *The Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

73. A.L.I. REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter REPORTERS' STUDY]. The Reporters' Study was presented to the American Law Institute five years after the A.L.I. endorsed such study to examine the steep increases in products liability insurance. 1 *Id.* at 3-7. The Reporters' Study was limited to personal injuries "that [arose] out of product use, medical treatment, the workplace, and toxic exposures in the environment." 1 *Id.* at 7. The recommendations were formulated to address "substantive rules of liability governing these activities; . . . procedures through which liability and compensation are determined;" insurance, both public and private; and legislative and administrative regulation of risk designated activities. 1 *Id.* at xi.

siderable lengths to distance itself from that Reporters' Study,<sup>74</sup> and there is nothing in that study that represents the views of the A.L.I.<sup>75</sup>

Furthermore, as I indicated earlier, I tend to agree with Professor Henderson's position that it is not desirable to have legal rules that force many socially responsible businesses out of business.<sup>76</sup> If it were true that there were extensive hazards that are uninsurable,<sup>77</sup> I think that would be an important matter for concern.

I have been teaching insurance law for a number of years. There is a great deal about insurance that I do not understand, as there is a great deal about torts that I do not understand. However, as I suggested earlier, I have suspected that unforeseeable hazards are in fact insurable,<sup>78</sup> and I was impressed by Mr.

74. In the forward of the Reporters' Study, Geoffrey Hazard, the Director of the American Law Institute, explained the Council's divergent views on the merits of some of the proposals, specifically that the Council had taken no position on the study as a whole or on its particular proposals. 1 *Id.* at xii.

75. The special status of the report was further emphasized by a note attached to the inside cover which stated:

This Reporters' Study has been published under a provision of the Institute's Bylaws that authorizes the Council to publish documents even though their contents have not been approved by the Council or the membership. As stated in the legend on the title page, the contents do not represent the position of the Institute.

76. *See supra* pp. 218-19.

77. *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1542-43 (1987). The author provides a general discussion of how the insurance system operates. He describes insurers as agents of risk diversification who must identify risks that are independent (uncorrelated) and aggregate them in order to reduce the total risk of the set. In describing the effects of insurers attempts to exploit the "law of large numbers," by spreading the risks efficiently throughout the insured population, he emphasizes the problems faced by members of the risk pool when such risks are not independent. *Id.* at 1539-43. "[The] aggregation of such risks would be unproductive because the reserves of the insurer would have to maintain would equal, or perhaps, exceed the reserves individuals would have to maintain if uninsured . . . this is why society-wide calamities, such as nuclear war are uninsurable." *Id.* at 1543.

78. *See* Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses*

Crofton's suggestion that this is the case.<sup>79</sup> Professor Henderson's rebuttal of that serves as further evidence that he is at his strongest when he places a law and economics analysis behind him.<sup>80</sup> I do not believe the issue is resolved by developing narrow definitions of insurance.<sup>81</sup> Nor do I think it is consistent to have insurance policies available today, containing normal limitations, such as deductibles or ceilings on liability, while not excluding unforeseeable risks.<sup>82</sup>

I do not know what the limits are of insurance that can be sold, but I suspect, based on what Mr. Crofton has said, that unforeseeable risks continue to be covered at a price.<sup>83</sup> Furthermore, we do not have a widespread problem of manufacturers going out of business due to their net worth being reduced by product li-

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*Beating Us at Our Own Game?*, 9 J.L. & COM. 167, 182 (1989) (reporting that unforeseeable risks are insurable at dramatically increased premiums).

79. See Michael Crofton, *From a Defense Attorney's Perspective: "There Is No Free Lunch,"* 10 TOURO L. REV. 57, 58 (1993).

80. See Henderson, *supra* note 49.

81. See W. Kip Viscusi, *The Performance of Liability Insurance in States with Different Product Liability Statutes*, 19 J. LEGAL STUD. 809, 816-20 (1990). The author suggests that state statutes that limit product liability definitions may reduce ambiguity once courts have interpreted the statutes, however, until courts interpret the statutes, the ambiguous definitions contribute to the unaffordability and unavailability of insurance. *Id.* at 816. Furthermore, the author suggests the narrow definitions

provide a consistently more profitable context for product risk insurance. It would be an oversimplification to conclude that it is the definitions themselves driving this result. Because such definitions tend to be an integral part of the statutory treatment of liability, a more reasonable interpretation is that the definitions variable serves as a proxy for statutory provisions that, on balance, foster a more profitable environment for the insurer.

*Id.* at 820; cf. Priest, *supra* note 77, at 1548 (arguing that injured consumers are benefited by narrow definitions of risk pools, because such definitions increase "product sales, [since] the premium added to the price of the product more closely approximates the consumer's expected loss . . .").

82. See Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985).

83. See Crofton, *supra* note 79.



ability claims to ten cents on the dollar.<sup>84</sup> It has not happened in any industry that I know of in the United States, with the exception of asbestos<sup>85</sup> and Dalkon Shield<sup>86</sup> cases. However, those are not cases of innocent producers.<sup>87</sup> Those are cases where what happened to the companies was richly deserved by those companies. The notion that there is something economically distorted about having insurance that is sold by underwriters who are taking a gamble, and therefore padding the price because they are

84. See W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* 214 (1991) (suggesting that courts "are sending firms price signals that in effect enable them to pay ten cents on the dollar for the economic value of the lives that will be lost as a result of product risks . . ."); Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 870 (1984) (suggesting that courts' "proper payout ratio could vary from [ten] cents on every [one dollar] claimed to a full, dollar-for-dollar payout . . .").

85. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982) (permitting recovery for injuries and wrongful deaths from the manufacturer of a knowable risk of asbestos exposure). See Michael A. Hiltzik, *New York's Rules Seen Among Most Restrictive in Manville Case: State Laws Bar Some Asbestosis Victims from Legal Relief*, L. A. TIMES, Nov. 4, 1985, § IV at 1. In 1985, approximately 35,000 people injured by asbestos exposure had filed suits against Johns-Manville causing it to file for Chapter 11 and reorganize by "establish[ing] a claims fund financed by up to 80% of its stock and \$75 million annually from its profits." *Id.*

86. See, e.g., *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989); *A.H. Robins Co., v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981); *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210 (Kan. 1987).

87. See Michael Rustad and Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1311 (1993). The authors report that "[t]wo hundred thousand persons will die from asbestos-related diseases by the end of the twentieth century. Many of these deaths have resulted from asbestos manufacturers' active concealment of the dangers of unprotected exposure." *Id.* at 1311 (footnotes omitted). In a study conducted by the authors regarding products liability cases from 1965 to 1990, they found that "[t]he majority of plaintiffs in these cases were permanently or partially disabled as a result of the corporation not having taken prompt remedial measures." *Id.* 1311-12. See also *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1240 (Kan. 1987) (finding Dalkon Shield company intentionally concealed test results that product was unsafe, paid money for favorable test results and marketed product with the knowledge of its dangers).

taking a gamble,<sup>88</sup> is something that is not self-evident. I think you need to know more about what the numbers are before you are able to come to a conclusion. I do not know what the numbers are, therefore I have not come to a conclusion.

I would like to expand on a point that Professor Henderson confirmed at lunch today. For some time, studies have indicated that a terrible burden exists on manufacturers due to products liability. Nevertheless, the cost of products liability, which is represented by the cost of products liability insurance, runs at approximately one percent of total manufacturing costs across the board.<sup>89</sup> For example, in an industry with unusual hazards, underwriters may sell insurance at a highly padded premium in order to cover uncertainties. As Professor Henderson suggested, the underwriters pad by approximately a factor of ten.<sup>90</sup> If the cost of manufacturing products increases by nine percentage points, representing the difference between insurance costs selling at one percent of normal manufacturing costs and padding insurance by a factor of ten, it is self-evident that you have a terrible result in continuing to protect the consumer who is injured by a product that was defective.

Moreover, I think the discussion regarding social insurance<sup>91</sup> is a red herring. I recognize there are many more preferable ways

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88. See, e.g., *Clougherty Packing Co. v. Commissioner*, 811 F.2d 1297, 1306 (9th Cir. 1987). In *Clougherty*, the court stated “[i]nsurance involves transferring from the insured to the insurer the consequences of a possible future event. The likelihood that a loss will occur is of uncertain but predictable magnitude; the size of loss is similarly uncertain but predictable.” *Id.*

89. See generally U.S. GEN. ACCT. OFF., *LIABILITY INSURANCE: EFFECTS OF RECENT “CRISIS” ON BUSINESSES AND OTHER ORGANIZATIONS* 32 (July 28, 1988) (“On average, as a percentage of annual gross receipts, small businesses spent 1.0 percent on liability coverage for policy years 1985 and 1.2 percent for 1986.”).

90. See *supra* p. 221.

91. Social insurance is defined as:

A comprehensive welfare plan established by law, generally compulsory in nature, and based on a program which spreads the cost of benefits among the entire population rather than on individual recipients. The federal government began to use social insurance programs in 1935 with the passage of the Social Security Act. The basic federal and state

than lawsuits for paying consumers' hospital bills and the like.<sup>92</sup> If our society is prepared to implement alternative social safety nets, I shall welcome them. If alternatives were implemented, they would significantly impact tort law. In the absence of having those safety net institutions, it seems fair to me to evaluate the care and rehabilitation of accident victims and the protection of their families through tort law.

Finally, I suggest that much of what you hear, regarding the inefficiency of tort as a method of compensating accident victims, is exaggerated. The numbers pertaining to the supposed cost of tort compensation tend to reflect the inefficiency, not of tort as such, but of negligence law in particular. You are talking about the expense of the waste that is involved in worrying about risk-benefit analysis and otherwise disputing the existence of negligence. Tort law need not be that expensive if you have a strict liability system.

*Hon. George C. Pratt:*

Professor Henderson, you asked to have a moment rebuttal.

*Professor James Henderson:*

I will just make two remarks. One, I think it is one percent of the gross domestic product, not the manufacturer's costs. Two, I spent the first day and a half in my insurance course, Professor

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approaches to social insurance presently in use are: Old Age, Survivors and Disability Insurance (i.e. social security); Medicare and Medicaid; unemployment insurance; and worker's compensation.

BLACK'S LAW DICTIONARY 806 (6th ed. 1990).

92. See generally 1 REPORTERS' STUDY, *supra* note 73, at 181-202 (discussing current programs of social insurance and possible alternatives to obviate the tort compensation system); Jeffrey O'Connell, *Alternatives to the Tort System for Personal Injury*, 23 SAN DIEGO L. REV. 17 (1986) (suggesting, as alternatives to social insurance, a statute providing defendants with a choice between litigation or periodic payments, different insurance policy or product warranty binding seller to compensate victims for economic losses).

Gray, working through a hypothetical to develop the distinction between insurance and gambling.

*Professor Peter Zablotsky:*

I am pleased that the discussion of misuse and a few other remarks prompted Professor Henderson to disclose a few secrets. At the same time, I want to reassure you, speaking for the *Touro Law Review*, the symposium issue will not be out in the next three weeks, and your secrets are completely safe with us, so thank you. Just one point. I still think that the ultimate and operative issue is whether the cumulative effect of the proposed components of the product liability causes of action will be perceived as shifting the theories of liability. I think if we can agree on that, we will have consensus. If not, that is where the discord will arise. Thank you.

*Hon. George C. Pratt:*

I think that you should be aware, if you are not already, that Professor Zablotsky is the one responsible for this entire symposium. Peter, you deserve a great deal of credit for assembling a panel of such experience, knowledge and ability. For me, at least, this has been a mind stretching experience. I think I have bridged ten years in the circuit court. On behalf of the law school, let me thank all the members of the panel for putting aside many important things in coming here today and participating in the discussion. We hope that it has been as worthwhile to you as it has been to us.

