The Louisiana Products Liability Act: Making Sense of It All

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I. INTRODUCTION

This is an article about words, the words of the statute that now governs Louisiana products liability law. The name of that statute is the Louisiana Products Liability Act (the Act) and it is long, technical, and complex; however, before commencing an analysis of the Act's words a warning is appropriate.

A long time ago Dean Leon Green pointed out that there are no magic words in the law;¹ thus undue reliance on language alone is both undesirable and misleading. He aptly stated that "the first requisite of intellectual freedom, and as much so in the science of law as elsewhere, is a wholesome fear of words."² Why should such a great thinker and fine writer be so scared of words?

One of Dean Green's greatest disciples, the late Wex Malone, impressed the answer upon lawyers and scholars everywhere, but especially here in Louisiana. The most important of many legacies that Professor Malone left Louisiana law is that the decision of tort cases requires the resolution of difficult policy issues.³ In making those inevitable policy choices, judges

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¹ I. L. Green, Judge and Jury 43-49 (1930).
² Id. at 44.
³ Johnson, In Memoriam Wex S. Malone: Ave Atque Vale, 48 La. L. Rev. 1065 (1988). As Professor Johnson so eloquently noted in his eulogy to Professor Malone:
   What a piece of work is a man:
   how noble in reason, how infinite in faculties.
   —Shakespeare, Hamlet, Act II, scene II.
   It seems entirely apt that one invoke the Bard to open this commemorative issue
cannot hide behind talismans and shibboleths but must instead address the social questions raised. Words alone do not decide tort cases; whether the case involves the interpretation of a statute or the scope of a “common law” duty, juries and judges decide cases by resolving the factual and policy issues presented.4

As Dean Green noted, law is really the power that we give judges to decide those cases.3 To exercise that very precious and sometimes dangerous power the judges must purposefully analyze the cases before them from every angle. In a tort case, that means considering all the relevant policies involved, including deterrence, risk spreading, the administration of justice, compensation, the internalization of all the costs of an activity, punishment, society’s sense of fairness, and what if anything the legislature has said on the matter.6 With that major caveat this word game will begin; but, it is my hope that this paper’s preoccupation with statutory detail proceeds in light of, rather than in spite of, the legacies of Professor Malone and Dean Green.

Although the story of the Act7 does not begin with Halphen v. Johns-Manville Sales Corp.,8 that case may well have spurred the Act’s passage. In Halphen the United States Fifth Circuit Court of Appeals certified a products liability question9 to the Louisiana Supreme Court: Would Louis-

for the late Professor Wex Smathers Malone. Each was fond of language; each knew its attributes and its limitations. And this particular selection from among all of Shakespeare’s works seems particularly apposite to the life and times of Wex Malone. It is a comment on his own life and his own work—he was indeed a man noble in reason and infinite in his faculties. But it is even more a comment on the confidence that he placed in the men and women of the law. He was ever the one to discourage formulas and checklists as methods for solving difficult legal issues in his most celebrated field—torts. He was always seeking to persuade us that the role of the human judge was paramount; that one could not hide behind words, phrases or shibboleths of arcane ancestry; that there was never a good substitute for the human element of weighing and balancing, comparing the worth of one social policy to another. Out of this dynamic smithy of the law emerged, in his view, justice and rationality.

Id. at 1065.
4. Id.
5. L. Green, supra note 1, at 39-42.
7. Hearings on La. S. 684, before the Senate Committee on Judiciary A, May 17, 1988 [hereinafter Hearings] (remarks of John Kennedy and Professor William E. Crawford). In fact the Louisiana Law Institute had prepared a proposed products liability act as early as 1983 but that piece of legislation, although similar in some particulars to the 1988 Act, was never passed. 8. 484 So. 2d 110 (La. 1986).
iana law make a manufacturer liable for injuries that its products caused even though at the time the product left the manufacturer's control it neither knew nor could have known that the product was "unreasonably dangerous"? Responding to that question, Justice Dennis engaged in a lengthy and scholarly analysis of Louisiana product liability law.

Justice Dennis reached the conclusion, with one concurrence and over two dissents, that a Louisiana court could, under certain circumstances, hold a manufacturer liable for injuries caused by a product that was unreasonably dangerous at the time of trial but not at the time of manufacture. If the "danger in fact" a product posed was greater than its utility, the product would be "unreasonably dangerous per se," and the fact that a risk was neither known nor knowable when the product left the manufacturer's control would become irrelevant and inadmissible. Put differently, in an "unreasonably dangerous per se" case a court could exclude state of the art evidence. Products that fit within this very narrow category might aptly be labelled "bad products."

The Halphen court also described the other bases of liability under Louisiana product liability law: mismanufacture, in which the court would not admit state of the art evidence; failure to warn, in which state of the art evidence would be admissible; and design defect, in which state

10. Halphen, 484 So. 2d at 113.
11. Id. at 119 (Watson, J., concurring). Justice Watson concurred with the majority that a court could hold a manufacturer liable for injuries caused by an unreasonably dangerous product even if the manufacturer neither knew nor could have known of an inherent danger that the product posed. However, he would have done so based on a balancing of the probability and magnitude of the risk against the utility of the thing, instead of creating the "unreasonably dangerous per se" classification.
12. Id. at 120 (Marcus, J., dissenting). Justices Marcus dissented, joined by Justice Blanche. He stated that the manufacturer should be allowed to assert as an affirmative defense that it could not have discovered the danger posed by the product under the state of the art research and scientific techniques at the relevant time.
13. Id. at 114 (citing Hunt v. City Stores, Inc., 387 So. 2d 585 (La. 1980)). From the citations in the opinion it appears that the court derived the "unreasonably dangerous per se" category from the writings of Dean Page Keeton, one of the nation's preeminent torts scholars. Halphen, 484 So. 2d at 114. Several other states have adopted similar tests but have limited the application of these tests to asbestos cases. See, e.g., Johnson v. Raybestos-Manhattan, Inc., 740 P.2d 548 (Haw. 1987); Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984); Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982). It is noteworthy that Halphen was an asbestos case.
16. Halphen, 484 So. 2d at 114; see infra text accompanying notes 109-28 for a discussion of mismanufacture claims.
17. Halphen, 484 So. 2d at 114; see infra text accompanying notes 234-64 for a discussion of failure to warn claims.
of the art evidence would be admissible unless the “unreasonably dangerous per se” doctrine applies.8

In response to the supreme court’s answer to the certified question in Halphen, the Fifth Circuit held that asbestos was “unreasonably dangerous per se,”19 a conclusion that Justice Dennis’ opinion neither expressly stated nor impliedly mandated. The furor over Halphen was monumental. Defense lawyers claimed that it was a pro-plaintiff decision, while plaintiffs’ attorneys complained that it was pro-defense. Before the Louisiana Supreme Court had an opportunity to further explain and delineate the Halphen categories through the ordinary process of case-by-case judicial clarification, critics of the decision called for legislative action. That action came last summer, before the Louisiana Supreme Court had held that a single product was “unreasonably dangerous per se.”20 The legislature, at the behest of Governor Roemer21 and the Louisiana Association of Business and Industries,22 enacted the Louisiana Products Liability Act. The Act at least partially overrules Halphen and essentially codifies the law of products liability in Louisiana.23

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8. Halphen, 484 So. 2d at 115; see infra text accompanying notes 129-233 for a discussion of design claims.

19. 788 F.2d 274, 275 (5th Cir. 1986) (“[W]e find it apparent from the citations and discussion in the certification response that the Supreme Court of Louisiana places asbestos in . . . the [unreasonably dangerous per se] category.”).

20. For a confusing case in which the category was tangentially discussed, see Brown v. Sears Roebuck & Co., 514 So. 2d 439 (1987), reh’g denied, 516 So. 2d 1154 (1988). The third circuit court of appeals found that all escalators were “unreasonably dangerous per se.” The supreme court affirmed but did not expressly hold that escalators are unreasonably dangerous “per se”. Rather, Justice Watson’s opinion indicated that they are unreasonably dangerous to small children, making their manufacturers and custodians strictly liable for escalator injuries to those children. Justice Calogero, in a concurring opinion, agreed with the result reached by the court, but would have found the defendants liable for their failure to adequately warn of the dangers posed to children. In a per curium denial of a petition for rehearing the court clarified its earlier opinion and indicated that its analysis of the case did in fact turn on the manufacturer’s failure to warn. Recently, a Louisiana appellate court has held that three wheel all terrain vehicles are unreasonably dangerous per se. Antley v. Yamaha Motor Corp., No. 87-1172, 1989 La. App. Lexis 187, 1989 WL 10653 (La. App. 3d Cir. 1989).

21. Hearings, supra note 7 (remarks of Governor Roemer).

22. Id., before the House Committee on Civil Law and Procedure, June 7, 1988 (remarks of Wayne Fontana).

23. Actually it is somewhat misleading to say that the Act codifies the law because, rather than restructuring the Civil Code articles dealing with delictual responsibility, the legislature placed the Act in title nine of the Revised Statutes. This is another instance of a disturbing trend toward the placing statutes directly relating to tort responsibility in the revised statutes rather than the Civil Code. Perhaps the most visible manifestation of this trend is in the area of tort immunities where many statutes have limited the liability of certain classes of persons for negligence. See, e.g., La. R.S. 9:2792 (Supp. 1988) (members, officers, directors, and trustees of charitable or nonprofit hospital, institution, or organization); id. § 2792.1 (director, officer, or trustee of any nonprofit organization); id. § 2792.2 (member of a
Now it will fall upon the courts to interpret this lengthy and detailed piece of legislation, the same courts whose decisions the legislature partially rejected by enacting the new legislation. This essay highlights some of the important issues that practicing lawyers and the courts will face in interpreting and applying the Act. The section following this introduction, Section II, notes the major actors in the legislative process, their apparent and articulated motives in supporting, or opposing, the Act and what, if any, conclusions the reader can draw therefrom. Section III analyzes the Act itself, focusing on the causes of action that it creates in a products liability case as well as those that it takes away. Section IV notes the continued utility of the *Bel* test to determine the applicability of comparative fault in a products liability case, and section V briefly introduces the retroactivity issue. The final section is a short conclusion.

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24. There are, of course many issues which the Act suggests that unfortunately will not be dealt with herein. For instance, the definition of “manufacturer” in La. R.S. 9:2800.53(1), as enacted by 1988 La. Acts No. 64, is generally the same as the pre-Act case law definition of the term; however, the Act appears to limit the ability of a claimant to recover from the domestic seller of an alien manufacturer. The domestic seller of an alien manufacturer is deemed to be a manufacturer under the Act only if the seller is “in the business of importing or distributing the product for resale and the seller is the alter ego of the alien manufacturer,” a peculiar twist on the traditional use of the alter ego doctrine. Thus, in order to hold the seller liable under the Act the claimant must be capable of piercing the corporate veil up to the manufacturer even though the claimant’s goal is to proceed against the seller not the manufacturer. In determining whether the seller is the alter ego of the manufacturer the court is instructed to consider: “whether the seller is affiliated with the alien manufacturer by way of common ownership or control; whether the seller assumes or administers product warranty obligations of the alien manufacturer; whether the seller prepares or modifies the product for distribution; or any other relevant evidence.” For a pre-Act analysis of the general problem, see Media Prod. Consultants, Inc. v. Mercedes-Benz of North Am., Inc., 262 La. 80, 262 So. 2d 377 (La. 1972). In Louisiana the alter ego issue is a question of fact. For a discussion of some of the other issues that the Act raises which are not discussed herein, see Kennedy, A Primer on the Louisiana Products Liability Act, 49 La. L. Rev. 565 (1989).

II. WHO WAS WHO AND WHAT DID THEY WANT?

Legislative history is often lacking when one approaches legislation in any state; Louisiana is no different and the history of the Act is symptomatically bare. However, one can glean several broad insights relevant to future interpretation of the statute by focusing on who the major nonlegislator actors involved in the Act’s passage were, what they wanted, and what they did.

The three major nonlegislator actors in the enactment process were Governor Roemer, the Louisiana Association of Business and Industry (LABI), and the Louisiana Trial Lawyers Association (LTLA). Governor Roemer needs no introduction. The LABI is an association composed of Louisiana businesspersons and others interested in matters that affect Louisiana business and the economic well-being of the state. The LTLA is a group of trial attorneys, most of whom represent plaintiffs in tort suits. During the past regular legislative session the LTLA retained the author as a consultant. I testified against earlier versions of the Act and later reviewed various proposals to amend it, including the final package.

It bears emphasis that each actor in the legislative process wanted fair laws for Louisiana. The problem was that the actors just could not seem to agree among themselves on what was fair. It is no great revelation to say that the LTLA wanted either a law favoring plaintiffs or no new law at all. The plaintiffs’ lawyers could have lived with Halphen and were willing to have the Louisiana courts continue to develop products liability law on a case-by-case basis. Alternatively, the trial lawyers proposed the enactment of a short and broad statute covering products liability rather than a long, technical one. At one point, the trial lawyers proposed the enactment of Restatement (Second) of Torts Section 402A, the fountainhead of most strict products liability law around the nation.

Just as the LTLA wanted a law that favors plaintiffs, the LABI wanted a law that would make it easier for defendants to win lawsuits. The LABI contended that insurance either was unavailable for manufacturers or was too costly because of a liability crisis. Overly liberal courts had allegedly caused this insurance crisis in their desire to compensate accident victims.

28. Id.
29. It would not have been unprecedented for Louisiana to have adopted section 402A as a statute; Arkansas essentially enacted it several years ago. See Ark. Stat. Ann. § 16-116-101 (1987).
even where there was no wrongdoing by the defendant manufacturers. There were rumblings from the LABI camp that liability in the absence of blameworthiness—intentional tort or negligence—was an undesirable development in Louisiana and national tort law. Some argued that negligence theories, aided by such doctrines as res ipsa loquitur, sufficiently protected the injured citizens of our state. If strict liability was to stay, then the LABI desired a strong state of the art defense, contending that a court should not hold a manufacturer liable for risks that were scientifically unknowable at the time of the product's manufacture. The LABI rejected an approach that relied upon case-by-case development of the law after *Halphen*. The organization also opposed enactment of section 402A. To some, its reluctance to accept such a broad statute showed a desire to bind the hands of Louisiana courts more tightly in products cases, indicating mistrust of the judiciary and a yearning for that desirable but unattainable goal of precise predictability and certainty in tort law.

Throughout the legislative process the LABI also asserted that legislation overruling *Halphen* was necessary to protect Louisiana industry and to attract new business to the state. There are obvious logical flaws in this argument. First and foremost, the Act provides protection to Louisiana business only in cases where Louisiana law governs the suit. Presumably, Louisiana law governs only those products suits in which Louisiana has the most substantial relationship to the occurrence and the parties. Usually the state where the injury occurs will have the most significant connection with the dispute and therefore its law will control. Therefore, Louisiana products law should, with few exceptions, apply only to cases in which the plaintiff's injuries occur in Louisiana. If a New York buyer, for example, were injured in New York by an exploding bottle of "Cajun Cream Soda," bottled in Baton Rouge, the court would probably apply New York law to the controversy because that is the most appropriate law for that controversy. The fact that the manufacturer produced the soda in Louisiana should not alter the choice of law determination. Thus, in the hypothetical case, the Act would not "protect" the Louisiana manufacturer.

That conclusion might not be so disturbing if the Act afforded an additional measure of protection to Louisiana businesses over and above

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32. Id.
34. See cases cited at supra note 33; see also Restatement (Second) of Conflict of Laws § 146 (1971).
that which it affords to non-Louisiana businesses in suits involving injuries that occur in Louisiana. If it did, then it would at least have the virtue of attracting new business into the state. However, because of the operation of the same conflicts rules that prevent "extra-state" protection of Louisiana businesses, this result seems unlikely. Consider the case of a Louisiana citizen who is injured in Louisiana by an exploding soda bottle manufactured and bottled in New York. Because the injury occurred here, Louisiana law ought to apply. Thus, to the extent that the law is pro-business or pro-defendant, that bias will provide an advantage to the non-Louisiana defendant as well as to the Louisiana defendant. Any protection that the Act provides for Louisiana industry is therefore not only limited in geographic scope but also extends to non-Louisiana manufacturers. Consequently, the Act would have little or no effect in attracting new businesses to the state. A business can obtain the benefits of the Act by merely selling its products in Louisiana. It need not relocate here. Moreover, any additional protection for Louisiana or foreign manufacturers comes at the expense of their injured Louisiana victims. If these Louisiana victims cannot recover from manufacturers for their product-caused injuries, they will be forced to rely heavily on the state's social welfare programs.

The LABI argument that Louisiana businesses need the Act to lower insurance rates and make insurance generally more available may also be faulty.\(^5\) In the "unreasonably dangerous per se" category of cases, which the Act eliminates, state of the art evidence is inadmissible. Such evidence is usually detailed, technical, and disputed. Eliminating that category of case and making state of the art a defense in all design and warning cases—the approach of the Act—promises to increase the cost of products trials.\(^6\) Cost of litigation is one of the variables in the rate-setting calculus an insurer engages in. Hence, the Act arguably has the effect of increasing insurance rates and making it less available to Louisiana businesses.

Given the partisan nature of the two primary combatants, one justifiably wonders what the Governor wanted. An examination of the Governor's goals, when compared to those of the LABI and the LTLA, yields a general guideline for interpretation of the Act—making Louisiana products liability law conform to national products liability law. From all that he and his representatives said, it appears that the Governor wanted to bring Louisiana products liability law into the American "mainstream."\(^7\)


\(^6\) One may reasonably doubt whether this statement is true in practice, if not theory, because it is doubtful that most plaintiff's lawyers would try a case on the "unreasonably dangerous per se" theory alone. Thus the court and jury would indeed consider state of the art evidence in most products trials anyway. However, one can imagine many plaintiffs electing to rely solely on the "unreasonably dangerous per se" theory in order to keep state of the art evidence from the judge and jury.

\(^7\) See supra note 21.
The perception among nonresident businesses that Louisiana law is different from the law in other states, the Governor seemed to believe, adversely affects the state's economic interests. Unfortunately the legislature failed to analyze carefully the extent to which non-Louisiana businesses see our law as different and the effect this perception may have on our ability to attract those businesses to Louisiana. On that issue platitudes, rather than hard data, carried the day.

The Governor made his sentiments concerning "mainstreaming Louisiana law" known to the first Senate committee that considered the Act. His executive counsel, John Kennedy (a contributor to this issue), echoed the Governor's desires throughout the pre-enactment process. Consequently, in considering the meaning of the precise language the legislature used, the courts should be conscious of relevant national law on the particular question involved and avoid an interpretation of the Act that is contrary to generally accepted principles of products liability law.

Concededly, tort law is traditionally mostly judge-made law, and each state has its own peculiar rules and applications. But there are some broad general principles that one can synthesize from the many decided cases, and it is these general principles that courts should refer to as the "mainstream of American products liability law." When doubts about the Act's interpretation arise, the courts should heed and give effect to these principles.

An analysis of the actual legislative process produces a second very general interpretative guideline. The LTLA opposed earlier versions of the Act because, in its opinion, the early drafts unnecessarily limited the rights of Louisiana citizens. The version of the bill first considered by the full Senate essentially required that a plaintiff in a design or a failure to warn case establish the defendant manufacturer's noncompliance with the state of the art at the time that the product left the manufacturer's control. The LTLA thought that this provision was unfair because the defendant would have superior knowledge of state of the art evidence and better access to it.

Voicing those considerations on the Senate floor, Senator Baggert proposed an amendment preserving state of the art as a defense but placing the burden of proving what the state of the art was and compliance with it on the manufacturer. The Senate was preparing to vote on the proposed amendment when, in a dramatic turn of events, Senator Hainkel asked for a brief recess so the "two sides" could discuss their differences and

39. Id. at 4.
42. The Senator was the proponent of the Act.
attempt to hammer out a compromise.\textsuperscript{43} The compromise bill that came out of the recess negotiations became the Act that the Governor signed. It included a provision, to be discussed in more detail below,\textsuperscript{44} that places the burden of proof concerning state of the art in design and warning cases on the manufacturer.\textsuperscript{45} As part of the compromise, the LABI and the LTLA also agreed that neither would oppose the compromise bill in the House.\textsuperscript{46}

Of what relevance is this detail concerning the Act's passage to its meaning and interpretation? The Act is a compromise, which, after some major changes regarding the state of the art, neither side opposed. As such, the courts should avoid any interpretation that would unduly favor defendants over plaintiffs or vice versa, because if the Act unduly favored one side over the other, either the LABI or the LTLA would have opposed it. This is, in fact, a general rule of statutory construction that the Louisiana Supreme Court has previously noted and relied upon.\textsuperscript{47}

To summarize, the courts should note two critical points arising out of the legislative process. First, Governor Roemer desired a Louisiana products liability law that was consistent with the mainstream of American law on the subject. Second, the Act represents a compromise between the two primary opponents in the legislative process. Together, these insights point to the desirability of interpreting the legislation in a manner that preserves the rights of both accident victims and manufacturers and conforms to the dominant themes in modern American products liability law.

III. THE ACT ITSELF

A. Initial Observations

1. Generally

The Act expressly states that it "establishes the exclusive theories of liability for manufacturers for damage caused by their products."\textsuperscript{48} Under the Act a manufacturer is liable for damage proximately caused by an "unreasonably dangerous" characteristic of its product provided: the dam-

\textsuperscript{43} Morning Advocate, May 26, 1988, at B-1, col 1.
\textsuperscript{44} See infra text accompanying notes 200-233.
\textsuperscript{45} See supra note 22, remarks of all for the lack of "spirited dispute."
\textsuperscript{46} See supra note 22, remarks of all for the lack of "spirited dispute."
\textsuperscript{47} State v. Standard Oil Co. of Louisiana, 188 La. 978, 178 So. 601 (1937). See also Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331, 1338 (La. 1978) ("Casual observation tells us that all legislation is founded on the principle of mutual concession.").
\textsuperscript{48} La. R.S. 9:2800.52, as enacted by 1988 La. Acts No. 64.
ages arise out of a reasonably anticipated use of the product; and the unreasonably dangerous characteristic either existed at the time the product left the manufacturer's control or, in a design or warning case, resulted from a "reasonably anticipated alteration or modification." 49

"Reasonably anticipated use" is defined as "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." 50 The courts no doubt will delineate the precise contours of the concept on a case-by-case basis. Although most pre-Act cases referred to "normal use," 51 pre-Act precedent on the subject should continue to be persuasive. The new phrase does not appear to change the law in this area; therefore, "reasonably anticipated use," like "normal use," should include foreseeable or expected misuse where the court decides that the misuse is within the scope of the manufacturer's duty to make a safe product.

Happily, the Act does not employ the Restatement's word "defect" to define an element of a plaintiff's case. According to section 402A of the Restatement (Second) of Torts, in order to recover in a strict products liability case a plaintiff must show that a "product in a defective condition unreasonably dangerous to the user or consumer or to his property" caused his injury. Many courts have wrestled with the question of whether the plaintiff must prove both that there is a defect and that the product is unreasonably dangerous, or whether the fact that the product is unreasonably dangerous makes it defective. 52 The majority rule in other states, followed in Louisiana before the Act's passage, seems to be that the fact that the product is unreasonably dangerous will, without more, make the product defective. 53 Other courts have concluded that the plaintiff need only show a defect that proximately caused its injury. 54 These courts reason that requiring a showing of unreasonable danger improperly reintroduces negligence principles into the strict liability case where the product, not the manufacturer, is supposedly on trial. 55 As noted the Louisiana courts did not adopt this notion but instead required the plaintiff to prove that the product was unreasonably dangerous, a concept the courts have become

49. Id. § 2800.54, as enacted by 1988 La. Acts No. 64.
50. Id. § 2800.53 (7), as enacted by 1988 La. Acts No. 64.
52. Restatement (Second) of Torts § 402A (1965).
53. See generally Prosser & Keeton, supra note 6, § 99.
56. See Prosser & Keeton, supra note 6, § 99.
familiar with in both products cases and in cases arising under Civil Code articles 2317 and 2322. The Louisiana courts can continue to rely on that familiar concept under the Act.

New Louisiana Revised Statutes 9:2800.54 sets forth the ways in which a product may be unreasonably dangerous: in construction or composition; in design; because the manufacturer has not provided an adequate warning about the product; or because the product does not conform to an express warranty that the manufacturer made about the product. The express language of the Act makes these the only theories of recovery available against a manufacturer for damages that its products cause. One immediately notes the absence of Halphen’s unreasonably dangerous per se category, which now seems to be dead and gone from Louisiana. The Act’s exclusivity also glaringly eliminates a general negligence cause of action against a manufacturer and, on careful reading, restricts the re-dhibition rights that injured victims enjoyed under pre-Act law.

2. The Act’s Exclusivity: What About Negligence?

The deletion of the negligence claim against a manufacturer departs radically from prior Louisiana products liability law as well as from national tort law. Were its absence from the Act not so clear the desire to interpret the Act consistently with general national tort law would dictate its retention. The exclusion of negligence appears even odder when it is considered that the genesis of product liability law was in warranty and negligence, and that one of the justifications for imposing strict liability on a manufacturer is the difficulty of proving the manufacturer’s negligence in making and selling a dangerous product. Why, if some of the proponents of products liability legislation desired to impose a blame-worthiness-based system, did they feel it necessary to take away the

58. La. R.S. 9:2800.54 (B)(1), as enacted by 1988 La. Acts No. 64.
59. Id. § 2800.54 (B)(2), as enacted by 1988 La. Acts No. 64.
60. Id. § 2800.54 (B)(3), as enacted by 1988 La. Acts No. 64.
61. Id. § 2800.54 (B)(4), as enacted by 1988 La. Acts No. 64.
63. Syrie v. Knoll Int'l, 748 F.2d 304 (5th Cir. 1984); Corbin v. Coleco Indus., Inc., 748 F.2d 411 (7th Cir. 1984); Wagner v. International Harvester Co., 611 F.2d 224 (8th Cir. 1979); Albanese v. Emerson Elec. Co., 552 F. Supp. 694 (D. Del. 1982); Prosser & Keeton, supra note 6, § 96.
66. In Louisiana, the phrase “fault based system” is misleading because under Civil Code article 2315 and the cases interpreting it, fault includes strict and even absolute liability, whereas to many common law attorneys, fault traditionally only includes intentional torts and negligence. Cf. Uniform Comparative Fault Act § 1(b). Thus in Louisiana all torts are “fault” based even if the defendant is not “morally blameworthy.”
plaintiff's right to proceed in negligence?\footnote{Restatement (Second) of Torts § 289 (1965).} Arguably, a generalized fear of the judiciary prompted the elimination of the negligence action against a manufacturer. The proponents of the new legislation probably feared the use of the negligence concept to revive the *Halphen* “unreasonably dangerous per se” category.

The illustration of that concern requires a brief discussion of basic negligence concepts. Judge Learned Hand's definition of negligence forces a defendant to pay for any damages it causes if the magnitude of the risk its conduct presents, discounted ex ante by the likelihood that the risk would actually arise, exceeds the social utility of that conduct.\footnote{Put differently, a defendant who fails to take certain precautions is negligent if $B < P \times L$ where $B$ is the burden, or cost of prevention, $P$ is the probability of the accident's occurrence, and $L$ is the loss that could be expected to result if an accident occurs. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).} In this formula the costs of obtaining information about the risk (necessarily including evidence of the state of the art) as well as the opportunity costs of doing without the conduct or doing it differently (the social utility of defendant's conduct) are all relevant and the court should consider them in deciding the case. It is the relevance of evidence on what the manufacturer knew or should have known that distinguishes the Hand formula (and, indeed any negligence test) from the *Halphen* “unreasonably dangerous per se” category.\footnote{For a discussion of the analytical differences between the two concepts, see supra text accompanying notes 13-20}

Under the Hand formula, merely marketing a product could conceivably trigger liability for manufacturer negligence if the magnitude of the risk that the product presented outweighed its social utility. Thus, a court using the Hand rule could find negligence if the manufacturer marketed a “bad” product. The proponents of new products legislation were extremely wary of this bad product category, fearful that courts would use it to reintroduce *Halphen's* “unreasonably dangerous per se” concept.\footnote{See infra text accompanying notes 144-50.} This concern ignores the major difference between the unreasonably dangerous per se theory and negligence, for while state of the art evidence is relevant in any negligence case it is always excluded in a per se case. But despite this crucial difference, the Act's proponents were unwilling to include a general negligence heading in the legislation.

With no way to deal with the bad product judicially, the market becomes the only check on those products. Under the market scenario, people allegedly would not purchase bad products. These products would thus not be profitable, and their manufacturers would cease making them.\footnote{Cf. G. Calabresi, supra note 6, at 17-38, 69-94 (1970).} But unless the law forces the manufacturer to take account of all the
costs of its products in setting their price, the market does not function to check the production of "bad" products. Accident costs that the manufacturer does not take into account in its pricing calculus are known in economic terms as "externalities." These accident cost externalities allow the manufacturer to charge less than it should, thus selling and producing more than it should.

An example may help clarify the point. Imagine a manufacturer of "Saturday Night Special" handguns who is not liable for the injuries that its buyers inflict on others. The manufacturer may have a very profitable venture, but if the tort system forced it to bear all the costs of its enterprise by compensating those persons foreseeably injured by its products (in the hands of foreseeable users), it would have to raise its prices drastically and consequently would sell far fewer guns. Are the Louisiana courts now unable to deal with potential problems like this, because there is no longer an unreasonably dangerous per se category of products liability and no general action in negligence? Has the law lost the tools it has always had to eliminate accident costs as externalities? Are we left with a distorted market as the only check on an otherwise unregulated product? Must we await a legislative or administrative solution?

Have victims then truly lost meaningful rights? In interpreting the Act in the spirit of compromise that it represents, much of the load that negligence might have borne will now fall on the shoulders of the Act's exclusive categories, especially design and failure to warn. Although the origins of products liability law lie, in part, in the general action for negligence, most of its current emphasis and development is in the particular areas of mismanufacture, design defects, and failure to warn, three of the Act's four categories. Thus, the elimination of the general negligence cause of action may have only limited practical effect. As noted, however, it has some theoretical implications in the bad product cases.

73. Id. at 68-94.
74. Accident costs that the manufacturer does not have to take into account will move the manufacturer's marginal cost curve down and to the right thus reducing its costs per unit and leading to increased production. Lower costs per unit potentially means lower prices and artificially higher demand. Eliminating externalities forces the marginal cost curve back to its proper position vis-a-vis the manufacturer's marginal benefits curve which, in turn, leads to lower efficient production levels and higher prices. Higher prices and lower production obviously means fewer sales.
75. See generally Strickland v. Fowler, 499 So. 2d 199 (La. App. 2d Cir.), writ denied, 500 So. 2d 411 (1986); Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985) (the court decided that small handguns are neither ultrahazardous nor unreasonably dangerous under Louisiana law).
76. For a discussion of design defect cases under the Act, see infra text accompanying notes 171-232. For a discussion of the Act's treatment of failure to warn see infra text accompanying notes 234-64.
77. See supra text accompanying note 75 and infra text accompanying note 181.
3. Exclusivity and the Redhibition Claim

Perhaps a more disturbing development is the Act's apparent effect on the redhibition action against the manufacturer. A brief review of pre-Act law will make the change the Act renders and the potential problems it creates clearer. Under the Civil Code articles on sales, a seller warrants that the goods it sells are free from redhibitory vices. A redhibitory vice is one that renders the product either absolutely useless or that makes its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it had he known of the vice.

Under long-standing Louisiana jurisprudence, the court in a redhibition case against a manufacturer presumes that the manufacturer knows of any redhibitory defects in its products. This presumed knowledge renders the manufacturer a bad faith seller under Civil Code article 2545, thus subjecting it to an action not only for damages, but for attorney's fees as well. Since the court's decision in *Phillippe v. Browning Arms Co.*, Louisiana law has recognized that a characteristic which rendered a product unreasonably dangerous could also constitute a redhibitory vice; thus, the prevailing plaintiff in a products liability action could recover attorney's fees. Additionally, lost profits are an item of recovery in a redhibition action against the manufacturer, and, at least since the Louisiana Supreme Court's decision in *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, remote buyers have been able to sue product manufacturers in redhibition despite the lack of contractual privity.

81. See, e.g., PPG Indus., Inc. v. Industrial Laminates Corp., 664 F.2d 1332 (5th Cir. 1982); Rey v. Cuccia, 298 So. 2d 840 (La. 1974).
82. La. Civ. Code art. 2545 provides:
   The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, including reasonable attorneys' fees, is answerable to the buyer in damages.
83. 395 So. 2d 310 (La. 1980).
84. La. Civ. Code art. 2545; *Phillippe*, 395 So. 2d at 319. This notion was articulated and championed by Professor David Robertson in his seminal article on Louisiana products liability law. Robertson, supra note 78, at 50 (1975).
86. 262 La. 80, 262 So. 2d 377 (La. 1972).
87. Id. at 90, 262 So. 2d at 381. ("Louisiana has aligned itself with the consumer-protection rule, by allowing a consumer without privity to recover, whether the suit be strictly in tort or upon implied warranty.").
The Act in its definition of "damage" clearly does away with the right to recover attorneys fees from a manufacturer in a products tort suit. What is perhaps more disturbing is that the Act, at first glance, appears to do away with a redhibition claim against the manufacturer for products containing defects that are redhibitory vices but that do not render the product "unreasonably dangerous."

Imagine a Louisiana landscaper who purchases a tractor-lawnmower from a Louisiana seller who had purchased it from a large New Jersey manufacturer. Further suppose that although the machine presents no risk of personal injury to the plaintiff or others, it simply does not work. As a result, the landscaper loses a significant amount of work and money. Under traditional notions the product would not be unreasonably dangerous.

Assuming further that the seller was unaware of the defect, it is liable only to repair, remedy, or correct the vice. If the seller could not cure the defect, then the seller would be liable to the buyer for return of the purchase price of the tractor with a right to offset any corresponding benefits that the buyer received from its use of the defective product. This is still true under the Act as it makes no change in the relationship between a nonmanufacturing seller and its buyer.

Before the Act, the seller could reclaim any sums it paid to the buyer from the manufacturer. Article 2531 provides, in part: "In any case in which the seller is held liable because of redhibitory defects in the thing sold, the seller shall have a corresponding and similar right of action against the manufacturer of the thing for any losses sustained by the seller. . . ." As Shakespeare said, "[T]here's the rub." How can the seller have an action against the manufacturer on a theory outside the Act—that is, under an article 2531 theory—if the later enactment of the products Act provides the exclusive theories of recovery against a manufacturer? If the Act takes precedence, does the Louisiana seller have to bear the burden of the manufacturing "defect?"

It does not seem likely that the authors of the products Act intended to take the right to seek indemnity away from the seller. If the Act did have this effect, it would favor foreign manufacturers at the expense of

89. See infra notes 109-71.
91. Id.
92. Id.
94. The later enacted statute should govern any inconsistencies between it and older law. Macon v. Costa, 437 So. 2d 806 (La. 1983); State in re Sapia, 397 So. 2d 469 (La. 1981); Smith v. Trosclair, 321 So. 2d 514 (La. 1975).
Louisiana sellers. This is an unlikely intent, at least given the articulated goal of helping Louisiana businesses.\textsuperscript{95}

A variation on the facts raises further problems. What if the Louisiana seller, like so many other Louisiana businesses, has gone out of business? If the tractor is not unreasonably dangerous but useless, can the landscaper recover from the manufacturer? How? The Act, as noted, states that it provides the "exclusive theories" of recovery against a manufacturer for damage, and redhibition is not one of the expressly listed theories. Even more basically, what if the manufacturer is the seller? Must the consumer rely upon the Act or not recover at all? Again, the Act says it is "exclusive."

The availability of lost profits presents another difficulty. Prior to the passage of the Act the landscaper could have recovered his lost profits in redhibition\textsuperscript{96} from the manufacturer, who the law presumed knew of the defects in the tractor. Does the exclusivity clause of the Act preclude recovery from the manufacturer for profits the landscaper lost as a result of redhibitory defects? Once again, under a literal reading of the Act, the answer is no, unless the tractor is unreasonably dangerous.

The solution to these problems under the Act seems to be that a redhibition action does survive in all of the hypothetical cases and is available to allow the plaintiff to recover for other than personal injuries. It is the Act’s definition of "damage" that partially saves the redhibition claim. The Act is exclusive only for the recovery against a manufacturer for "damage," a defined term. "Damage" is defined as follows:

"Damage" means all damage caused by a product, including survival and wrongful death damages, for which Civil Code Articles 2315, 2315.1 and 2315.2 allow recovery. "Damage" includes damage to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that Section 3 of Chapter 6 of Title VII of Book III of the Civil Code, entitled "Of the Vices of the Thing Sold," does not allow recovery for such damage or economic loss. Attorneys' fees are not recoverable under this Chapter.\textsuperscript{97}

The idea is apparently that redhibition survives only for economic loss. To the extent that the damage is compensable in redhibition, it is not damage under the Act. Hence, the Act’s exclusivity provision does not prevent recovery for economic loss in redhibition.

Happily, two of the Act's supporters, who have written on its effects, my colleague, Professor William E. Crawford,\textsuperscript{98} and my co-contributor to

\textsuperscript{95} See supra text accompanying note 32.
\textsuperscript{96} See cases cited supra note 85.
\textsuperscript{97} La. R.S. 9:2800.53(5), as enacted by 1988 La. Acts No. 64 (emphasis added).
this issue, John Kennedy, also contend that the consumer retains the right to sue a manufacturer in redhibition for economic loss. Professor Saul Litvinoff also reads the Act in this manner.

Both Professor Crawford and Mr. Kennedy suggest that the Act governs claims for personal injury, while redhibition governs claims for “economic” loss, a notion consistent with some American attitudes towards tort and contract, but not mandated by a literal reading of either the redhibition statutes or the Act. What does this dichotomy mean for Louisiana law? It means that the consumer’s redhibition rights are limited; they are limited to the recovery of economic loss. In order to recover for personal injuries that a product causes the injured plaintiff must proceed under the Act. Perhaps the most significant effect of this development is that plaintiffs can no longer recover attorney’s fees in personal injury/products liability cases. To that extent, the Act overrules Phillippe. How-


100. Report, Louisiana State Law Institute, Revision of the Law of Sales-Redhibition, Prepared for Meeting of the Council, Saul Litvinoff, Reporter; Julio Romanach, Staff Attorney, 11 (Nov. 18, 1988) (on file at Louisiana State Law Institute Offices at Paul M. Hebert Law Center). If a court or litigant rejects the collective wisdom of Litvinoff, Crawford, Kennedy, and Galligan and gets lost in the statute’s confusing treatment of the subject, there is another way to deal with the redhibition-exclusivity dilemma. Until now this discussion assumed that it is possible for a product to be useless but not unreasonably dangerous. That may not be the case. The Act nowhere requires that the “danger” the product presents is a danger to the person. That is, read literally, a product might be unreasonably dangerous if it presents a risk to property or even to the plaintiff’s economic interests. For instance, in the design section the plaintiff must establish an alternative, less dangerous design, and must show that the likelihood of the product’s causing the claimant’s damage and the severity of that damage outweighed the product’s utility. See infra text accompanying notes 174-97. But, as noted, damage is broadly defined to include economic loss in some cases. Hence, under a literal reading of the Act, a product can be unreasonably dangerous if it presents a sufficient risk to a plaintiff’s economic interests even if it presents no risk at all to his personal safety. Read thusly, the hypothetical landscaper recovers in several of the above-described scenarios, because a useless product becomes unreasonably dangerous when economic losses are included in the risk-side calculus.

Under this interpretation, the Act swallows up and includes, rather than does away with, the buyer’s redhibition claim against a manufacturer. Unfortunately for plaintiffs and their lawyers, reading the Act in such a manner would result in a departure from accepted principles of products liability law given the American fetish for separating personal injury claims from tort claims for economic loss. See, e.g., Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976); Moorman Mfg. Co. v. National Truck Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982); Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981). Moreover, the Act’s proponents certainly did not contemplate this reading. But it is a possible reading of the Act.

ever, attorneys' fees are still recoverable in redhibition. Why should a plaintiff who suffers economic loss from a product recover its attorneys' fees, but not the plaintiff who suffers personal injury? I see no principled basis for justifying the different results in the two cases.

May the plaintiff cumulate redhibition and Act claims? It seems that he can, but only if he suffers both economic loss and personal injury. Attorneys' fees in such a case should be recoverable but arguably only so far as they relate to time the attorney spent on the economic loss claim. Thus, the Act will force courts to allocate the total time spent on the case between the two claims.

The Act does allow the recovery of economic loss but only if it is not recoverable in redhibition. To that extent only the Act liberalizes the redhibition claim and allows those outside the distributional chain, such as donees, to recover economic losses that they might not recover in redhibition. This limited liberalization of redhibition comes at the expense of all future claimants who suffer product-related personal injuries and cannot recover their attorneys' fees.

One is left with the uncomfortable notion that the Act might have accomplished its goals much more simply. The drafters could have listed redhibition as one of the exclusive theories of recovery available against a manufacturer. No doubt, the proponents of the Act rejected this solution because it would have meant that Phillippe would have survived and products victims would have still recovered attorneys' fees. Alternatively, the drafters might have listed redhibition as one of the exclusive theories of recovery available against a manufacturer but amend Civil Code article 2545 to delete the right to recover attorneys' fees. Why save the right to attorneys' fees in economic loss cases but not personal injury cases? Ultimately the Act gives a manufacturer the right to recover attorneys' fees from another manufacturer when it suffers economic loss; but, it insulates that same manufacturer from liability for attorneys' fees when a plaintiff sues it for personal injuries that the manufacturer caused.

4. Damage and Bystanders

The Act broadly defines "damage." Some states do not allow recovery in tort for damage to the product itself; the Act does, provided no recovery is available under a redhibition theory. Other states do not allow

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103. Alternatively, and more simply, the drafters could simply have said that: "A claimant can still recover economic loss in redhibition."
recovery of economic losses in tort cases;105 again, the Act does, if they are not available in redhibition.

Likewise, the Act, while exclusive, provides a broad definition of those who can recover for damages from a manufacturer, termed the "claimant." "Claimant" is defined as anyone asserting a claim.106 By implication, the duty of a manufacturer under the Act extends to users as well as handlers, and there is no privity requirement. This broad definition of claimant also seems to resolve a question that the Restatement leaves open,107 whether or not a bystander can recover for injuries suffered as a result of an unreasonably dangerous product.108 For instance, if in the hypothetical, the tractor malfunctioned and injured a child walking nearby, could the child recover? Under the Act there seems little question that an injured bystander may be a claimant and thus could prevail if the product in question was unreasonably dangerous.

In summary, the Act purports to exclusively govern the theories of liability available to recover from the manufacturer of a product. The Act eliminates the unreasonably dangerous per se claim, takes away a plaintiff's general negligence action against a manufacturer, and limits recovery in redhibition from a manufacturer. Although at first blush the Act's exclusion of a negligence claim appears radical, that may not be the case given the potential breadth and flexibility of the Act's categories. The Act's effect upon redhibition is potentially more onerous to the citizens of the state, but all agree that the redhibition claim against the manufacturer for economic loss survives. What the Act clearly does is take away the personal injury claimant's right to recover attorneys' fees. Additionally, the Act resolves any lingering doubts in favor of the bystander's right to recover in a products liability suit. This essay now turns to the task of examining the four categories of liability that the Act creates.

B. Unreasonably Dangerous in Construction or Composition

Perhaps the most basic form of products liability is the action for damages caused by a product made unreasonably dangerous by some error in its construction.109 Imagine a car that comes off the production line with brakes that will fail in the rain, because some worker neglected to include a part of the car's braking system, a part included on all properly manufactured cars of the same make and model. On a general level, the

107. Id. See also Restatement (Second) of Torts § 402A comments j, l, and o (1965).
108. Id.
109. For a general discussion of the liability of a product manufacturer, see Prosser & Keeton, supra note 6, § 99.
Act does not affect either the trial or the outcome of this case. The plaintiff who is injured when the brakes fail can recover without having to prove negligence on the part of the manufacturer. Likewise, the state of the art for automotive manufacturing at the time the product left the manufacturer’s control is irrelevant to the inquiry, because the issue is not what the maker could have done; the manufacturer has failed to live up to the standards that it has set for itself. However, a more specific examination of pre-Act Louisiana law and the Act reveals some potential dissimilarities.

In *Halphen*, Justice Dennis described the pre-Act Louisiana law of mismanufacture as follows:

A product is unreasonably dangerous in construction or composition if at the time it leaves the control of its manufacturer it contains an unintended abnormality or condition which makes the product more dangerous than it was designed to be. A manufacturer or supplier who sells a product with a construction or composition flaw is subject to liability without proof that there was any negligence on its part in creating or failing to discover the flaw. Evidence of what knowledge was available to the manufacturer has no relevance in such cases because the product, by definition, failed to conform to the manufacturer’s own standards.

The Act preserves the mismanufacture category, but defines it as follows:

A product is unreasonably dangerous in construction or composition if, at the time the product left its manufacturer's control, the product deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer.

One will instantly note some differences between the pre-Act jurisprudence and the Act mismanufacture formulations. Most critically, the Act employs


112. La. R.S. 9:2800.55, as enacted by 1988 La. Acts No. 64.
a material deviation from the norm standard, whereas pre-Act law based liability on deviations that made the product more dangerous than it was designed to be. Do these standards really differ?

The facts of Weber v. Fidelity & Casualty Insurance Co. of New York,113 the granddaddy of Louisiana strict products liability cases, provide an apt opportunity to examine this question. In Weber, the plaintiff-buyer purchased cattle dip that used arsenic as one of its active ingredients. The buyer's two sons prepared the dip mixture and then applied it to the cattle. Shortly thereafter the boys became nauseated and seven of the cattle died. The supreme court allowed recovery. Justice Tate, speaking for the court,114 stated that the plaintiff need not prove negligence in a case like Weber.115 If the dip contained more arsenic than the manufacturer intended and that increased concentration made the product more dangerous, then the manufacturer would be strictly liable for injuries under the Weber-Halphen formulation of the law. Would the manufacturer be liable under the Act's standard? If the extra 1% arsenic is considered a material deviation, the defendant would be liable under the new legislation.116 But, it could be argued that by volume the deviation was not material. That interpretation of the materiality requirement is clearly contrary to the Act's spirit and would be an extremely undesirable variation from nationally accepted products liability law.117 The purpose of the mismanufacture category is to protect consumers from unintended errors in the manufacturing process that make a product unsafe.118 What makes the deviation material is its increased propensity to cause injury. To allow a defendant to escape liability in the asserted hypothetical where a deviation is not statistically material but is one that makes the product more dangerous would be inconsistent with the spirit of products liability law. Thus, when faced with a mismanufacture case the court should conclude that any

113. 259 La. 599, 250 So. 2d 754 (1971).
114. There were two dissents. Id. at 611, 250 So. 2d at 758 (Hamlin and McCaleb, J.J., dissenting).
115. "If the product is proven defective by reason of its hazard to normal use, the plaintiff need not prove any particular negligence by the maker in its manufacture or processing." Id. at 603, 250 So. 2d at 756.
118. See, e.g., Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). The court there notes that another reason for the court's development of strict liability was a plaintiff's difficulty in proving what a manufacturer knew or should have known in a negligence case. Id. at 365, 161 A.2d at 77.
manufacturing deviation which renders a product more dangerous than intended is a material deviation under the Act.

Actually, the Act may somewhat broaden the scope of the mismanufacture category. The Act not only covers deviations from the manufacturer's otherwise identical products but also deviations from specifications or performance standards. Thus, if a whole product line deviates from printed specifications or performance standards the Act literally states that a court might find that every product in that line is unreasonably dangerous in construction or composition.

As was the case under prior Louisiana law, a manufacturer's compliance with the state of the art should not be a relevant consideration in a mismanufacture case under the Act. The Act does not expressly say that state of the art evidence is inadmissible; however, to admit such evidence in a mismanufacture case would be contrary to both national products law and prior Louisiana law, and would only confuse the factfinder. As a result, a court should always exclude state of the art evidence in a mismanufacture case.

One final but important point regarding mismanufacture cases bears emphasis. In order to recover, the Act requires the plaintiff to prove both that the defect rendering the product unreasonably dangerous existed at the time the product left the manufacturer's control, and that the characteristic legally, or proximately caused the plaintiffs' injuries. Occa-

120. See La. R.S. 9:2800.59, as enacted by 1988 La. Acts No. 64.
122. See *Halphen*, 484 So. 2d 110; *Bohn Ford*, 483 So. 2d 934.
123. La. R.S. 9:2800.54(C), as enacted by 1988 La. Acts No. 64. This is true in each of the Act's categories although in a design or warning case the characteristic may also arise from a "reasonably anticipated alteration or modification." See id. art. 2800.54(B), as enacted by 1988 La. Acts No. 64.
124. One of the major developments in Louisiana tort law in the last thirty years was the court's analytical shift away from the troublesome proximate cause requirement, (for an excellent discussion of Louisiana proximate cause cases see Comment, Proximate Cause in Louisiana, 16 La. L. Rev. 391 (1956)) and its replacement with the duty-risk approach. See, e.g., Dixie Drive It Yourself System v. American Beverage Co., 242 La. 471, 137 So. 2d 298 (1962). Proximate cause analysis relies on shibboleths like "foreseeable," "direct," and "remote" as substitutes for an analysis of the policy issues that are at the heart of the determination of where the court should limit a defendant's responsibility for an act. See Comment, Proximate Cause in Louisiana, supra. Duty-risk is supposed to force the court to articulate the policy reasons that determine its decision. *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1155-56 (La. 1988). Does the Act do away with the duty-risk approach in a products case? Are juries once again to decide proximate cause? These and other questions unfortunately are beyond the scope of this article. However, after the supreme court's recent decision in *Pitre*, one may reasonably employ either duty-risk or traditional legal/proximate cause notions in tort cases.
125. La. R.S. 2800:54(A), as enacted by 1988 La. Acts No. 64.
sionally, the existence of the flaw at the relevant time and causation might be difficult to prove. The plaintiff may have to rely upon circumstantial evidence. By way of example, in Weber, the buyer threw out the cattle dip immediately after the accident for fear that the container and its contents might cause some even worse tragedy. As a result of his actions there were no samples available to determine the arsenic content of the dip involved. Despite this lack of precise data on the existence of any mismanufacture or on the causal relationship between the alleged defect and the plaintiffs' damages, the plaintiffs recovered. The fact and manner of the cattle's death and the boys' illness created a permissible inference that an overabundance of arsenic in the dip was responsible for the plaintiffs' damage, and the defendant's experts had not sufficiently explained away this inference. Summing up this aspect of the case, Justice Tate said:

In the present case, the plaintiffs have met [their burden of proof] . . . by evidence found credible by the trier of fact. They have showed that the dip was used as the manufacturer must reasonably have anticipated, that it killed the cattle, and that the most probable reason it killed the cattle was an excessive amount of arsenic in the small portion of the dip utilized to prepare the spray solution.

The defendants have not produced evidence that the portion of the dangerous dip was manufactured properly. The manufacturer did not produce evidence that the batch of the dip had contained the proper proportion of arsenic. . . .

The plaintiffs relied upon, and the court accepted, circumstantial evidence of both mismanufacture and causation.

The Act does not deny courts the opportunity to rely upon such evidence. It does not purport to affect every aspect of the trial of a products suit, and where it does not expressly displace prior law that law remains as persuasive, if not binding, authority. Thus cases like Weber are not overruled. If the circumstantial evidence is credible—that is, sufficient to go to the trier of fact—then the plaintiff can still rely on it.

127. Id. at 610, 250 So. 2d at 757-58.
128. Another case involving a similar problem with circumstantial evidence is Hunt v. Ford Motor Co., 341 So. 2d 614 (La. App. 2d Cir. 1977). In Hunt the plaintiff suffered injuries when she lost control of her car. She sued Ford for mismanufacture and the seller for negligent failure to repair the car after she had repeatedly complained of problems with the steering. She could not point to any particular defect; however, the court allowed her to rely upon the fact of the accident and her prior complaints as circumstantial evidence
In conclusion, the Act’s mismanufacture category preserves a manufacturer’s strict liability in tort for injuries resulting from a mismanufactured product that is more dangerous than other properly manufactured products of the same make and model. State of the art evidence is irrelevant in a mismanufacture case; however, circumstantial evidence is not only relevant and admissible, but potentially crucial.

C. Unreasonably Dangerous in Design

1. Generally

In cases where the manufacturer fails to follow even its own design criteria, courts have not hesitated to impose strict liability. A more difficult issue arises when the product is built exactly as the manufacturer intended, but some characteristic of the product’s design injures the plaintiff. Should a court hold the manufacturer strictly liable in tort in such a case? One of the most famous early strict liability tort cases, Greenman v. Yuba Power Products, Inc., was a design case, but courts have since proceeded cautiously in this area. Both courts and commentators have been concerned about the ability of the judicial arm to make the sometimes difficult technological determinations or the oftentimes bitterly debated policy decisions. While we may sympathize with the difficulties lawyers and judges face in confronting these technical and scientific issues, difficulty of decision alone is an inadequate excuse for inaction. Courts exist to resolve policy questions in the context of particular disputes. The effect that the resolution of those questions may have on later litigants and
society at large is an intended and necessary by-product of the system.\textsuperscript{133}

During the legislative process leading up to the Act's passage much of the debate and disagreement centered on the design issue. No doubt a large part of the litigation over the Act's interpretation will also focus on the design sections. There are two reasons for this. First, there does not seem to be any societal or legal consensus on the standard courts should use to govern a manufacturer's liability for its design decisions. Second, the design sections of the Act are the most difficult to read and understand in light of previous case law.

Nationally, there are two broad tests used in cases to decide whether a product is unreasonably dangerous in design. A review of these tests will help both to explain pre-Act Louisiana design liability law and to place what the Act does in a more meaningful historical and national context. One test, which has its origins in the comments to Restatement Section 402A, is known as the "consumer expectation" test.\textsuperscript{134} It basically provides that a product is unreasonably dangerous in design if it is dangerous to an extent beyond that which the ordinary consumer would expect.\textsuperscript{135} The Louisiana Supreme Court employed this test in the \textit{DeBattista} case.\textsuperscript{136} Commentators have criticized the consumer expectation test because it is vague\textsuperscript{137} and, at the same time, potentially underinclusive and overinclusive. It is potentially underinclusive because the consumer, who has no knowledge about the product's technology and the potential safety devices available, may expect a product that is less safe than it should be.\textsuperscript{138} The consumer's lack of expertise could also make the test overinclusive. The unsophisticated consumer may expect a product that is safer than humanly possible.\textsuperscript{139} This latter concern obviously has state of the art overtones.

\begin{itemize}
\item \textsuperscript{133} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
\item \textsuperscript{134} See Prosser & Keeton, supra note 6, § 99, at 698-99.
\item \textsuperscript{135} See Restatement (Second) of Torts § 402A comment (1979).
\item \textsuperscript{136} DeBattista v. Argonaut-Southwest Ins. Co., 403 So. 2d 26 (La. 1981). For an excellent review of pre-Act Louisiana law on the design category of cases, see McDonald, Liability for Products Unreasonably Dangerous in Design (Outline prepared for lecture at Paul M. Hebert Law Center's Center for Continuing Professional Development Seminar on The New Louisiana Products Liability Act, Nov. 18-19, 1988).
\item \textsuperscript{137} Comment, Design Defects: Are Consumer Expectations Unrealistic?, 45 La. L. Rev. 1313 (1985); cf. Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 114 n.2 (La. 1986). In the context of adopting the risk utility test for use in determining whether a product is "unreasonably dangerous per se," Justice Dennis noted that "[o]ther tests may have their own merits in different contexts . . . ." Some courts have allowed the plaintiff to use either a consumer expectation or a risk-utility test. Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). In these cases the defendant bears the burden on the risk-utility issue.
\item \textsuperscript{138} Prosser & Keeton, supra note 6, § 99, at 698-99.
\item \textsuperscript{139} Id.
\end{itemize}
A second test employed in design cases by some jurisdictions is called the "risk-utility" test. Under this test a product is unreasonably dangerous in design if its risks outweigh its utility. As worded, the test has obvious similarities to the Hand test for negligence. One might object to the risk-utility test because it could allow reintroduction of negligence principles into strict liability cases. Phrases like "unreasonably" arguably refer to negligence principles rather than strict liability. In a products liability case, supposedly the product, rather than the conduct of the manufacturer, is on trial but the risk-utility test, some argue, focuses on the manufacturer's conduct rather than on the product.

Perhaps recognizing this difficulty, Dean Wade articulated a risk-utility test that partially responds to it. His proposal directs a court to presume that the manufacturer has knowledge of the product's allegedly dangerous characteristic. Then, after presuming that knowledge, the court should ask whether a reasonable seller would have sold the product in such a condition. The court should inquire whether a manufacturer with knowledge of the alleged deficiency would be negligent for selling a product in that condition. In other words, after presuming knowledge of a risk, the court engages in a negligence type risk-utility test. The appeal of this test, according to Dean Wade, is that it employs negligence concepts with which courts and juries are familiar; but the standard, thanks to the presumption of knowledge of any defect, is tougher than a mere negligence standard.

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141. See supra text accompanying notes 68 and 69.


143. Prosser & Keeton, supra note 6, § 99, at 694.


146. Id. at 839-40.

147. Id.

148. Id. See also Phillips, 269 Or. 485, 525 P.2d 1033.

149. Wade, supra note 145, at 840 ("...This language gives the tort flavor. It uses the familiar concept of a reasonable prudent man; which juries have always been able to handle ...")

150. Dean Keeton suggested a substantially similar test himself. Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30 (1973); Prosser & Keeton, supra note 6, § 99, at 699-700. Wade and Keeton at one point disagreed upon the time at which knowledge would be imputed—sale (Wade) or trial (Keeton). See Phillips, 269 Or. at 492, 525 P.2d at 1036 n.6. Some have reasoned that the two tests, consumer expectation and risk-utility, represent the same inquiry from different perspectives: a reasonable consumer would expect exactly the same product that the reasonable nonnegligent manufacturer with knowledge of the defect would sell. Phillips, 269 Or. at 503-04, 525 P.2d at 1041-42. See also Pawlak v. Brown, 430 So. 2d 1346 (La. App. 3d Cir. 1983).
There are two issues that immediately arise out of this version of the risk-utility test. The first one relates to what effect the presumption of knowledge, which imputes knowledge of the risks that the product's design presents to the manufacturer, should have. The presumption is no doubt a response to the plaintiff-consumer's difficulty of establishing negligence, particularly what the manufacturer knew or should have known, in a products case. If consumers were losing design cases in negligence more often than society desired because of the difficulty of establishing the manufacturer's negligence, presuming manufacturer knowledge of product risks would be a reasonable way to deal with the problem. But should the presumption be irrebuttable? Put differently, should the manufacturer be able to show that under the technology at the time that the product left its control it was impossible to discover the risks that injured the plaintiff?

Proponents of an irrebuttable presumption point to the manufacturer's superior ability to bear and spread risks, as well as the desirability of having a manufacturer take all its enterprise's costs into account in deciding what price to charge and at what levels to produce. Furthermore, one might argue that an irrebuttable presumption of knowledge has the desirable effect of encouraging manufacturers to design safer products, while at the same time compensating accident victims. Some argue that the "lowest cost avoider" should bear the risk of a dangerous product whatever the state of technology. The manufacturer is usually the lowest cost avoider vis-a-vis the plaintiff because it is in a better position to discover risks and take some steps to avoid them. These scholars and judges would, at least in some cases, presume knowledge of the unknowable.

Opponents of an irrebuttable presumption of knowledge argue that it is unfair and actually will hinder the development of safer products. They also might argue that from a moral perspective liability without negligence is antithetical to commonly accepted notions of fairness. The opponents also might argue that it is especially unfair to irrebuttably presume knowledge of a risk when, under the existing technological and scientific knowledge, it was impossible for the manufacturer to know of

153. See, e.g., Prosser & Keeton, supra note 6, at 693.
the product's risks at the time the product left its control. These are deep and difficult issues on which reasonable people disagree.

The second issue raised by the risk-utility test is only a problem from the perspective of those who believe that courts have grown too liberal in their desire to award compensation to injured victims and desire to tie the judiciary's hands more tightly. That problem is that a risk-utility test, with or without a state of the art defense, allows the court to determine whether an entire product line, as designed, should even be on the market. If a court using the risk-utility analysis and the presumption of knowledge decides that a product is unreasonably dangerous as designed, it has necessarily decided that all those exactly like it (the entire product line) are unreasonably dangerous. Of course a rational mind might conclude that judicial condemnation of a product line is only a logical and fair byproduct of the risk-utility test, and that such a decision is less far-reaching than many others courts must make in cases all the time, not just accident cases. But someone fearful of a court's decision that a whole product line is unreasonably dangerous might want to take the power to make that decision away from the court. Such a person might desire some modification to the risk-utility test or might require a plaintiff to show more than that a product's risks outweigh its utility.

2. Pre-Act Louisiana Design Law

With that theoretical introduction, let us now turn to pre-Act Louisiana design law. In Weber dictum, Justice Tate stated that if a product was defective in "design, composition, or manufacture" and it caused injury, the claimant could recover without proving negligence because the "manufacturer is presumed to know of the vices in the things he makes, whether or not he has actual knowledge of them." This statement seemed to sanction the presumption of knowledge in tort cases. Other cases followed this approach. Thus, it seemed Louisiana

156. Prosser & Keeton, supra note 6, § 99, at 700-01; W. Prosser, J. Wade, & V. Schwartz, supra note 152, at 742. See supra note 118.

157. From the perspective of pre-Act Louisiana law an irrebuttable presumption of knowledge with no state of the art defense parallels the "unreasonably dangerous per se category.

158. See infra text accompanying notes 172-98.

159. Civil right cases, prisoners' rights cases, and school desegregation cases immediately come to mind.


161. Id.

162. See, e.g., Scott v. White Trucks, 699 F.2d 714 (5th Cir. 1983); PPG Indus., Inc. v. Industrial Laminates Corp., 664 F.2d 1332 (5th Cir. 1982); Rodrigue v. Dixilyn Corp. 620 F.2d 537 (5th Cir.), cert. denied, 449 U.S. 1113, 101 S. Ct. 923 (1980); Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973); Hebert v. Outboard Marine Corp., 638 F.
was a risk-utility jurisdiction. Then in *DeBattista v. Argonaut-Southwest Insurance Co.*, Justice Dennis relied upon the consumer expectation test in allowing recovery to a plaintiff infected with hepatitis by tainted blood.

Next came the *Halphen* case, which entirely recast the tests for design liability. In his *Halphen* taxonomy of Louisiana products liability law, Justice Dennis established three ways a plaintiff could prove that a product was unreasonably dangerous as designed. First, the product could be "unreasonably dangerous per se," a variation on the risk-utility test.

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164. 403 So. 2d 26, 31 (La. 1981) wherein the court stated:

According to the original comment to Section 402A, a "defective condition" is one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Restatement (Second) Torts, § 402A comment g. Comment i, defining "unreasonably dangerous," states: "The article must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." See *Welch v. Outboard Marine Corp.*, supra; *Loycano v. Continental Ins. Co.*, 283 So.2d 302 (La.App. 4th Cir.1973). A consumer expectation approach is particularly appropriate in Louisiana which has aligned itself with those jurisdictions showing particular concern for consumer interests. *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 90, 262 So.2d 377, 381 (1972). Examples given in comment i make it clear that such innocuous products as sugar and butter, unless contaminated, would not give rise to a strict liability claim merely because the former may be harmful to a diabetic or the latter may aggravate the blood cholesterol level of a person with heart disease. Presumably such dangers are squarely within the contemplation of the ordinary consumer. *Cronin v. J. B. E. Olson Corp.*, 8 Cal.3d 121, 104 Cal.Rptr. 433, 441, 501 P.2d 1153, 1161 (1972). Prosser, the reporter for the Restatement, suggests that the "unreasonably dangerous" qualification was added to foreclose the possibility that the manufacturer of a product with inherent possibilities for harm (for example butter, drugs, whiskey and automobiles) would become "automatically responsible for all the harm that such things do in the world." Prosser, *Strict Liability to the Consumer in California*, 18 Hastings L.J. 9, 23 (1966).

Accordingly, we conclude that blood contaminated with hepatitis virus is defective, i.e., unreasonably dangerous to normal use. The risks involved in receiving a transfusion of blood in this condition are certainly greater than a reasonable consumer would expect.

In that case state of the art evidence would be inadmissible. Second, the plaintiff could prove that although "balancing under the risk-utility test leads to the conclusion that the product is not unreasonably dangerous per se, alternative products were available to serve the same needs or desires with less risk of harm." Finally, a manufacturer could be liable if "there was a feasible way to design the product with less harmful consequences." In the second and third Halphen design categories, the manufacturer was held to the standard of an expert in its field. In its defense the manufacturer could offer evidence on "whether a manufacturer, held to the standard of an expert, could know of and feasibly avoid the danger. . . ."

The Halphen tests for design liability left many unanswered questions. No doubt the courts would have answered these and other questions in

166. Id. at 114 ("The fact that a risk or hazard related to the use of a product was not discovered under existing technology or that the benefits appeared greater than they actually were are both irrelevant."). See also id. at 115.
167. Id. at 115.
168. Id.
169. Id. ("In regard to the failure to use alternative products or designs, as in the duty to warn, the standard of knowledge, skill and care is that of an expert, including the duty to test, inspect, research and experiment commensurate with the danger. Accordingly, evidence as to whether the manufacturer, held to the standard and skill of an expert, could know of and feasibly avoid the danger is admissible under a theory of recovery based on alleged alternative designs or alternative products.") (Citations omitted). There is nothing very radical about this expert standard. Under accepted principles of negligence, one with specialized training must employ his or her superior knowledge to avoid liability for negligence. See, e.g., Prosser & Keeton, supra note 6, § 32, at 185-93.
170. 484 So. 2d at 115 (emphasis added).
171. In the first category, "unreasonably dangerous per se," isn't utility, in part, a measure of whether or not there might be alternative products available? Isn't the utility of a product lower where safer alternatives are available? And, if that is the case, then has state of the art reentered the case through the back door? For instance, is asbestos unreasonably dangerous per se? Even if knowledge of the risks were known during the Second World War, depending on one's view of the world, one could make a reasonable argument that its utility outweighed the risks it presented given the important role it played in the defense of the country because there were no reasonable alternative products for the same use. Viewed thusly, state of the art would be inadmissible to deny a risk's "foreseeability" but admissible in measuring the utility of a product. For what purpose was state of the art admissible in the second and third design categories? To show that the manufacturer could not have known that there was an alternative product or an alternative design? That the manufacturer could not have known of the risks its design presented? Could a manufacturer be liable for a product whose utility outweighed its risk just because there was some safer product available that reduced the risk but cost much more to manufacture or was less efficient in performing the same functions as the product "on trial?" Compare Toups v. Sears Roebuck and Co., 507 So. 2d 809, 815-16 (La. 1987) ("Even if the utility of a product outweighs its dangers, if the product could feasibly be designed to be less hazardous, the manufacturer is liable.") and Thomas v. Black & Decker, Inc., 502 So. 2d 157, 162 (La. App. 3d Cir. 1987) ("There is no duty to provide safety devices for a tool that is not unreasonably dangerous in normal
the years to come had the legislature not acted. Now the courts will spend
their time answering questions regarding the meaning of the Act.

3. The Act’s Design Sections

The best way to start the discussion of the Act’s design sections is
to quote the relevant sections in their entirety. Section 9:2800.56 is entitled
“Unreasonably dangerous in design” and provides:

A product is unreasonably dangerous in design if, at the time it
left its manufacturer’s control:
(1) There existed an alternative design for the product that was
capable of preventing the claimant’s damage; and
(2) The likelihood that the product’s design would cause the clai-
mant’s damage and the gravity of that damage outweighed the
burden on the manufacturer of adopting such alternative design
and the adverse affect, if any, of such alternative design on the
utility of the product. An adequate warning about a product shall
be considered in evaluating the likelihood of damage when the
manufacturer has used reasonable care to provide the adequate
warning to users and handlers of the product.1

Under section 9:2800.54, a claimant bears the burden of proof on all the
elements set forth in section 9:2800.56.

Before discussing the issues and ambiguities that 9:2800.56 present, it
is first necessary to note another relevant provision of the Act, section
9:2800.59 (A). This portion of the Act embodies the state of the art
provision for design cases. This is one of the provisions added to the bill
during the recess in the Senate debates that was taken in order to work
out a compromise. Section 9:2800.59, entitled, “Manufacturer knowledge,
design feasibility and burden of proof,” is the heart of the compromise
that the parties reached. Subpart A provides:

A. Notwithstanding R.S. 9:2800.56, a manufacturer of a product
shall not be liable for damage proximately caused by a charac-
teristic of the product’s design if the manufacturer proves that,
at the time the product left his control:
(1) He did not know and, in light of then-existing reasonably
available scientific and technological knowledge, could not have
known of the design characteristic that caused the damage or the
danger of such characteristic; or
(2) He did not know and, in light of then-existing reasonably

available scientific and technological knowledge, could not have known of the alternative design identified by the claimant under R.S. 9:2800.56(1); or

(3) The alternative design identified by the claimant under R.S. 9:2800.56(1) was not feasible, in light of then-existing reasonably available scientific and technological knowledge or then-existing economic practicality. 173

As written the subsection clearly creates an affirmative defense for the manufacturer. 174

a. The Plaintiff's Prima Facie Case in a Design Case

i. The Existence of an Alternative Design Capable of Preventing the Damage

Just what must the claimant show under section 9:2800.56(1)? The first requirement is the existence of an "alternative design." This alternative design criterion seems to be a rational way to focus a design trial. The court and jury will essentially be comparing the plaintiffs' proposed design with the actual design. This comparison will make design cases less abstract. But the requirement will make it difficult or impossible for the court to conclude that a product is defective in design because it is a "bad" product. 175 That is, a strict reading of the Act suggests that even if the risks a product presents outweigh its utility, the product is not defective in design unless the plaintiff establishes that an alternative safer design existed. As illogical as that sounds, that is what the Act seems to say. This literal but illogical reading peels away the rhetoric surrounding one of tort reform's core assumptions. Tort reformers just do not trust the courts to make certain decisions, such as weighing risk and utility. Here, the Act places the alternative design hurdle in the plaintiff's path as a way to obstruct a pure risk-utility analysis. If all the proponents wanted to do was overrule Halphen's unreasonably dangerous per se class of product's cases, a simpler way of accomplishing that would have been simply to make state of the art an affirmative defense. Imposing the alternative design requirement as well makes the plaintiff's burden unnecessarily heavy.

What then does it mean that plaintiff establish that an alternative design for the defendant's product "existed" at the time the product left the manufacturer's control? Does it mean that some manufacturer some-
where must have actually implemented the alternative design? If so, then the industry will define its own standard of care. Can this be so? Judge Learned Hand's comment in *The T.J. Hooper*\(^\text{176}\) is apposite here; to paraphrase, what everyone does, custom, is relevant but not conclusive on the question of what they should do. In his words, "'[a] whole calling may have unduly lagged . . . .'\(^\text{177}\) What others did is relevant evidence but should not conclusively define how much care a manufacturer should have exercised.

Alternatively, must the claimant show that someone had reduced the proposed alternative design to paper or to a sample or model? Again, this places great faith in the industry's ability to police itself. Perhaps instead the plaintiff need only show that some designer somewhere had mentioned the possibility of its proposed alternative design, or even thought of it. Merely raising the possibilities reveals the nightmarish difficulties courts and juries would face in deciding when a design "‘existed.’" These practical problems alone counsel against requiring the plaintiff to establish that its proposed alternative design "‘existed.’"

More importantly, if the Act requires the plaintiff to present evidence of actual plans or models, it would seem to require the plaintiff to prove what the state of the art was at the time that the product left the manufacturer's control. This reading would force the plaintiff to prove facts about which the manufacturer has superior knowledge and to which it has easier access. It also renders section 9:2800.59(A), which creates affirmative defenses based on state of the art, superfluous, because if the plaintiff did not establish the defendant's failure to use the available scientific knowledge then it would not have established a prima facie case, and the court would never reach the state of the art issue as an affirmative defense. The very existence of section 9:2800.59(A) suggests that courts interpreting the Act should not require a claimant as part of its case in chief to prove the manufacturer's failure to comply with the state of the art.

The plaintiff must show an alternative design in a design case, but the court should not require the claimant to prove that someone had actually employed, drafted, or manufactured that proposed alternative design at the time that the product left the manufacturer's control.\(^\text{178}\) To

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176. 60 F.2d 737 (2d Cir. 1932).
177. Id. at 740.
178. Jesse D. McDonald has called the alternative proposed design requirement of section 2800.56(1) the plaintiff's "threshold requirement," McDonald, supra note 136, at 9. He states that section 2800.56(1) requires that the plaintiff show that at the time the product in question left the manufacturer's control the plaintiff's proposed alternative design had:
   - been conceived in the mind of some person, . . . and must at least have either
   - been described in words somewhere and/or laid out in drawing form. . . . put
   - another way, unless the safety-promoting characteristic embodied in the alternative
do so requires the plaintiff to prove a manufacturer's noncompliance with the state of the art. As far as plaintiff's prima facie case is concerned, the plaintiff should only have to show that there is an alternative design possible or existing at the time of trial. The court, at this point in a design case, should not focus on the time that the product on trial left its manufacturer's control.

This reading of the statute is preferable for several reasons. Most notably, it explains the existence of section 9:2800.59(A). A court, as we all know, should interpret a statute so that all sections have meaning.\(^1\) Read as this piece proposes, section 9:2800.59(A) has meaning. Requiring plaintiff to prove noncompliance with state of the art as part of its case-in-chief reduces section 9:2800.59(A) to an illogical appendage. Moreover, it is more reasonable to require the manufacturer to produce evidence regarding the state of the art in its industry at the time the product left its control, because the manufacturer is an expert in its field and has better access to that information. The law quite sensibly requires in certain cases a party in control of and familiar with information to produce that information and convince the trier of fact of it.\(^2\) The same is obviously true of evidence concerning the feasibility of implementing particular technology. Finally, the proposed reading is preferable because the legislature added section 9:2800.59(A) to convince both sides to "support" the bill. It is submitted that the LTLA would have opposed the bill unless the amendment was going to soften the potentially harsh requirement that a claimant prove a manufacturer's noncompliance with the state of the art.

Another ambiguity in the Act relates to the difference, if any, between an alternative product and an alternative design, a distinction Justice Dennis

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design identified by plaintiff has been given SHAPE and ORGANIZATION, it cannot rise to the dignity of "DESIGN" and could not have "EXISTED" as such back at the time the product left the manufacturer's control.\(^3\) While I believe that Mr. McDonald's articulation of the alternative proposed design requirement is inconsistent with the compromise that added Revised Statutes 9:2800.59 and assured the Act's passage he and I do agree that Revised Statutes 9:2800.56(1) clearly does not require the plaintiff to prove that the proposed alternative design was in production or in use at the time the product in question left the manufacturer's control. Id. He states that such a requirement would be inconsistent with section 2800.59(A)(3). Id. What he and I apparently disagree on is the point at which section 2800.59 becomes inconsistent with the alternative proposed design requirement of section 2800.56(1).


Can a plaintiff in a design case under the Act recover only if he proves that there is an alternative design available for the product in question but not an alternative product available? It seems that the difference between an alternative design and an alternative product is merely one of degree and that just because a proposed alternative design does not look the same or function exactly the same as the product on trial does not mean that the plaintiff's proposed alternative is not an alternative design. If the necessity of proving an alternative design is read too narrowly, it will force the parties in products liability cases to engage in needless litigation concerning the difference between a "design" and a "product." For instance, is a seat belt a separate product from an air bag? Or are they both just alternative designs of the same product, a passenger restraint system? Or, is the car the product and the type of restraint system just a design aspect of the larger product? If the courts read the Act too literally and narrowly, these and other difficult and unnecessary questions will arise.

Of course, these issues raise the question of the "bad" product. Perhaps there are some products with no socially viable alternative that should not be on the market at all. Does the Act's alternative product design requirement take the power to make such a decision away from the courts? In other words, does a plaintiff's case fail if he proves a product's risks are greater than its utility, but cannot establish that an alternative, safer design exists? A literal reading of the Act suggests that the answer to both questions is yes. But again, the answer revolves around just how strictly the courts will read the alternative design requirement of section 9:2800.56(1). It is this writer's contention that the courts should not read that requirement too strictly. The courts should construe it as a reasonable requirement that will focus design trials on the two designs before the court, the actual design and the proposed alternative design. To summarize, the court should require the claimant to point to an alternative design but should not require him to prove defendant's failure to comply with the state of the art.

The requirement in section 9:2800.56(1) that the claimant's proposed alternative design would "prevent" its damage presents another interpretative problem. Suppose that there is an alternative design that would...
not have prevented the claimant's injury totally but would have reduced greatly the severity of injury. Air bags versus seat belts in automobiles once again provides an apt example. Even with an air bag one might still have suffered some damage, but less than the damage suffered with only a seat belt in the car. In such a case the air bag would not have prevented all the claimant's damage. Assuming for the moment that an air bag is a technologically available, economically feasible alternative to a seat belt, should the manufacturer prevail in a case where even with an air bag the claimant would have suffered some damage, albeit much less than with the seat belt? To let the manufacturer prevail in the posited case would force plaintiffs to propose absolutely safe designs for products, that is, designs that would have resulted in no injuries. Such designs may not exist. Moreover, absolutely safe designs might not have been feasible at the time the products on trial left their manufacturers' control, even though safer designs were feasible. Not requiring a manufacturer to implement safer, if not absolutely safe, designs runs counter to common sense as well as accepted notions of gradual product improvement.

A more reasonable reading would require only that the proposed alternative design would prevent exactly those injuries that occurred. That is not to say that the alternative design would have prevented all injuries, but only the precise combination and quantity of injuries that occurred. Put more succinctly, if the alternative design would have reduced the plaintiffs' injuries, it should satisfy the statute's "prevention" requirements. From a technical perspective, the court could read the prevention requirement as relating to those injuries for which the defendant's design was a cause-in-fact and that would not have occurred under the plaintiff's proposed design.

ii. The Risks Posed by the Product as Designed Outweigh its Utility

The Act not only requires that the claimant establish an alternative design, but also that the risks associated with the product as designed outweigh the product's utility at the time that the product left the manufacturer's control.\(^{183}\) This is a risk-utility test, albeit a test that comes into play only after the establishment of an alternative design. One important temporal note about the section merits consideration. Reading section 9:2800.54 and section 9:2800.56 in pari materia, one must conclude that the court determines whether or not the product is unreasonably dangerous as of the time that it left the manufacturer's control, not the time it was designed. Thus, if a manufacturer designed a product in 1986 but sold it in 1988, the court would use 1988 notions of risk and utility

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in the risk-utility calculus, because 1988 was the date that the product left the manufacturer's control.

What remains to be done in this portion of the paper is an analysis of the factors involved in the new statutory risk-utility test. The statute requires the court to examine the likelihood that the claimant's damage would have occurred and the gravity of that harm. Literally, the statute commands the court to consider the likelihood of injury and the gravity of the resulting harm. How does the court quantify "likelihood" and "gravity?" Likelihood can only mean a probability, so quantification should not be difficult, even if unavoidably imprecise. The gravity or severity of harm should be expressed as a dollar figure rather than some unquantifiable notion, such as the level of suffering that the claimant has endured. This is not to suggest that a monetary recovery is truly equal to the suffering that an injured plaintiff endured, but as thousands of trial lawyers have told juries: "It's the only thing we have." Thus, when a judge considers whether a claimant has established a prima facie case under the products Act and his or her attention turns to the risk-utility aspects of the case, employing a dollar figure to gauge the severity of plaintiff's damages is the preferable method. Computing the "risk" side of the risk-utility calculus is then an easy matter, for it is merely the likelihood (a percentage) times the severity of the claimant's damage (a dollar figure). True, the Act does not expressly specify this method, but that is the only logical way to read it. It is, in essence, the risk side of Judge Learned Hand's negligence equation.

On another point, the Act expressly reminds the court to consider an adequate warning when assessing the likelihood of the plaintiff's injury. Obviously, a warning that alerts a consumer to product hazards and, if possible, instructs on safe use will lower the incidence of product related accidents. Here the Act is consistent both with prior Louisiana law on the subject and with national products liability law.

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184. Id.


186. In this regard, the risk-utility test is quite similar to the Hand negligence test, leaving aside the question of the cost (or burden) of acquiring knowledge of the "defect." See supra text accompanying notes 68 and 69.

187. See supra note 68 and accompanying text.

188. See La. R.S. 9:2800.56(2) ("An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.").

Another obvious issue the statute raises is whether the court examines the likelihood and severity of the injuries that the particular claimant before the court suffered, or whether the risks to all potential plaintiffs are considered. Under a literal reading, the court focuses on the particular plaintiff before it. The Act instructs the court to examine the "likelihood that the product's design would cause the claimant's damage and the gravity of that damage."  

The Act further instructs the court to balance the likelihood and severity of the plaintiff's harm against the "burden on the manufacturer of adopting [the claimant's proposed] alternative design and the adverse effect, if any, of such alternative design on the utility of the product."  

This seems to analyze the burden on the defendant of changing its design for all products like the one that injured the plaintiff, not just the one product that injured the plaintiff. The costs of adopting the proposed alternative design would require changing designs, as well as manufacturing techniques, for all products designed like the one on trial. Concomitantly, the requirement that the court considers the "adverse effect" of the proposed alternative on the product's utility suggests a broader perspective than simply the one particular product involved in plaintiff's injury. 

If the risk-utility balance really focuses on the likelihood and severity of the particular plaintiff's damages as against the total effect on the defendant of adopting an alternative product design, plaintiffs will not win many design lawsuits. Courts cannot read the Act so illogically. The balance should compare the likelihood and severity of all the injuries of all potential plaintiffs to the burden on the manufacturer of adopting an alternative design and the adverse effect, if any, upon the entire product line's utility. This would be consistent with accepted national notions of how to engage in a risk-utility test.  

The case may arise in which there is no adverse effect upon the product's utility under the proposed alternative design, but instead a positive effect. The proposed alternative design may, for example, be safer, more

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190. La. R.S. 9:2800.56(2), as enacted by 1988 La. Acts No. 64 (emphasis added).
191. Id.
192. It should be noted that the Restatement adopts this position for negligence cases. See generally Restatement (Second) of Torts § 293 (1965). It states:

- In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:
  - (a) the social value which the law attaches to the interests which are imperiled;
  - (b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;
  - (c) the extent of the harm likely to be caused to the interest imperiled;
  - (d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.
efficient, cheaper, and easier to use. Can the court consider these positive effects even though the statute limits the calculus to the adverse effect? Of course. To conclude otherwise would undermine the positive effect that products liability law has had in encouraging the development and manufacture of safer products.\textsuperscript{193}

Who is to engage in this balancing procedure under the Act, judge or jury? The answer to that question is that both are. First the judge must engage in a balancing process to determine if the plaintiff has established a prima facie case. If the plaintiff has, then the jury must determine whether, in its common-sense opinion, the product design in question is unreasonably dangerous.\textsuperscript{194} As noted above,\textsuperscript{195} Dean Wade proposed a desirable way of aiding the jury in making this determination. He suggested that after the court has examined the relevant factors and has concluded that the plaintiff established a prima facie case, it should then ask the jury if, presuming knowledge of the risks inherent in the product’s design, a reasonable manufacturer with knowledge of those risks

\begin{itemize}
\item[(1)] The usefulness and desirability of the product - its utility to the user and to the public as a whole.
\item[(2)] The safety aspects of the product - the likelihood that it would cause the injury, and the probably seriousness of the injury.
\item[(3)] The availability of a substitute product which would meet the same need and would not be as unsafe.
\item[(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.
\item[(5)] The user’s ability to avoid danger by the exercise of care in the use of the product.
\item[(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.
\item[(7)] The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.
\end{itemize}

Wade, supra note 144, at 837-38. One will note that Dean Wade’s emphasis of “the injury” in factor 2, like the Act in 9:2800.56(2), seems to unduly narrow the risk-side injury to the particular plaintiff. Courts have not let this interfere with a broader, more logical approach to the problem.

With some appropriate changes in language to reflect the precise terms of the Louisiana Act, the Wade factors are complete and familiar to courts. All are relevant under the Act although some the plaintiff must establish and others the defendant must prove.

The Act does not change pre-Act law which held that the jury decided what was unreasonably dangerous. Adams v. Johns-Manville Sales Corp., 727 F.2d 533, on reh’g, 752 F.2d 1004 (5th Cir. 1984).

\textsuperscript{193} See, e.g., Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972); Martin v. Ryder Truck Rental, Inc., 353 A.2d 581, 587 (Del. 1976); Prosser & Keeton, supra note 6, § 98, at 693; Shapo, supra note 189, 7.05 [5].

\textsuperscript{194} Dean Wade has suggested that the court should consider the following seven factors in determining whether a product is unreasonably dangerous:

\textsuperscript{195} See supra notes 144-47.
would have sold the product as designed. To help the jury make that determination after presuming knowledge, which is essentially a negligence determination, the court could either give the jury a general instruction defining negligence as the exercise of due care or could give a more detailed instruction that outlines any particularly relevant factors. The appeal of the Wade formulation is that it relies upon negligence notions, which courts and juries are familiar with and have developed an expertise in, while holding the manufacturer to a heightened standard of care.

In light of the Wade formulation, a court hearing a case under the Louisiana Act might frame the question for the jury as follows: Presuming that the defendant had knowledge of the risks that its design presented and knowledge of the availability of the alternative design that the plaintiff identified, would a reasonable seller with this knowledge have sold the product as designed? It should be noted that the proposed jury instruction adds a presumption of knowledge of the plaintiff's proposed alternative design. The presumption is consistent with the framework of the Act.

The legislature's decision to require proof of an alternative design will avoid claims that the defendant did not do a good enough job, although no safer design can be shown. The requirement of a proposed alternative design will focus the court's analysis in a design case and make the risk-utility analysis more concrete. In essence, the trial becomes a comparison between the risk and utility of the plaintiff's proposed design and the risk and utility of the defendant's actual design—a real horse race. Presuming knowledge of the plaintiff's design focuses the jury's evaluation of whether the manufacturer's design was "reasonably" safe. Would a manufacturer with knowledge of the risks its design presented and knowledge of a proposed alternative design have reasonably sold its product, as designed?

The court should not consider whether the defendant could have known of the plaintiff's proposed design at the time the product left its control or whether the alternative design was feasible in light of the state of the art at the outset. Whether the plaintiff's proposed design exceeds the state of the art at the time the product left the manufacturer's control relates to the manufacturer's affirmative defenses under section 9:2800.59(A),


197. See supra note 149.

198. See La. R.S. 9:2800.56 and .59, as enacted by 1988 La. Acts No. 64.
which is discussed below. It does not relate to the plaintiff's burden in establishing a prima facie case.

To summarize, the design sections require a plaintiff to show two things in order to establish a prima facie design case: an alternative, safer design, and that the risks associated with the defendant's product as designed outweighed its utility. In alternative design cases, the courts must give effect to all the Act's sections, not focus on whether safer designs actually existed at the time the product on trial left the defendant's control; to do that illogically requires the plaintiff to show that the defendant failed to comply with the state of the art. The most important thing that one can say about the new Louisiana risk-utility test is that courts should not read it in an unduly literal or technical manner but should continue to take account of all the relevant factors that they now consider in determining if the risk of engaging in an activity outweighs its utility.\textsuperscript{199}

\textit{b. The Manufacturer's State of the Art Defenses}

If the judge concludes that plaintiff has established a prima facie case and that there is a jury question whether the product as designed presented an unreasonable risk of harm, then it will be necessary to consider the manufacturer's defenses, especially the state of the art defenses of section 9:2800.59(A). The jury should only consider the defendant's affirmative defenses if it concludes that the product, as designed, is unreasonably dangerous.\textsuperscript{200} The Act expressly states that the manufacturer bears the burden of proof on the statutory affirmative defenses.\textsuperscript{201}

At the outset a word on state of the art is appropriate.\textsuperscript{202} The cases and commentaries on products liability law contain many conflicting definitions of state of the art.\textsuperscript{203} Likewise there are different perspectives on the relevance of state of the art evidence in a products case.\textsuperscript{204} Some states

\textsuperscript{199} See, e.g., Bell v. Jet Wheel Blast, 462 So. 2d 166 (La. 1985); Entrevia v. Hood, 427 So. 2d 1146 (La. 1983).

\textsuperscript{200} J. Friedenthal, M. Kane, & A. Miller, Civil Procedure §§ 5.15 and 5.20 (1985).

\textsuperscript{201} La. R.S. 9:2800.59(A), as enacted by 1988 La. Acts No. 64 (“Notwithstanding La. R.S. 9:2800.56, a manufacturer of a product shall not be liable for damage proximately caused by a characteristic of the product’s design if the manufacturer proves that, at the time the product left his control ... ”).


\textsuperscript{203} Shapo, supra note 188, § 10.01 [1] (“Few phrases in the law of products liability have caused as much judicial frustration as the term 'state of the art.' ”); Note, Proposals, supra note 121.

\textsuperscript{204} See generally Prosser & Keeton, supra note 6, § 99, at 700.
have excluded state of the art evidence as irrelevant in certain cases. Other states allow admission of state of the art evidence in all cases, but limit the role of state of the art to only one factor for judge and jury to consider in the risk-utility test. Still others allow the defendant to prevail in the case if the defendant proves that it has complied with the state of the art; in these states, compliance with the state of the art is treated as an affirmative defense.

The several conflicting definitions of state of the art have no doubt led to some of the disagreement on what effect it should have. Under one recent commentator's definitional scheme, state of the art could mean compliance with custom in the industry. Courts and commentators might criticize this definition because it allows the industry in question to define its own standard of care. Or, state of the art could mean compliance with the most recently developed scientific or technological expertise in the industry. Defendants typically criticize this definition because, since economic execution lags behind scientific development, this definition ignores the feasibility of complying with state of the art. Under yet another definition, state of the art could mean the feasible compliance with modern scientific and technological knowledge. Plaintiffs frequently argue that this definition frustrates safer product development. Under this definition consideration of feasibility may allow the manufacturer to define its standard of care to a certain extent. The Act apparently adopts a hybrid of the second and third definitions of state of the art. In sections 9:2800.59(A)(1) and (2), the statute seems to refer to the second definition, while in section 9:2800.59(A)(3) the Act uses the third definition.

Section 9:2800.59(A)(1) exculpates a defendant if that defendant establishes that "in light of reasonably available scientific and technological knowledge [it] could not have known of the design characteristic that caused the damage or the danger of such characteristic." The language

205. See supra note 13.
208. Note, Proposals, supra note 121, at 945-46.
209. Id. ("At one end of a spectrum of possible meanings is 'customary industry practice,' the definition most favorable to industry.")
210. Id. at 946-49.
211. Id. at 946 ("At the other end of the spectrum is the view that the state of the art is the aggregate of product-related knowledge existing at any given point in time.")
212. Id. at 951-52.
213. Id. at 946.
214. Id. at 950-51.
employed here raises several serious questions. First, how could a defendant who made a product ever not be aware of a "design characteristic?" It seems a highly unlikely event. The question whether a defendant could not have been aware of the "danger" is much more likely to credibly arise.

Second, and this cannot be overemphasized, the standard is not a negligence standard. It is a more difficult burden on the manufacturer than a mere negligence standard would impose. For one thing, the defendant bears the burden of proof on the issue. But more revealingly, a negligence standard would exculpate the defendant if it established that in the light of reasonably available scientific and technological knowledge, it neither knew nor should have known of the danger that its design presented.\textsuperscript{216} The statute, on the other hand, exculpates the defendant only if in light of the relevant industry wisdom, it could not have known of the risk.\textsuperscript{217} The notion of what one should know has a well-accepted meaning and is included in the standard definition of negligence.\textsuperscript{218} Use of could rather than should is a significant deviation from negligence principles. There are many things that one should not know of but that one could have known of. One could not know of a fact if he lacked the mental or physical ability to find it out.\textsuperscript{219} The court should make this determination of what a defendant could know in light of what an expert in the field could know under the state of the art.\textsuperscript{220} The manufacturer is not exculpated if it merely proves that it did not know what a reasonable manufacturer should have known. It must prove that, in light of the scientific and technological knowledge reasonably available at the time the product left its control, it could not have known of the risks associated with its product's design.

Shifting the burden of proof on the knowledge issue to the defendant and using could rather than should represents a rational middle ground. The defense represents a reasonable accommodation between the desire to encourage manufacturers to develop safer products and recognition of the reality that limitations on current knowledge bind the manufacturer. It is also a reasonable accommodation between a strict liability standard for design decisions and a negligence standard. The middle ground response is particularly appropriate given the apparent lack of societal consensus on how to define the manufacturer's standard of care in design cases.

\textsuperscript{216} Prosser & Keeton, supra note 6, § 31, at 170. ("Risk, for this purpose, may then be defined as a danger which is apparent, or should be apparent, to one in the position of the actor."); Kent v. Gulf States Util. Co., 418 So. 2d 493, 497 (La. 1982); Restatement (Second) of Torts § 289 comment b (1965).

\textsuperscript{217} La. R.S. 9:2800.59(A)(1), as enacted by 1988 La. Acts No. 64.

\textsuperscript{218} See supra note 216.

\textsuperscript{219} American Heritage Dictionary (2d College Ed. 1982).

\textsuperscript{220} See supra text accompanying notes 168 and 169.
"Could" also represents a reasonable middle ground between the positions of the two primary nonlegislator antagonists, the LABI and the LTLA; the standard between ordinary negligence and strict liability is also consistent with the compromise these two groups reached to ensure the Act's passage.

Is there any legal precedent for employing such a heightened standard that is not strict liability? Courts could draw from several areas by analogy. Louisiana courts require certain defendants to exercise the highest or utmost degree of care. These defendants include: innkeepers,221 common carriers,222 and owners or users of intrinsically dangerous instrumentalities.223 In each of these categories the defendant has more control over either the place that injury occurs or the injury-causing instrumentality than the plaintiff does. Likewise, the manufacturer of an unreasonably dangerous product has total control over the design and manufacture of its products. Similarly, a special relationship exists between an innkeeper and its guests, and between a common carrier and its passengers. Out of the relationship arises an expectation on the consumer's part that its stay or passage will be safe because the innkeeper or common carrier will do its utmost to protect it. Analogously, the product user very reasonably expects a safe product and places his or her trust in the manufacturer to provide that safe product. In fact, this expectation of a safe product was one of the reasons for employing strict liability in tort in the first place.224 Finally, the owner or user of an intrinsically dangerous instrumentality also has a heightened duty, due in part, to the high risk that absent the exercise of utmost care by the owner or user, injury is likely to occur. Likewise, many of the products modern day manufacturers produce, from the largest jets to the smallest pharmaceuticals, entail a high degree of risk. In short then, there is persuasive and analogous authority from other areas of tort law that courts can cite, employ, and borrow from to effectively define the heightened standard of care that "could" calls for.

Returning to the words of the statute itself, what does "reasonably available" mean in reference to scientific and technological knowledge? Courts should read it as providing for a reasonable but brief period of time to allow a manufacturer to learn of recent developments through the channels that an expert in the manufacturer's field normally consults, including technical journals, seminars, its own research and development, and word of mouth. The requirement should be read in light of the desire to encourage manufacturers to respond to recently developed information

221. See, e.g., Banks v. Hyatt Corp., 722 F.2d 214 (5th Cir. 1984); Krasz v. La Quinta Motor Inns, 410 So. 2d 1048 (La. 1982).
224. See infra notes 127-33 and accompanying text.
and technology. But it merits repeating that what is critical is not what one should know in light of that reasonably available data, but what one could know.

Section 9:2800.59(A)(2) provides the second of the Act's affirmative defenses. This section relieves from liability the manufacturer proving "in light of then-existing reasonably available scientific and technological knowledge [it] could not have known of the alternative design identified by the claimant. . . ." 225 This second affirmative defense employs the same "could" standard as the first. 226 Courts should read the word "could" the same way in both subsections. The subsection's existence serves to make the approach to design cases suggested above—presuming the manufacturer's knowledge of the proposed alternative design—reasonable. The court can presume knowledge of the alternative design, but if the defendant proves that it could not have known of the proposed alternative design, it will win the case. In fact, the very existence and wording of the affirmative defense mandates a presumption that the defendant knew of the plaintiff's proposed design. Otherwise, section 9:2800.59(A)(2) would be superfluous.

Section 9:2800.59(A)(3) provides a feasibility defense to a manufacturer that proves the "alternative design identified by the claimant . . . was not feasible, in light of then-existing reasonably available scientific and technological economic practicality." 228 At first glance it may seem that there is some overlap here between the plaintiff's prima facie case and the defendant's affirmative defenses. If this overlap exists, is section 9:2800.59(A)(3) merely superfluous? On further investigation it becomes evident that it is not. The reader will recall the compromise reached to assure the passage of this Act without opposition: state of the art would be a defense but the defendant would bear the burden of proof on that issue. 229 This is the key to meaningfully interpreting section 9:2800.59(A)(3).

The section is a feasibility defense that takes state of the art into account. A brief digression will help to explain this point. One element the plaintiff must prove in a design case is the risk-utility test. The likelihood and severity of the damage must outweigh the burden on the manufacturer of changing to the alternative design and the adverse effect of that design on the product's utility. In making this risk-utility determination, the court should not refer to state of the art evidence. That is, in examining the burden on the manufacturer of adopting the plaintiff's proposed alternative design, the court should assume that producing plaintiff's proposed design would be technologically, even if not economically,

226. Id.
227. See supra notes 194-98 and accompanying text.
229. See supra text accompanying notes 40-46.
feasible. The economic feasibility, in light of state of the art, becomes relevant only as part of defendant's affirmative defense under section 9:2800.59(A)(3). Thus, even if the plaintiff proves that the utility of the product as designed was less than the risks it presented, considering the plaintiff's proposed alternative design, the court must still hold for the defendant if the defendant establishes by a preponderance that the plaintiff's design was not feasible when the product left the manufacturer's control in light of the state of the art.\textsuperscript{230}

Another issue arises regarding the meaning of "then-existing economic practicability." Are courts to police the profitability of defendants' operations, determining when a company is profitable enough to have to engage in design changes and when it is not? Is the section meant to protect the inefficient manufacturer of a dangerous product? It seems unlikely that this was the intent and undesirable that it should have been. Instead, courts should take a common sense approach to the problem and analyze the proposed alternative designs and their cost in light of the effect on the price and utility of the product in question, in much the same way as they do now. As Mr. Kennedy notes,\textsuperscript{231} the evaluation of economic feasibility should be an industry-wide rather than manufacturer-specific evaluation.

c. Summary

The design sections of the new Act will be subject to intense scrutiny in the years to come. In some particulars, literal compliance with isolated sections of the Act will lead to absurd results that are inconsistent with the spirit of the legislation and contrary to common sense.\textsuperscript{232} As a result, courts should read the design sections within the context of the entire Act, recalling that the Act is a compromise reached by nonlegislator actors to assure its passage. Particularly, the courts should take account of the fact that the legislature added section 9:2800.59 to the Act to make it clear that although compliance with the state of the art would exculpate the defendant, the defendant was to bear the burden of proof on that issue. Thus, it is submitted that the plaintiff, as part of its case in chief, does not have to prove failure to comply with the state of the art.

The Act carefully reminds the reader that in deciding whether or not a design is unreasonably dangerous the court should consider any adequate warnings concerning the product.\textsuperscript{233} The warning sections of the Act, while

\begin{itemize}
  \item \textsuperscript{230} If indeed the plaintiff's proposed alternative design was not feasible under the state of the art one might logically conclude in most cases that the utility of the product really did outweigh the risks that it presented.
  \item \textsuperscript{231} Kennedy, A Primer on the Louisiana Products Liability Act, 49 La. L. Rev. 565 (1989).
  \item \textsuperscript{232} See supra text accompanying notes 175-93.
  \item \textsuperscript{233} La. R.S. 9:2800.56(2), as enacted by 1988 La. Acts No. 64.
\end{itemize}
more cumbersome than the design sections, pose less of an analytical dilemma. A discussion of those sections follows.

D. Unreasonably Dangerous Because of Inadequate Warning

Predictably, a plaintiff can recover under the Act for any damage caused by a manufacturer’s failure to adequately warn of a product’s dangerous characteristic. This is in accord with prior Louisiana law. In a warning case under the Halphen taxonomy, as in a design case, the court would hold the manufacturer to the standard of an expert in its field and would consider state of the art evidence.

1. Failure to Warn Under the Act

Under section 9:2800.54, a claimant bears the burden of establishing that the manufacturer did not provide the claimant, or another, with an adequate warning, and that the failure to do so proximately caused the claimant’s injuries. As in the design category, the claimant bears the burden of showing either that the damage-causing characteristic existed at the time the product in question left the manufacturer’s control, or that it resulted from a “reasonably anticipated alteration or modification of the product.”

The Act defines “adequate warning” as follows:

“Adequate warning” means a warning or instruction that would lead an ordinary reasonable user or handler of a product to contemplate the danger in using or handling the product and either to decline to use or handle the product or, if possible, to use or handle the product in such a manner as to avoid the damage for which the claim is made.

A striking element of the definition is that it equates warning and instruction. Both the law and the layperson recognize that a warning differs from an instruction. A warning alerts the reader to a potential danger, saying “Watch out sucker.” An instruction tells the user how to use the product properly. The warning and instruction may appear in close proximity, as where an instruction immediately follows a warning and tells

235. Id. at 115.
236. La. R.S. 9:2800.54 and .57, as enacted by 1988 La. Acts No. 64.
237. Id. § 2800.54(C), as enacted by 1988 La. Acts No. 64.
238. Id. § 2800.53(9), as enacted by 1988 La. Acts No. 64.
239. Frumer and Friedman, supra note 206, § 2.22[5].
240. Id. See also Walker v. Maybelline Co., 477 So. 2d 1136 (La. App. 1st Cir.), writ denied, 481 So. 2d 1333 (1985).
241. Frumer and Friedman, supra note 206, § 2.22[5].
the user how to avoid the risk that the warning has alerted him to, but the two are distinct.

Despite this perhaps ill-advised marriage of the two concepts in the definition of warning, it is unlikely that any unjust results will ensue. The "warning" under the Act must both alert and instruct. The conjunctive nature of the definition demands this result, for the warning must both lead the ordinary user or handler to contemplate the danger in using the product (the warning component) and to either use it safely (the instruction component) or to decline to use it. The option to decline to use the product refers to the product that no instruction can make perfectly safe to use; the best the manufacturer can do in this case is to alert the user to the risks inherent in those potentially unsafe uses of the product.\textsuperscript{242}

A second point about the definition that merits emphasis is that a warning, in order to be adequate, should be both understandable and conspicuous. A warning that is not understandable is insufficient for obvious reasons; but the warning also ought to be conspicuous, for an understandable warning that does not call attention to itself is not helpful to the user or the consumer.\textsuperscript{243} By requiring that an adequate warning have the results of risk-contemplation, and then safe use or declination to use, the Act's definition covers these dual concerns.

An issue that arose during the debates about the Act related to the use of the word "contemplate" in the definition of "adequate warning." The LTLA preferred the word "understand," because "contemplate," according to Webster, means to "gaze at thoughtfully,"\textsuperscript{244} and a warning that leads the user to gaze at it, but not to understand it, is inadequate.\textsuperscript{245} Although this is true, the definition requires that the user contemplate "the danger," not the warning itself. Thus the definition seems to take care of the LTLA concern while retaining "contemplate."

What is the standard of care that a manufacturer must exercise in warning of a risk in its products? Section 9:2800.57(A) states:

A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such charac-

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\textsuperscript{242} See Restatement (Second) of Torts § 402A comment k. The Restatement refers to such cases as "unavoidably unsafe." Id.


\textsuperscript{244} Webster's Third New International Dictionary 491 (3d ed. 1969).

\textsuperscript{245} Frumer and Friedman, supra note 206, § 222[5].
teristic and its danger to users and handlers of the product. This definition raises several crucial questions. Does the mention of reasonable care mandate a negligence standard? In this light does the plaintiff have to prove that the manufacturer knew or should have known of the risk that it failed to warn about at the time that the product left the manufacturer’s control? Does the plaintiff have to prove that the manufacturer failed to comply with the state of the art?

In order to answer these questions the courts should once again take note of the compromise reached to assure passage of the Act. As noted in the discussion of the design cause of action, the compromise added a section that made state of the art an affirmative defense and that logically placed the burden of proving compliance with the state of the art on the manufacturer. Section 9:2800.59(B), also part of the compromise, deals with state of the art evidence in a warning case. It provides that:

Notwithstanding R.S. 9:2800.57(A) or (B), a manufacturer of a product shall not be liable for damage proximately caused by a characteristic of the product if the manufacturer proves that, at the time the product left his control, he did not know and, in light of then-existing reasonably available scientific and technological knowledge could not have known of the characteristic that caused the damage or the danger of such characteristic.

Based on the existence of the just-quoted subsection and its resemblance to the design state of the art sections, courts could take a similar approach to state of the art in warning cases and design cases. The court can presume knowledge of the characteristic and then ask the jury whether, given that presumed knowledge, the defendant used reasonable care to warn of the characteristic in question. If the answer is no, the defendant can still exculpate itself by showing compliance with state of the art. Any other reading negates section 9:2800.59(B), because it requires the plaintiff to prove noncompliance with the state of the art. As in the design state of the art sections, the manufacturer must show that, in light of the state of the art, it could not have known of the dangerous characteristic, not that it should not have known of it.

1. Warning of the Obvious Use and Warning the Intermediary

Section 9:2800.59(B) is not the only protection that the statute gives to a manufacturer. Section 9:2800.57(B) provides that:

247. See supra text accompanying notes 40-46.
248. La. R.S. 9:2800.59(B), as enacted by 1988 La. Acts No. 64 (emphasis added).
249. See supra text accompanying notes 145-49.
A manufacturer is not required to provide an adequate warning about his product when:

(1) The product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics; or

(2) The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.\(^{251}\)

This section is a rather wordy enunciation of the general rule that a manufacturer does not have to warn of open and obvious defects.\(^{252}\)

The first prong of section 9:2800.57(B) seems to deal with a defect that any reasonable user should know of, while the second prong apparently addresses the especially knowledgeable user. Both the notion that the manufacturer does not have to warn of an obvious defect\(^{253}\) and the idea that a manufacturer need not warn the sophisticated user of risks that the user should be aware of\(^{254}\) are consistent with prior Louisiana law.

The "obvious defect" language in the new Act presents no conceptual difficulties, and further elaboration is unnecessary. On the other hand, the sophisticated user concept may raise some questions. When can a manufacturer satisfy its duty to provide an adequate warning to users or handlers by warning an intermediary? One such sophisticated user may be the learned intermediary. A doctor, for example, warned by a drug company of risks inherent in the use of some of its products would be a learned intermediary.\(^{255}\) But the intermediary issue arises in other contexts as well, such as the toy manufacturer providing a warning to a parent about risks a child encounters, or an equipment manufacturer providing a warning to an employer about risks that employees will encounter.\(^{256}\)

There will certainly be cases where the manufacturer satisfies its duty to

\(^{251}\) Id. § 2800.59(B), as enacted by 1988 La. Acts No. 64.
\(^{253}\) See Bloxom, 512 So. 2d 839; see also Whitacre v. Halo Optical Prod., Inc., 501 So. 2d 994 (La. App. 2d Cir. 1987) and Scott v. Terrebonne Lumber Co., 479 So. 2d 410 (La. App. 1st Cir.), writ denied, 485 So. 2d 61 (1985).
\(^{254}\) Hines v. Remington Arms Co., 522 So. 2d 152 (La. App. 3d Cir. 1988). See generally Frumer and Friedman, supra note 206, § 2.22[5]. Cf. Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1136 (La. 1988) ("A defendant's duty should not turn on a particular plaintiff's state of mind, but instead should be determined by the standard of care which the defendant owes to all potential plaintiff's.").
warn the user by providing a warning to an intermediary, such as where a manufacturer warns or instructs a parent of a risk that a child could not understand. Alternatively, the manufacturer may satisfy its obligation by providing a buyer-employer with warnings and instructions to pass on to its employees concerning safe and proper product use. As regards the general user, what community is the court to use? It should use the community of foreseeable users not the entire community.257

These particular hypotheticals bring another aspect of the problem into focus: The duty of the manufacturer to give a warning that cannot be removed by an intermediary, and the duty of the manufacturer to ensure that the warning is passed on to the ultimate user. What about the case where the manufacturer knows or foresees that the buyer will not pass the warning on to the user or handler or will remove it, although the manufacturer could provide a warning that would be passed on or not removed? Has the manufacturer in a case like that provided the user or handler with an adequate warning?

This problem is especially acute in the employer-buyer/employee-user context, because the employer’s potential liability to the employee for failure to pass on a warning may be undermined by the operation of the workers’ compensation laws. Since these statutes usually provide the employer with an immunity from an employee’s nonintentional tort suits, the incentive to assure that the warning is passed on is reduced.258 One commentator has suggested that this immunity may promote laxity in employer standards when it comes to passing on warnings.259 Workers’ compensation

257. La. R.S. 9:2800.53 (1)(a) and .57, as enacted by 1988 La. Acts No. 64.
259. Note, Failure to Warn and the Sophisticated User Defense, 74 Va. L. Rev. 579, 587 n.36 (1988), wherein the author states:

Unfortunately, these incentive systems are not free from distortion. Implicit in them is the notion that individual members of chains are rational decisionmakers, who will pass along the information necessary to prevent an injury so long as the cost of informing the party next in line is less than the cost of potential liability created by failure to warn. This is an efficient and, therefore, by definition, a socially desirable outcome. The incentives created by this system, however, become distorted when the costs borne by one member of a chain for failure to warn are artificially altered.

The workers’ compensation system, for example, introduces this type of distortion into products liability law by artificially reducing the penalties paid by employers for their unreasonable acts. Workers’ compensation was adopted because, in return for concessions to workers, it severely limits employees’ recoveries from employers. Workers’ compensation is designed to allow injured workers to make minimum recoveries without the necessity of proving negligence. In exchange for accepting no-fault liability, employers have received immunity from suits for common law damages, as well as severe limitations on workers’ recoveries. Employees, however, retain their right to sue third parties, such as manufacturers, for full tort damages. Where an employee receives tort compensation from a third party, his employer
laws limit the employer's exposure, so in deciding whether to pass on a warning, the employer arguably need not consider all the costs of breaching its duty. Can the manufacturer satisfy its duty to warn by providing the employer with a warning that the manufacturer foresees will not be passed on even though the manufacturer could reasonably have provided a warning that would certainly be passed on? The Act potentially aggravates the difficulty of answering this question.

As noted, the Act requires a claimant in any products case to show that the unreasonably dangerous characteristic existed at the time the product left the manufacturer's control, or in design and warning cases resulted from a "reasonably anticipated alteration or modification of the product."260 "Reasonably anticipated alteration or modification" is defined as follows:

"Reasonably anticipated alteration or modification" means a change in a product that the product's manufacturer should reasonably expect to be made by an ordinary person in the same or similar circumstances, and also means a change arising from ordinary wear and tear. "Reasonably anticipated alteration or modification" does not mean the following:

(a) Alteration, modification or removal of an otherwise adequate warning provided about a product.
(b) The failure of a person or entity, other than the manufacturer of a product, reasonably to provide to the product user or handler an adequate warning that the manufacturer provided about the product, when the manufacturer has satisfied his obligation to use reasonable care to provide the adequate warning to such person or entity rather than to the product user or handler.261

Does the Act exculpate the manufacturer whose warning is expectedly removed or not passed on, although the manufacturer, in the exercise of reasonable care could provide a better, if not foolproof, warning? It is submitted that in such a case the manufacturer has not provided an adequate warning to the user and therefore has not satisfied its obligation to use reasonable care in providing an adequate warning. The duty to

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will be reimbursed for the benefits already paid under workers' compensation. Third parties, however, are barred from receiving contribution or indemnity from employers. Employers are not joint tortfeasors.

The reduced penalties imposed on employers for negligence reduce their potential costs for failure to warn and, therefore, have the unfortunate result of reducing the likelihood that employers will warn their employees. This result is particularly significant in light of the possibility that employers are the members of marketing chains best able to warn the ultimate users, their employees. [citations omitted]

260. Id. § 2800.54(C) and .57, as enacted by 1988 La. Acts No. 64.
261. Id. § 2800.53 (8), as enacted by 1988 La. Acts No. 64.
warn requires the manufacturer to warn the ultimate user rather than just the intermediary in this case.

The same analysis is appropriate when the manufacturer should reasonably anticipate that the warning provided will be easily and probably altered, modified, or removed, and the manufacturer could reasonably supply a warning that could not so easily be tampered with. In such a case the warning is inadequate, and the manufacturer must do more.

b. The Continuing Duty to Warn

The Act also requires that a manufacturer exercise reasonable care to warn of any risks it learns of after the product leaves its control. Section 9:2800.57(C) provides:

A manufacturer of a product who, after the product has left his control, acquires knowledge of a characteristic of the product that may cause damage and the danger of such characteristic, or who would have acquired such knowledge had he acted as a reasonably prudent manufacturer, is liable for damage caused by his subsequent failure to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.262

This is consistent with national law and pre-Act Louisiana law on the subject.263 One notes that the duty is two-fold. First, the manufacturer must exercise reasonable care to discover risks that it did not know of when the product in question left its control. Second, if it discovers or should have discovered such a risk, it must exercise reasonable care to warn of such risks.264

In closing, it bears emphasis that although a manufacturer has provided an adequate warning about a product, a court may still hold it liable on any other theory of products liability sanctioned by the Act. One such theory, breach of express warranty, presents a relatively new, if not complex, avenue of recovery for the injured consumer.

E. Unreasonably Dangerous Because of Nonconformity to Express Warranty

The express warranty section presents few of the analytical ambiguities raised by the design section and, to a lesser extent, the warranty section. While the cause of action is similar to some pre-Act Louisiana redhibition

262. La. R.S. 9:2800.57(C), as enacted by 1988 La. Acts No. 64.
264. Id.
MAKING SENSE OF PRODUCTS ACT

[128x668]1989]  

jurisprudence, the Act’s express warranty theory is a relatively new development in Louisiana law. For guidance the courts might look to the Uniform Commercial Code express warranty section, the Magnusson-Moss definition of written warranty, Restatement (Second) of Torts Section 402B and the Uniform Product Liability Act Section 104(D). The Act defines “express warranty” as:

[A] representation, statement of alleged fact or promise about a product or its nature, material or workmanship that represents, affirms, or promises that the product or its nature, material or workmanship, possesses specified characteristics or qualities or will meet a specified level of performance. “Express warranty” does not mean a general opinion about or praise of a product. A sample or model of a product is an express warranty.

What are the potential sources of express warranties? They can be written or oral, or arise from a sample or model. They can appear in the parties’ written contract. They can arise from pre-contract sales talk that is not mere puffing, or from sales brochures or other advertisements. In short, the sources of express warranties are virtually limitless! Plaintiffs lawyers should look to these and other sources. They are limited only by the extent of their own ingenuity in finding express warranties.

To recover in an express warranty case, the claimant must establish that the product in question is unreasonably dangerous because of its failure to conform to an express warranty. A product is unreasonably dangerous when it does not conform to an express warranty made at any

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268. Restatement (Second) of Torts § 402B provides:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and
(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

269. MUPLA § 104(D). See also Froen, supra note 110, at 11-17.
270. La. R.S. 9:2800.53(6), as enacted by 1988 La. Acts No. 64.
271. Id. See also U.C.C. § 2-313 (1)(C) (1987).
274. Id. at 335.
time by the manufacturer about the product if the express warranty induced the claimant or another person to use the product, and if the breach of the express warranty proximately caused the claimant's damages. Thus the claimant in an express warranty case must show: (1) an express warranty, (2) that induced the use of the product, (3) breach of that express warranty, (4) proximately causing the plaintiff's (5) damage.276

Privity of contract is not a prerequisite to recovery. The plaintiff need not show that it was a buyer of the product or even a user or handler. It need only show that the warranty induced the use of the product, not necessarily use by the plaintiff. Thus, if a non-buyer uses a product because a manufacturer warrants that it will not blow up, and it does blow up, injuring the user and some third party, the third party as well as the user could employ the Act's warranty section to recover despite the lack of any contractual relationship between any of them.

The notion of the warranty "inducing" the use is a reasonable departure from the common law277 and pre-Act Louisiana law,278 which had required that the buyer have relied upon the warranty when buying the good in order to recover for its breach. The concept of inducement is certainly related to the idea of reliance. Reliance cases may be persuasive but should not be controlling in express warranty cases under the Act. Instead, the courts should develop a body of law defining and interpreting the term inducement free of the shackles of the unduly narrow concept of reliance. On a national level, it is worth noting that the U.C.C. substitutes the phrase "basis of the bargain" for reliance in express warranty cases.279 The comments seem to indicate that the seller bears the burden of proving that a warranty did not induce a sale,280 and the case law under the U.C.C. has been similarly lenient in requiring proof of "reliance."281

In summary, courts interpreting the Act's express warranty provision should recall that one of the Governor's and the legislature's purposes in enacting The Louisiana Products Liability Act was to "mainstream" Louisiana law.282 To fulfill that goal the courts should feel free to look to how

276. Id. § 2800.58, as enacted by 1988 La. Acts No. 64, provides:

A product is unreasonably dangerous when it does not conform to an express warranty made at any time by the manufacturer about the product if the express warranty has induced the claimant or another person or entity to use the product and the claimant's damage was proximately caused because the express warranty was untrue.


278. Modern Farm Serv., Inc. v. Ben Pearson, Inc., 308 F.2d 18 (5th Cir. 1962).


280. Id. § 2-313 comments 3 and 8 (1987).


282. See supra notes 38-39 and accompanying text.
courts in other states have interpreted the U.C.C.'s express warranty section and Restatement section 402B, as well as how courts have interpreted the warranty definition in the Magnuson-Moss Act.

IV. COMPARATIVE FAULT

Sometimes it is safest to state the obvious, and the obvious here is that the Act makes no change in Louisiana's comparative fault law. Cases interpreting and applying Civil Code article 2323 are still the law in products cases. Translated, the courts should still decide whether comparative fault is applicable on a case-by-case basis. There was an attempt made to mandate the application of comparative fault principles to every case, but that effort failed. As Professor Alston Johnson, the chairperson of the Governor's task force on tort reform, noted in an excellent article in the Louisiana Law Review, when the legislature passed 2323, that statute preserved the courts role in deciding whether a given risk is within the defendant's duty. In this context that inquiry may be reworded as follows: does the manufacturer's duty to provide the user with a product that is not unreasonably dangerous include the risk that the user might be negligent? If the answer in the particular case is that the manufacturer's duty does not extend so far, then the case should not even go to the jury. The court should direct a verdict for the defendant. If, on the other hand, the duty is found to encompass the risk of user negligence, then the court must consider a further and very difficult question: Would the application of comparative negligence principles to the case at bar substantially undermine the purposes that imposing the duty on the manufacturer serves? This inquiry requires an examination of all the purposes of products liability law: deterrence, risk-spreading, compensation, and, of course, the fair resolution of disputes. If the answer to this question is yes, then the plaintiff should recover all of his or her damages, but it will be a very rare case where the court concludes that the claimant should recover one hundred percent. If the court answers this further question no, then it should submit the case to the jury with appropriate instructions on comparative fault. Since this is the very approach courts use in deciding whether comparative fault should apply to a negligence case, it should not be difficult to apply. In the strict liability context it is often said that the court should apply the Bell test in deciding whether comparative negligence applies, a reference to the test the court articulated in Bell v. Jet Wheel Blast.

285. Id.
286. See Bell, 462 So. 2d 166.
In *Bell*, the court articulated the following test to determine whether to apply the comparative fault statute to a particular products case:

Where the threat of a reduction in recovery will provide consumers with an incentive to use a product carefully, without exacting an inordinate sacrifice of other interests, comparative principles should be applied for the sake of accident prevention. The recovery of a plaintiff who has been injured by a defective product should not be reduced, however, in those types of cases in which it does not serve to promote careful product use, or where it drastically reduces the manufacturer's incentive to make a safer product.287

This test is merely an application of Professor Johnson’s notion that the court must decide whether to apply comparative fault principles on a case-by-case basis and in light of all the policies at stake.

One might criticize the *Bell* test from a logical standpoint by contending that plaintiffs do not consider whether courts will reduce their recovery when deciding how to act. Realistically, the only thing they may consider is whether their conduct might lead to injury. This criticism seems well taken, however, it is equally true in a negligence case and significantly undermines any deterrence justification for any comparative or contributory fault scheme.

But the second prong of the *Bell* test has realistic meaning in a products case. Imagine a case where a large manufacturing concern anticipates that its product, as designed, will cause $10,000,000 in damages. Finally, suppose that the manufacturer, based upon historical litigation data, currently can expect that recoveries across the board will be reduced by twenty-five percent due to plaintiffs’ anticipated comparative fault, resulting in total liabilities of $7,500,000, and that the concern is aware of an alternative design which would reduce damages to $8,000,000.288 In this scenario, the costs of providing the safer alternative design are greater than the foreseeable accident losses reduced by the plaintiffs’ comparative negligence. Thus, the manufacturer will not incur the accident prevention costs. In such a case a court might well conclude that application of comparative negligence would not further the purposes of accident law. Since the so-called *Bell* test is still the law the court’s right to make that determination is preserved.

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287. Id. at 171-72.
288. The example in the text implicitly makes the further simplifying assumption that plaintiff’s comparative negligence would not be a problem with the alternative design. This is a realistic assumption in many cases such as where safety features could reduce or prevent any injuries arising from plaintiff’s comparative negligence. In *Bell* itself, safety devices could have turned plaintiff’s inattentiveness from life or limb threatening to harmless daydreaming.
V. Retroactivity

The burning question in at least some peoples' minds is whether the Act will have retroactive application or not. This short section merely introduces that issue and presents what seems to the author to be the most persuasive resolution. The Act itself merely says that it "shall become effective September 1, 1988." 289 Civil Code article 6, however, provides:

In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretive laws apply both prospectively and retroactively unless there is a legislative expression to the contrary. 290

There is no contrary legislative expression in the Act; thus, the question then becomes whether the Act is substantive or procedural. One might very logically conclude that the statute is substantive, because it takes away the plaintiff's right to proceed against a manufacturer in negligence under Civil Code articles 2315 and 2316. 291 Concomitantly the Act substantively limits the citizen's rights under the sales articles, totally eliminating the right to recover attorneys' fees in a personal injury action. 292 Furthermore, the Act deprives the injured citizen of the right to rely on the theory that a product is unreasonably dangerous per se. These are substantive rights that Louisiana citizens had before the Act's passage and that they have now lost. Nothing in the Act indicates that it should have retroactive effect. For those reasons the Act should not be applied retroactively, and it would be incredible for courts to conclude otherwise.

V. Conclusion

This exposition of the Act has dealt with some of the major issues that the statute presents for the courts and attorneys. As the tenor of this piece suggests, the Act is, in places, wordy and complex. This complexity will heighten the difficult task that the courts will face in giving it meaning. There are several spots in the Act where, read literally, it unduly favors plaintiffs and other places where a literal reading would generally favor defendants. In applying the Act the courts should of course avoid ridiculous results. They should also remember that one of the Act's primary purposes was to conform Louisiana products liability law to the mainstream American law on the subject. As such, courts should reject interpretations that significantly depart from general American principles of products liability law. The removal of the general negligence claim from the plaintiff's arsenal is an unfortunate exception. Moreover, the courts should keep in

291. See supra text accompanying notes 58-77.
292. See supra text accompanying notes 78-103.
mind that the Act represents a compromise between the two sides involved. The courts should reject any interpretation that unduly favors one side over the other because there would have been no compromise if the Act unduly impaired the rights of either plaintiffs or defendants.

Finally, despite the existence of the Act and its complexity, there is no escaping the fact that courts decide tort cases, and that in deciding those cases, social policy is the most important factor they consider, no matter what the previous cases say or what the statutes say. This is not to imply that courts should or would ignore this Act; but, this Act, like any other, relies on words to accomplish its purpose. Judges decide what those words mean and, in doing so, they depend upon their understanding of those words. Their view of the world, including their view of acceptable and unacceptable social policies, shapes that understanding. No matter how tightly the legislature drafts a statute, judges will still decide the particular cases. And, in deciding those cases, they will have choices to make.293

293. As the late Professor Wex Malone said so much more ably than I, specifically in regards to the troublesome concept of proximate cause or legal limitation.

The same policy considerations which would motivate a legislative body to impose duties to protect from certain risks are applied by the court in making its determination. All rules of conduct, irrespective of whether they are the product of a legislature or are a part of the fabric of the court-made law of negligence, exist for purposes. They are designed to protect some persons under some circumstances against some risks. Seldom does a rule protect every victim against every risk that may befall him, merely because it is shown that the violation of the rule played a part in producing the injury. The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the court in each case as it arises. How appropriate is the rule to the facts of this controversy? This is a question that the court cannot escape. Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 73 (1956).