Product Liability Reform Proposals in Washington—A Public Policy Analysis

I. Introduction

The current interest in statutory reform of product liability law\(^1\) presents a unique opportunity for the Washington Legislature to make some principled decisions in furtherance of the policies behind product liability law.\(^2\) Uncertainty as to the law, unpredictability of the outcome of litigation, and perceptions of inequities in the balancing process\(^3\) have increased the costs of insurance, litigation, and products, creating a crisis atmosphere,\(^4\) pitting manufacturers against consumers in a polarized confrontation.\(^5\) Manufacturers seek to minimize their exposure to liability, reduce the size of judgments, and generally restrict claimants’ ability to prevail.\(^6\) On the other hand, plaintiffs’ representatives seek to continue the present system which they perceive as favoring claimants.\(^7\) The legislature, in deciding the future direction of product liability law in Washington, must look beyond these polarized interests to policy considerations for guidance. The policies underlying product liability law support legislation defining a single, clear cause of action, applying com-

1. See, e.g., [1979] 7 PROD. SAFETY & LIAB. REP. (BNA) 608-09 (interview with U.S. Rep. LaFalce); id. at 635 (business and consumer groups endorse proposal); id. at 588 (Pennsylvania businesses report problems); Phillips, An Analysis of Proposed Reform of Products Liability Statutes of Limitations, 56 N.C.L. REV. 663 (1978).
2. For a discussion of the policies of risk distribution, consumer protection, and safety incentive, see the text accompanying notes 23-28 infra.
5. See [1979] 7 PROD. SAFETY & LIAB. REP. (BNA) 742-43 (lawyers, consumers, insurance officials clash at hearing); id. at 905 (consumers, insurance industry clash); The Products Liability Bill (R.I.P. 1979—But to be Born Again), 33 WASH. ST. B. NEWS, No. 7, at 7 (July 1979).
6. See LEGAL STUDY, supra note 3, at 19-31; The Products Liability Bill (R.I.P. 1979—But to be Born Again), supra note 5, at 7.
7. See LEGAL STUDY, supra note 3, at 19-31; The Products Liability Bill (R.I.P. 1979—But to be Born Again), supra note 5, at 7; Remarks of Ron Bland, President, Washington State Trial Lawyers Ass'n, before the Washington State Senate Select Committee on Product Liability (Sept. 8, 1979) (unpublished testimony on file in Senate Research Center, Olympia, Wash.).
parative fault principles, and adopting the contribution doctrine; however, those same policies require retaining the doctrine of joint and several liability, and rejecting proposals for a statute of repose.⁸

This comment examines the major reform proposals in light of product liability policies, the common law, and fundamental standards of fairness. It compares the alternatives of continuation under the present system, the model Uniform Product Liability Act (U.P.L.A.),⁹ and state legislative proposals. Finally, this comment offers specific recommendations regarding product liability legislation for Washington State.

II. HISTORICAL DEVELOPMENT

A brief overview of the historical development of product liability law helps to focus the issues involved in modern legislative reform proposals. The common law first addressed modern product liability issues in 1842 in Winterbottom v. Wright,¹⁰ denying recovery to a passenger in a defective carriage because he lacked privity of contract with the manufacturer.¹¹ Judicially created exceptions slowly eroded the Winterbottom privity rule¹² until 1916 when Judge Cardozo broke the privity barrier in MacPherson v. Buick Motor Co.,¹³ holding a manufacturer liable to the ultimate purchaser on a negligence theory.¹⁴ The next major development came in 1960 when in Henningsen v. Bloomfield Motors,¹⁵ under an implied warranty theory, the court held a manufacturer and intermediate sellers liable to the ultimate user, who was not even a purchaser.¹⁶ Because the negligence and warranty theories inadequately address the inherent

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⁸ A number of important issues are beyond the scope of this comment, including: insurance law reform, workers compensation reform, rules of evidence, affirmative defenses, and governmental tort liability limitations.


¹¹ Id. This holding, requiring privity of contract, is actually an interpretation of the case that stood until 1905 when Professor Bohlen discredited it as a misinterpretation. Bohlen, The Basis of Affirmative Obligations in the Law of Tort, 44 AM. L. REG., N.S. 209 (1905).


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

¹⁴ Id.


¹⁶ Id.
problems of such cases,\textsuperscript{17} the California Supreme Court in *Greenman v. Yuba Power Products*,\textsuperscript{18} in 1963, applied the doctrine of strict liability to a product liability case.\textsuperscript{19} In 1965, the American Law Institute published section 402A of the Restatement (Second) of Torts,\textsuperscript{20} leading to adoption of strict product liability by a majority of United States jurisdictions.\textsuperscript{21} Washington joined the majority in 1969 with *Ulmer v. Ford Motor Co.*\textsuperscript{22} Contemporary reform proposals result in large part from frustration with judicial efforts to interpret and apply strict product liability in light of the policies that led the Washington Supreme Court to adopt it eleven years ago.

\textsuperscript{17} The difficulty of proving the existence of a duty, required in negligence theory, proved all but insurmountable to many injured parties. Under warranty theory, the doctrine of privity, combined with short limitation periods, stringent notice requirements, and disclaimer provisions, often precluded recovery by injured parties unless the plaintiff persuaded a court to stretch the doctrines beyond their prior limits. See generally W. Prosser, *supra* note 12, §§ 96-98; *Restatement (Second) of Torts* § 402A, Comments b & m (1965); Comment, *Products Liability in Pennsylvania: Precedents, Problems and Proposals*, 83 Dick. L. Rev. 565 (1979).


\textsuperscript{19} Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Justice Traynor, in *Greenman*, held a manufacturer is strictly liable "when an article he places on the market, knowing it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

\textsuperscript{20} Section 402A provides:

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

*Restatement (Second) of Torts* § 402A (1965).  

\textsuperscript{21} W. Prosser, *supra* note 12, § 98, at 657-58.

\textsuperscript{22} 75 Wash. 2d 522, 452 P.2d 729 (1969). In *Ulmer*, the plaintiff was injured when a defectively installed bolt came loose causing her car to become uncontrollable and crash into an abutment. The plaintiff could offer no evidence of negligence. Defendant did present testimony that it had exercised due care. The trial court jury gave a defense verdict. The Washington Supreme Court reversed after reviewing the development of product liability law and quoting at length from Prosser and the Restatement (Second) of Torts § 402A. The court, however, specifically limited its holding to manufacturers, deferring decision as to the liability of retailers and intermediate sellers. *Id.*
III. UNDERLYING POLICIES

The major policies underlying strict product liability are: risk distribution, consumer protection, and safety incentive. The basis of the risk distribution rationale is that the manufacturer is in the best position to control and minimize risks and should, therefore, bear the burden of the inevitable costs associated with those risks. Manufacturers have a greater ability—compared with product users—to pay the costs of product-related injuries and to spread those costs among all consumers through price adjustments. As a matter of public policy, courts allocate liability to manufacturers without regard to issues of duty, privity, or even fault.

Similarly, the premise supporting the consumer protection rationale is that consumers, who often lack the skills and knowledge to avoid or prevent product-related injuries, should receive full compensation for those injuries. Because few consumers have the financial ability to absorb the costs of unanticipated product-related injuries, public policy places the financial burden on the party who placed the defective product on the market, again without regard to duty, privity, or fault in the negligence sense.

The closely related safety incentive rationale seeks to place the burden of paying for harm on the party in the best position to prevent injury. It presumes that if defective construction, design, or warning caused an injury, the manufacturer can and should market safer products. Therefore, to encourage development of safer products by making safety improvements the more economic alternative, public policy places liability for such product-related injuries on the manufacturer. On the other hand, this rationale also supports the proposition that the amount of the manufacturer’s liability should be proportionately less where


24. See note 23 supra.

25. Id.

26. Id.
the plaintiff's or a third party's actions are a cause of the injury. These policies of risk distribution, consumer protection, and safety incentive form the basis of strict product liability law and provide a standard for evaluating the various proposals for legislative reform.

IV. DEFINING THE CAUSE OF ACTION

The first major area of proposed legislative reform of product liability law is the definition of the cause of action. Eleven years after the Washington Supreme Court adopted strict product liability, the court still intermingles elements of negligence and strict liability doctrines in many product liability cases. The problem results from the court's failure to recognize that product liability cases involve two levels of analysis: first, whether the product is defective, and second, if the product is defective whether the manufacturer is liable for harm caused by the product. The Washington court adopted strict product liability in Ulmer v. Ford Motor Co., a construction defect case, and because of the unique character of construction defects, the court did not have to address the standard of responsibility applicable to determining whether a defect existed.

The existence of a defect was not at issue in the Ulmer appeal. The only issue was whether the plaintiff had to show negligence before the defendant manufacturer was liable. Having accepted the trial court's factual finding that a defect existed, the Washington Supreme Court held the manufacturer strictly liable because "(1) . . . there was a defect, (2) which existed at the time the product left the hands of the manufacturer, (3) which was not contemplated by the user, (4) which render[ed] the product unreasonably dangerous, and (5) [which] was the proximate cause of plaintiff's injury." The Ulmer court's holding, therefore, was that, given the existence of a defect, the manufacturer is strictly liable if the plaintiff proves

30. See text accompanying notes 31-46 infra.
32. See id. at 523, 452 P.2d at 730.
33. See id. at 523-33, 452 P.2d at 730-35.
34. Id. at 535, 452 P.2d at 738 (Neill, J., concurring).
the above five elements.

It was in the context of Seattle-First National Bank v. Tabert,35 a design defect case, that the Washington Supreme Court first said it was applying strict liability to the question of whether the design constituted a defect.36 The court proceeded, however, to say: "[W]e are dealing with a relative, not an absolute concept. . . . [A] number of factors must be considered. The relative cost of the product, the gravity of the potential harm. . . . and the cost and feasibility of eliminating or minimizing the risk. . . ."37 Those factors are remarkably similar to the traditional negligence factors, namely: the burden of exercising sufficient care, the probability of harm, and the gravity of the potential harm.38 The court did not distinguish between the two necessary levels of analysis in Tabert—defect determination and liability determination—instead treating it as a single-step analysis. Liability determination was not before the Tabert court, although the court's language seems to lead to a contrary conclusion.39 The court should have recognized that it was only considering the standard for determining the existence of a defect in design, and that the standard it prescribed was ordinary negligence on the part of the designer or manufacturer. Having found a defect on such grounds, the court then could have applied the Ulmer test40 to find the manufacturer strictly liable. By intermingling the strict liability and negligence doctrines and the two levels of analysis that it should have treated separately, the Washington court injected unnecessary confusion into product liability law governing design defect cases.

35. 86 Wash. 2d 145, 542 P.2d 774 (1975).
36. In the court's words, "strict liability does encompass a design defect . . . ." Id. at 149, 542 P.2d at 776.
   If a product is unreasonably dangerous, it is necessarily defective. The plaintiff may, but should not be required to prove defectiveness as a separate matter.
   Likewise, unreasonably dangerous implies a higher and different standard than what we conceive to be the intended thrust of section 402A strict liability. The emphasis is upon the consumer's reasonable expectation of buying a product which is reasonably safe. . . .
   [W]e hold that liability is imposed under section 402A if a product is not reasonably safe. This means that it must be unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer.
Id. at 154, 542 P.2d at 779.
37. Id. at 154, 542 P.2d at 779.
38. See W. PROSSER, supra note 12, § 31.
39. See 86 Wash. 2d at 149-50, 542 P.2d at 775-76.
40. See text accompanying note 34 supra.
The Washington Supreme Court arrived at the same confusing result in *Little v. PPG Industries, Inc.*,41 a warning defect case. The *Little* court used the language of strict liability42 but applied the same balancing test as in the *Tabert* design case.43 As in *Tabert*, the issue of liability determination was not before the *Little* court.44 Therefore, the court decided only the issue of defect determination, and it prescribed the same negligence standard for warning defect cases as for design defect cases.45

In effect, the Washington Supreme Court tries to superimpose the language of strict liability on both the issue of defect determination and on the issue of liability determination.46 In practice, however, the court properly applies the strict liability standard only to liability determination, and the lower negligence standard to defect determination. This intermingling of doctrines under the guise of uniformity creates problems for all parties in determining necessary elements of proof47 and available defenses.48 Most commentators have concluded that the uncertainty and confusion arising from the court's use of language require comprehensive legislation redefining the product liability cause of action to promote certainty and the policies of risk distribution, consumer protection, and safety incentive.49


42. See 92 Wash. 2d at 121, 594 P.2d at 913-14.

43. See id. at 122-23, 594 P.2d at 914. The *Little* court used almost the same language from *Tabert* as that quoted at note 36 supra.

44. See id. at 120-26, 594 P.2d at 913-16.

45. In *Little*, the court admitted it is "difficult to separate the concept of an 'inadequate warning' from that of a 'negligent supplier.' If one is proven, the other generally can be inferred." Id. at 122, 594 P.2d at 914.


47. E.g., a negligence cause of action requires proof of duty, breach, causation, and damages, W. PROSSER, supra note 12, § 30, whereas a § 402A cause of action requires proof of damages, causation, and existence of a defect at the time of manufacture, but no proof of duty. Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 535, 452 P.2d 729, 736 (1969) (Neill, J., concurring); see note 20 supra.

48. For example, contributory negligence is a defense to common law negligence, but it is not a defense to a § 402A strict liability action. See text accompanying notes 68-74 infra.

49. See, e.g., LEGAL STUDY, supra note 3, at 2; Sherman, Legislative Responses to Judicial Activism in Strict Liability: Reform or Reaction?, 44 BROOKLYN L. REV. 359,
Proponents of statutory reform advocate either a return to the negligence standard,\textsuperscript{50} or a new, separate, comprehensive definition of the product liability cause of action.\textsuperscript{51} The proposed legislation considered by the Washington Legislature in 1979 defined a product liability action as:

[A]n action brought against the [manufacturer, wholesaler, distributor, or retailer] of a product by a person seeking to recover damages . . . caused by a defective condition of a product, including without limitation:

(a) Any defect in product design;
(b) Any defect in product manufacture, including inspection and testing;
(c) Any failure to warn regarding the product; or
(d) Any failure to properly instruct in the use of the product.

A product liability action includes all actions based upon negligence, breach of warranty, strict liability in tort, and any other substantive legal theory . . . .\textsuperscript{52}

That proposal would have combined into a single cause of action the various theories upon which product liability claims currently rest. However, the 1979 drafts did not address the standard of responsibility the courts should apply.\textsuperscript{53} By the proposal's silence, and because courts strictly construe statutes in derogation of the common law,\textsuperscript{54} they probably would apply the

\textsuperscript{50} Sachs, supra note 23. Sachs argues that because a strict liability plaintiff must prove "either that the defect was the result of the defendant manufacturer's design or that the defect was present at the time the product left the manufacturer's control," and causation, and because most of the traditional negligence defenses are available, strict product liability is virtually the same as traditional negligence. \textit{Id.} at 263. Sachs points particularly to the difficulty of proving defect and causation and states, "in the proof of a product defect lies a task almost equal in difficulty to the proof of a manufacturer's negligence. Proving product design defect(s) is, for all practical purposes, the equivalent of proving the manufacturer's negligence in the design of the product." \textit{Id.} Sachs concludes, "the differences . . . are fewer rather than more, less rather than greater, and more apparent than real." \textit{Id.} Contra, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461-68, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring).

\textsuperscript{51} Sherman, supra note 49, at 361-71; see U.P.L.A., \textit{supra} note 3, §§ 102(a) & 104.


\textsuperscript{53} The 1979 Washington proposal simply stated that a product liability action includes all actions previously based upon negligence, breach of warranty, strict liability, etc., without expressing what standard of responsibility the courts should apply to this new cause of action. \textit{See} Engrossed Sen. Bill 2333, 46th Legis., Reg. Sess. (Wash. 1979).

\textsuperscript{54} "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." Shaw v. Railroad Co., 101 U.S. 557, 565 (1879). "The
existing strict liability standard to the proposed new cause of action. Because the Washington Supreme Court currently uses the language of strict liability for defect determination as well as for liability determination, it could view the 1979 proposal as an invitation to actually apply strict liability at both levels of analysis, thus placing a burden of almost absolute liability on manufacturers. Although such an extension of liability might increase certainty, it also might increase manufacturers' exposure to liability without advancing any of the policies underlying product liability law.

The U.P.L.A. contains an alternative definition of the product liability cause of action. It includes all the types of defects listed by the 1979 Washington proposal and adds failure to conform to an express warranty. Like the 1979 Washington proposal, the U.P.L.A. creates a single new cause of action, combining suits currently based upon strict liability, negligence, breach of warranty, and other substantive legal theories. Unlike the 1979

act . . . being in derogation of the common law, is to be taken strictly." Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797). "Where the expressions of the act . . . are in general terms, they are to receive a construction that may be agreeable to the rules of common law, in cases of a similar nature." Levinz v. Will, 1 U.S. (1 Dall.) 430, 434 (1789).

"It is a general rule of interpretation to assume that the legislature was aware of the established common-law rules applicable to the subject matter of the statute when it was enacted." State ex rel. Madden v. Public Util. Dist. No. 1, 83 Wash. 2d 219, 222, 517 P.2d 585, 587 (1973), cert. denied, 419 U.S. 808 (1974). "[T]he common law must be allowed to stand unaltered as far as is consistent with the reasonable interpretation of the new law." In re Estate of Tyler, 140 Wash. 679, 689, 250 P. 456, 460 (1926) (citations omitted). "We would not be justified in holding that the legislature has intended to overrule the holdings of this court and a long settled business policy, unless the intent so to do is clearly expressed in words or made to appear by necessary inferences to be drawn therefrom." Allen v. Griffin, 132 Wash. 466, 469, 232 P. 363, 364-65 (1925).

55. See text accompanying notes 31-46 supra.

56. For a discussion of the policies underlying product liability law, see the text accompanying notes 23-28 supra.


58. A product manufacturer is subject to liability to a claimant who proves by a preponderance of the evidence that the claimant's harm was proximately caused because the product was defective. A product may be proven to be defective if, and only if:

1. It was unreasonably unsafe in construction (Subsection A);
2. It was unreasonably unsafe in design (Subsection B);
3. It was unreasonably unsafe because adequate warnings or instructions were not provided (Subsection C); or
4. It was unreasonably unsafe because it did not conform to the product seller's express warranty (Subsection D).

Id. § 104.

59. "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication,
Washington proposal, the U.P.L.A. applies a strict liability standard only to liability determination;\(^\text{60}\) it applies the lower negligence standard to defect determination.\(^\text{61}\) This proposed split standard of responsibility more nearly reflects present Washington law than does the 1979 proposal,\(^\text{62}\) and it more equitably balances the interests of manufacturers and claimants with little loss of certainty and predictability.

In seeking to promote the goals of certainty, predictability, and equity by adopting a single, clear definition of a product liability cause of action, the Washington Legislature should incorporate the principles of the U.P.L.A. definition.\(^\text{63}\) By apply-

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60. See id. § 104 (quoted in note 58 supra).
61. Id. § 104 (quoted in note 58 supra).

In order to determine that the product was unreasonably unsafe in construction, the trier of fact must find that, when the product left the control of the manufacturer, the product deviated in some material way from the manufacturer's design specifications or performance standards, or from otherwise identical units of the same product line.

62. See text accompanying notes 31-46 supra.

63. The basic principles of the U.P.L.A. are contained in sections 102(D) and 104. U.P.L.A., supra note 3, §§ 102(D) & 104. Although the principles contained in these sections of the U.P.L.A. are worthy of incorporation, a close reading reveals excess verbiage that may be internally inconsistent. Compare, e.g., the first clause of § 102(D) (quoted at note 59 supra) with the first two sentences of § 104 (quoted at note 58 supra).
ing the negligence standard to defect determination, the proposed definition subsumes the state-of-the-art issue by making the actual design or warning a factor for the court to balance against the burdens of alternative courses of action. Thus, while increasing certainty and predictability by establishing a single set of rules and by clarifying what each party must prove to prevail, the U.P.L.A. principles also benefit manufacturers by formally taking into account the intrinsic nature of each type of defect for purposes of assigning the standard of responsibility. Because the U.P.L.A. principles more nearly express the present state of the law than the words currently used by the Washington Supreme Court, they would also preserve the underlying policies of product liability law. For these reasons, the legislature should adopt a single comprehensive definition of a product liability cause of action, incorporating the U.P.L.A. principle of a split standard of responsibility.

V. COMPARATIVE FAULT

A second area of proposed legislative reform of product liability law is the application of apportionment principles, often termed comparative fault. Historically, courts have denied apportionment in product liability actions, in favor of affirmative defense doctrines that leave each party to take all or noth-

64. Manufacturers want, but courts have denied, recognition of compliance with the state-of-the-art at the time of manufacture as a complete defense. The initial problem is defining the term "state-of-the-art." There is great dispute over whether it means the minimum, average, or maximum standards of that manufacturer, or of the entire industry at the time of manufacture, or whether the standards at the time of trial apply. See 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 6.01[1] n.15.1 (1979); 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16C[3][ii] (1979). In addition, there is little agreement about who will determine which standard to apply in a particular case. Id. Standards could be set by the manufacturers themselves, the courts, or a new federal bureaucracy. Because of these difficulties, because of the amorphous nature of safety standards among millions of products, and because the probable effect would be greater costs for all parties, the legislature should not adopt a state-of-the-art defense.

The better application of the state-of-the-art issue is that incorporated in § 104 of the U.P.L.A. Section 104 would permit the court to consider evidence of whether it was technically and economically feasible at the time of manufacture to design and produce a safer product. The court would then weigh the feasibility evidence against the likelihood and seriousness of harm to determine whether the particular design was unreasonably unsafe, or whether the product was unreasonably unsafe because of inadequate warnings or instructions. See U.P.L.A., supra note 3, § 104(B) & (C) (quoted at note 61 supra).


66. See note 30 supra.

67. See text accompanying notes 23-28 supra.
ing.68 In common law negligence actions, contributory negligence—both ordinary failure to discover or foresee dangers and unreasonable assumption of the risk—was a complete bar to recovery.69 Thus, if a plaintiff’s negligence contributed even slightly to his injury, the plaintiff recovered nothing.70 The Washington courts have not applied the harsh contributory negligence defense in product liability cases when the plaintiff’s negligence is of the type involving an ordinary failure to discover or foresee dangers.71 If the plaintiff’s acts constitute such ordinary negligence, the defendant remains liable for all damages despite proof that the defendant’s acts were only partially the cause of those damages. Washington recently adopted a comparative negligence statute that apportions fault between plaintiffs and defendants, reducing a plaintiff’s recovery in proportion to his fault.72 The courts, however, have refused to extend the stat-

68. See W. Prosser, supra note 12, § 65; Epstein, Plaintiff’s Conduct in Products Liability Actions: Comparative Negligence, Automatic Division and Multiple Parties, 45 J. AIR L. & COM. 87 (1979); Levine, Buyer’s Conduct as Affecting the Extent of Manufacturer’s Liability in Warranty, 52 MINN. L. REV. 627, 644-63 (1968); Twerski, From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts, 60 MARQ. L. REV. 297 (1977).

69. V. Schwartz, Comparative Negligence § 12.2 at 197 (1974); see W. Prosser, supra note 12, § 68.

70. The doctrine of contributory negligence first appeared in Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). W. Prosser, supra note 12, § 65, at 416 n.1. In Butterfield, the court denied the plaintiff recovery when a pole that was wrongfully protruding into the road knocked him to the ground, because he was riding his horse too fast and carelessly. The first United States case to apply contributory negligence was Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824). W. Prosser, supra note 12, § 65, at 416 n.1. In Smith, on facts almost identical to those in Butterfield, the court barred the plaintiff’s claim unless he could show he had used ordinary care and caution in riding his horse. Smith v. Smith, 19 Mass. (2 Pick.) at 624. The Washington Supreme Court has recognized the defense of contributory negligence since before statehood. See Tacoma Lumber & Mfg. Co. v. City of Tacoma, 1 Wash. 12, 23 P. 929 (1890); Northern Pac. R.R. v. Holmes, 3 Wash. Terr. 202, 14 P. 688 (1887). Cf. Meigs & Talbot v. Steamship Northern, 1 Wash. Terr. 78 (1859) (admiralty case finding contributory negligence and applying apportionment).


72. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages caused by negligence resulting in death or in injury to person or property, but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering.
ute to product liability cases involving ordinary contributory negligence, holding that it applies only where the common law defense of contributory negligence formerly was available. Because contributory negligence was not a common law defense to a strict product liability claim, courts have declined to extend comparative fault principles to product liability cases.

Unlike ordinary contributory negligence, however, the Washington courts recognize the assumption of the risk defense in product liability claims. The courts have modified this common law defense by applying comparative fault principles consistent with the comparative negligence statute. Thus, the Washington courts deny apportionment to one type of plaintiff fault while extending it to another. This judicial inconsistency is the source of proposals for legislative adoption of apportionment.

One option for the legislature is to take no action regarding apportionment, allowing the courts to develop common law solutions. Until 1980, that option was particularly viable because the Washington Supreme Court, in the 1977 case of Teagle v. Fischer & Porter Co., left open the possibility of judicially adopting comparative fault principles for product liability cases. A number of states, and several federal courts in


77. 89 Wash. 2d 149, 570 P.2d 438 (1977).

78. The Teagle court found that the defendant failed to prove any negligence on the part of the plaintiff. *Id.* at 160, 570 P.2d at 444-45. It was a matter of insufficiency of the evidence as to whether, under the circumstances, it was negligent to not wear safety glasses. The court, however, stated: "This does not necessarily close the door to our adoption of the theory that any evidence of the plaintiff's contributory negligence should be considered as damage-reducing factors. However, on the facts before us, this case is not the proper one to raise this issue." *Id.* at 159, 570 P.2d at 444. Teagle was a unanimous decision of the Washington Supreme Court. Cf. Albrecht v. Groat, 91 Wash. 2d 257, 588 P.2d 229 (1978) (Hicks, J., dissenting) (arguing the majority erred in rejecting comparative fault).

diversity actions, have judicially applied comparative fault to
product liability claims, and the Washington Supreme Court
might logically have followed. The court, however, closed the
door to applying comparative fault principles to strict product
liability actions in the 1980 case of Seay v. Chrysler Corp. After Seay, the only viable way to achieve application of apportionment principles to product liability cases is through legislation.

Most legislative proposals are variations of the proposed


Daly is particularly significant because of the prominence of the California Supreme Court as a leader in product liability law developments. Daly involved a plaintiff who received fatal injuries when thrown from his car after striking a freeway abutment. General Motors defended on the grounds of contributory negligence because the plaintiff did not use available safety equipment as instructed. The California Supreme Court reversed the defense verdict and prospectively adopted comparative fault after thoroughly analyzing the effect of comparative fault on the policies addressed supra at notes 23-28.


81. 93 Wash. 2d 319, 609 P.2d 1382 (1980).

82. Justice Dolliver's Seay decision recites the traditional arguments against applying comparative fault principles to strict product liability cases. He cites the theoretical difficulty of comparing concepts of negligence and strict liability. Id. at 322, 609 P.2d at 1383-84. The decision then purports to adopt the rule of Albrecht v. Groat, 91 Wash. 2d 257, 588 P.2d 229 (1978), which denied apportionment in a common carrier strict liability case. 93 Wash. 2d at 322, 609 P.2d at 1384. The heart of the Seay decision, however, is the statement that "[h]ad the legislature chosen . . . it could have extended [the comparative negligence statute] to strict liability. It did not do so." Id. at 323, 609 P.2d at 1384. Thus, the court gives the legislature's failure to reverse the court as the reason it would not utilize the door previously left open to adopt comparative fault principles. Seay was a six to three decision with a vigorous dissent by Chief Justice Utter, arguing, as did the California Supreme Court in Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), that the court should adopt comparative fault because it would lead "to a more just and equitable result." 93 Wash. 2d at 326, 609 P.2d at 1386.
Uniform Comparative Fault Act (U.C.F.A.),[83] which would require the fact finder to determine the relative degree of fault of each party, after which the court would apportion damages accordingly.[84] The U.C.F.A., as incorporated in all versions of the product liability legislation considered by the 1979 Washington Legislature,[85] would apply to all tort law, extending far beyond the product liability field.[86] In affecting such areas as intentional torts, the sweeping language of the U.C.F.A. raises

83. Sections 1 and 2 of the Uniform Comparative Fault Act [hereinafter cited as U.C.F.A.] contain the essence of the comparative fault provisions:

Section 1. [Effect on Contributory Fault]
(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant’s contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

Section 2. [Apportionment of Damages]
(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released . . . the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:
(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released . . . . For this purpose the court may determine that two or more persons are to be treated as a single party.
(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction . . . and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution . . . the court shall determine and state in the judgment each party’s equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
(d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party’s equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.


84. Id. See Wade, Products Liability and Plaintiff’s Fault—The Uniform Comparative Fault Act, 29 Mercer L. Rev. 373 (1978).


86. “In an action based on fault seeking to recover damages . . . .” Id. § 1.
policy issues different from, and beyond the scope of, product liability law. To avoid impacting such unrelated areas of the law, the legislature should limit application of comparative fault to product liability cases. The U.P.L.A. does limit its coverage to product liability cases,\(^87\) although it otherwise follows the U.C.F.A. formulation.\(^88\) Thus, should the legislature decide to enact a comparative fault statute, a carefully limited formulation would be superior to a broad U.C.F.A.-type approach.

Opponents of comparative fault argue that it is difficult to compare a defendant's strict liability with a plaintiff's negligence.\(^89\) Courts and commentators have developed a variety of theories to respond to the apparent problem. Many simply dismiss it as being more illusory than real.\(^90\) The Wisconsin Supreme Court, in the early case of Dippel v. Sciano,\(^91\) characterized strict product liability as negligence per se which brought it within the Wisconsin comparative negligence statute.\(^92\) A second theory compares the "social fault" of selling a defective product or the "legal fault" of a breach of duty to sell defect-free products with the plaintiff's contributory fault.\(^93\) A third

87. See U.P.L.A., supra note 3, §§ 102(D) & 111.
89. Seay v. Chrysler Corp., 93 Wash. 2d 319, 322, 609 P.2d 1382, 1383-84 (1980); see V. Schwartz, supra note 69, ch. 12; Fischer, Products Liability—Applicability of Comparative Negligence, 43 Mo. L. Rev. 431 (1978); Levine, supra note 57, at 654-62; Schwartz, Strict Liability and Comparative Negligence, 42 Tenn. L. Rev. 171 (1974); Comment, Another Citadel Has Fallen—This Time the Plaintiff's. California Applies Comparative Negligence to Strict Products Liability, 6 Pepperdine L. Rev. 485 (1979).
90. See Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); V. Schwartz, supra note 69.
91. 37 Wis. 2d 443, 155 N.W.2d 55 (1967); see Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93, 114-17 (1972).
92. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). Dippel has received extensive criticism for injecting unnecessary confusion into the situation, see, e.g., V. Schwartz, supra note 69, § 12.6, at 205-06, and for distorting the doctrine of negligence per se from its fixed standard of conduct to a case-by-case standard, see Fischer, supra note 89, at 439-42. Fischer argues that negligence per se and strict liability are simply incompatible. Id.

The "fictional fault" theory is subject to criticism for question begging. Fischer,
theory focuses on causation and purports to compare the relative causal contribution of each party to the result. A fourth theory for comparative fault is the "automatic apportionment" advocated by Professor Epstein. Epstein proposes a pro rata division of the damages among all parties who contributed to the harm. Epstein's proposal is as arbitrary as the all-or-nothing approach under present law. A defendant could reduce his judgment by half with proof that plaintiff was even one percent contributorily negligent.

A fifth proposed comparative fault theory, involving a simple reduction in damages, has particular appeal for Washington state. This theory compares the plaintiff's conduct against an objective reasonable person standard, determines to what extent the discrepancy caused the harm, and reduces the total damage award proportionately. This technique does not compare the conduct of the plaintiff and defendant; it simply reduces the plaintiff's recovery in proportion to his own fault. The defendant remains strictly liable for all damages not attributable to the plaintiff's conduct. The damage reduction theory is especially appropriate for Washington because it is consistent with the existing comparative negligence statute, which also reduces damages in proportion to the plaintiff's negligence. The theory advances the policy of deterrence underlying comparative negligence by requiring plaintiffs to act reasonably. Finally, the damage reduction approach supports the safety incentive and risk distribution policies underlying strict product liability law, while maintaining judicial flexibility to fashion specific

supra note 89, at 442-44. Fischer argues that social fault and personal culpability are no more comparable than strict liability and negligence. Id.


The comparative causation theory is subject to criticism because it is no easier to compare causation than to compare strict liability and negligence. Fischer, supra note 89, at 444-47. Further, critics state there is no functional relationship between causation and fault. Id. One party, with very little fault in terms of culpable conduct, could possibly be the primary cause, thus incurring 100% liability whereas fault might not exceed 10%.

95. Epstein, supra note 68, at 107-16.
96. Id. at 110-11.
97. Fischer, supra note 89, at 449-50.
98. Id. at 449.
100. Fischer, supra note 89, at 449.
101. Id. See text accompanying notes 23-28 supra.
implementation procedures. Thus, Washington should enact a simple damage reduction comparative fault statute for product liability cases.

Opponents of comparative fault also argue that juries are incapable of understanding and applying such a scheme.\(^{102}\) In fact, juries currently apportion damages on an ad hoc basis despite any theoretical difficulties.\(^{103}\) Institutionalizing and making a deliberate process of apportionment would increase certainty and predictability because the court and the parties could evaluate the jury’s criteria—a check that is not available in the present ad hoc system.\(^{104}\) The task of apportioning damages would be no more difficult than many other tasks the law requires juries to perform, such as valuing a person’s reputation or pain and suffering.\(^{105}\) Any error of a few percentage points would be infinitely better than the present all-or-nothing situation.\(^{106}\) The legislature, therefore, should not hesitate to entrust factfinders with responsibility for apportioning damages between manufacturers and negligent plaintiffs.

Another argument against comparative fault is that it would dilute the value of the consumer protection rationale behind strict product liability law.\(^{107}\) That argument, however, overlooks the fact that comparative fault would leave the manufacturer liable for all harm not attributable to the plaintiff’s conduct.\(^{108}\) The final argument propounded by opponents of comparative fault, that it would lead defendant manufacturers to plead contributory fault as boilerplate in every answer,\(^{109}\) is similarly unpersuasive. That argument disregards judicial adeptness at sorting out frivolous claims and defenses as demonstrated by the Washington Supreme Court in *Teagle v. Fischer & Porter Co.*\(^{110}\) The *Teagle* court rejected the contributory fault defense because

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106. *Id.* at 655.
110. 89 Wash. 2d 149, 570 P.2d 438 (1977).
the facts did not support it; the defendant failed to carry his burden of proof. Thus, none of the arguments against comparative fault are persuasive, and consequently they should not dissuade the Washington Legislature from enacting a comparative fault statute.

In addition to the dearth of effective arguments against comparative fault, a variety of affirmative reasons support Washington's adoption of such a statute. The overriding reason, as stated by the California Supreme Court in Daly v. General Motors Corp., is that it would be fair. It would be more equitable than the all-or-nothing status of current law, by assuring plaintiffs of full compensation for harm caused by products without forcing society to bear the costs attributable to plaintiffs' negligence. Thus, by advancing the comparative fault policy that a negligent plaintiff should not receive full compensation from a strictly liable defendant who was only partially at fault in causing the harm, the comparative fault doctrine furthers the strict product liability policy of equitable risk distribution.

Comparative fault would increase respect for the law because juries could decide cases on the facts by applying a rational instruction rather than on the basis of emotion. It would end the ad hoc balancing that now occurs contrary to jury instructions and replace it with reasoned deliberation. Similarly, the application of comparative fault would provide an incentive for consumers to exercise care for their own safety. It would account for the fact that consumers can sometimes best protect themselves by modifying their own behavior to prevent injury.

Comparative fault would continue to protect consumers against product defects, while also protecting manufacturers from liability that is unwarranted because not attributable to a

111. Id. at 159-60, 570 P.2d at 444-45.
112. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).
113. Id. at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390. See Comment, supra note 89, at 490-93.
114. Fischer, supra note 89, at 431-35; Levine, supra note 68, at 658.
115. Fischer, supra note 89, at 431-35; Levine, supra note 68, at 652-54.
116. Fischer, supra note 89, at 431-35.
118. "[I]n some cases, imposing liability on the manufacturer is not in the public interest. Certain types of injuries are better prevented by modifying the behavior of consumers." Id. at 380-81.
product.\textsuperscript{119} Comparative fault would only limit the consumer's compensation to the extent of the plaintiff's fault. The law should not shift to society through the pricing system that portion of the harm caused by the plaintiff's own acts anyway.\textsuperscript{120} Comparative fault would also increase the incentive for manufacturers to produce safer products, because their liability exposure would directly reflect the risks inherent in their products.\textsuperscript{121} By improving safety they could directly affect their liability exposure. Thus, by adopting comparative fault, the legislature would more equitably distribute the costs of product-related injuries, increase the jury system's accountability, provide an incentive for consumers to be safety conscious in their use of products, and preserve the policy favoring consumer protection.

By recommending adoption of comparative fault, this comment does not endorse the unnecessarily complex U.P.L.A. proposal,\textsuperscript{122} which confuses the matter by applying the "fictitious fault" approach.\textsuperscript{123} The drafters could more simply have directed the courts to reduce the plaintiff's damages proportionately to any amount of the total harm the factfinder identifies as caused by the plaintiff's conduct. This would be consistent with the comparative negligence statute already in force,\textsuperscript{124} as well as judicial formulations in other states.\textsuperscript{125} It would have the added advantage of leaving the detailed implementation for the courts to work out as they have successfully done under the comparative negligence statute. Thus, Washington can do better than the U.P.L.A. by adopting a simple, clear, and concise comparative fault statute.\textsuperscript{126}

\textsuperscript{119} See id. at 371.
\textsuperscript{120} Fischer, supra note 89, at 433.
\textsuperscript{121} See id.
\textsuperscript{122} See U.P.L.A., supra note 3, § 111.
\textsuperscript{123} See text accompanying note 93 supra.
\textsuperscript{124} Wash. Rev. Code § 4.22.010 (1979) (quoted at note 72 supra).
\textsuperscript{125} Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); cf. Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978) (arriving at the same result by applying the term "comparative causation").
\textsuperscript{126} Although a detailed analysis is beyond the scope of this comment, the legislature should realize that no comparative fault system can be totally fair and equitable unless it makes some basic changes in the workers' compensation law. Specifically, it should modify Wash. Rev. Code § 51.24.010 (1979) to permit a defendant manufacturer to obtain contribution for the employer's allocable share of plaintiff's damages, at least up to the policy limits. The U.P.L.A. takes a more extreme approach, reducing the manufacturer's liability by the amount of workers' compensation paid, without regard to proportion of fault, and entirely removes the insurer's right of subrogation against the manufacturer. U.P.L.A., supra note 3, § 114. This area needs more study in order to reach a
VI. Contribution

A third area of proposed legislative reform of product liability law is Washington's common law doctrine denying contribution among joint tortfeasors. Recognition of contribution, the right of a defendant to judicial assistance in securing a proportionate share of a paid judgment from another party who shared fault for the injury,\(^\text{127}\) would provide a more equitable distribution of injury costs among the responsible parties.\(^\text{128}\) Contribution differs from comparative fault in that it addresses only the distribution between or among tortfeasors of responsibility for paying those damages suffered by the injured party,\(^\text{129}\) whereas comparative fault is concerned with the allocation of fault between the plaintiff and the defendants as a group.\(^\text{130}\) Although the Washington Supreme Court reaffirmed the common law doctrine denying contribution in 1978 in *Wenatchee Wenoka Growers Ass'n v. Krack Corp.*,\(^\text{131}\) the legislature should statutorily join the majority of American jurisdictions which now permit contribution,\(^\text{132}\) further promoting equitable distribution of risks

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solution that will complement comparative fault while taking into account the historical and political concerns of those who would resist any effort to modify the workers' compensation statute.


130. *Id.*

131. 89 Wash. 2d 847, 576 P.2d 388 (1978). The court, while stating, "we neither hold nor mean to suggest that we will reject further consideration of this matter in an appropriate case," *id.* at 854, 576 P.2d at 392, reasoned that because other states have been inconsistent in their formulations of the doctrine, because the court perceives a conflict with the no-fault elements of strict liability, and because the parties did not provide workable answers to a number of practical questions, this was not the right case for adopting contribution. *Id.* at 850-54, 576 P.2d at 390-92. "Without viable answers, or possible solutions, to [these] questions, we would be abandoning a rule that has existed for over 70 years in favor of an 'unknown' which is rife with unresolved complications." *Id.* at 854, 576 P.2d at 392.

and costs.

Contribution among tortfeasors would be consistent with other actions of the Washington Legislature. In effect, the legislature repudiated the common law "clean hands" and "deter-

ence" doctrines supporting the no contribution rule when it adopted the comparative negligence statute. By implication, that statute emphasized the policies of equitable loss distribution and victim compensation. In addition, it demonstrated a legislative belief that factfinders are capable of apportioning fault among multiple parties. By adopting contribution, the legislature would advance the policies it has already adopted and would create conflict only with obsolete common law poli-

cies it has long rejected.

Washington's common law rule denying contribution is inequitable as among tortfeasors. Its interaction with the other-

wise beneficial doctrine of joint and several liability often causes one tortfeasor who is only partially at fault to bear the entire burden. Dean Prosser criticized the rule against contri-

(West Supp. 1975); CONN. GEN. STAT. § 52-577a(b) (1979); DEL. CODE ANN. tit. 10, §§

133. For a discussion of the common law clean hands requirement, see Comment, Contribution and Indemnity: Does the Right Exist Among Joint Tortfeasors When One is Liable On a Theory of Strict Liability?, 18 S. TEX. L.J. 572 (1977).


138. See text accompanying notes 143-54 infra.

139. W. PROSSER, supra note 12, § 50; Comment, supra note 137.
The best remedy for this situation is legislative adoption of a statute permitting contribution among tortfeasors.

Finally, contribution would have no adverse effect on the policies underlying product liability law. Once the defendants make the injured plaintiff whole, an equitable apportionment of the damages among the various defendants does not defeat those product liability policies. Contribution would, in fact, contribute to a more equitable risk distribution and increase the incentives on most parties for safety. Thus, the comparative fault policies, fairness among tortfeasors, and the product liability policies support legislative adoption of contribution among tortfeasors.

VII. JOINT AND SEVERAL LIABILITY

A fourth major area of proposed reform of product liability law is joint and several liability, a doctrine integrally involved with the contribution issue. Joint and several liability, the common law doctrine holding each of the jointly liable parties individually liable for the whole judgment where the harm is indivisible, is well established law in Washington. It involves the

140. W. Prosser, supra note 12, § 50, at 307 (citations omitted).
141. Comment, supra note 137, at 1024.
142. Consistent with the comparative negligence statute, Wash. Rev. Code § 4.22.010 (1979), and the comparative fault this comment recommends, Washington should adopt the variety of contribution that allocates the burden among the tortfeasors in proportion to their relative fault. See Comment, Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases, 10 St. Mary’s L.J. 587 (1979).
defendants' liability to the injured party, whereas contribution involves the relationships between those the court has found liable. The joint and several liability doctrine is commonly misunderstood as imposing the full burden upon one defendant in all cases. In fact, where time or space separates the multiple torts, the burden is upon the plaintiff to segregate the harm and then proceed against each defendant for only that defendant's allocable share. Even where the torts are concurrent in time and space, the plaintiff must show that the harm is not divisible among the defendants. If the plaintiff does not or cannot segregate the harm, then the defendants have an opportunity to do so. If the court finds the harm divisible, the doctrine of joint and several liability does not apply, limiting the plaintiff's recovery from each party to only that party's allocable share of the total damages. Still, the plaintiff must prove that each defendant was a proximate cause of the harm. Thus, joint and several liability applies under present law only when none of the parties can demonstrate to the court a rational basis for allocating damages among the various defendants.

The 1979 legislative proposals would have abolished joint and several liability. Supporters of the proposed change argue that the doctrine unfairly burdens one defendant with the entire cost of the plaintiff's injury, and that it is unnecessary under a comparative fault scheme. By adopting contribution, the legislature would emasculate the first argument, by permitting the joint defendants to collect proportionate shares from each other. The disproportionate burden argument then no longer would support abolishing joint and several liability.

The argument that joint and several liability is unnecessary

Wash. 2d 498, 348 P.2d 403 (1960).


148. See note 147 supra.


152. See text accompanying notes 127-42 supra.
under a comparative fault system raises the policy question of equitable risk distribution.\footnote{153. See text accompanying note 24 supra.} Someone must perform the task of securing contribution from each party at fault; the common law leaves that task to the defendants to resolve among themselves.\footnote{154. See note 143 supra.} The advocates of change would shift the collection burden to the injured party, forcing the plaintiff to secure judgment against each defendant individually for each individual’s share of the judgment. But that collection process could cost the plaintiff more than the amount ultimately obtained. Defendants could often completely thwart the plaintiff’s recovery by refusing to assist in segregating the damages or by pointing to each other as the sole cause. An additional consequence of abolishing joint and several liability would be that the injured party would have to bear the burden of an insolvent defendant. As a matter of policy, the common law allocates the collection and insolvency burdens to the parties at fault; in the interest of fairness, the legislature should not disturb that allocation. Because the common law doctrine of joint and several liability works fairly, because the doctrine of contribution will mitigate the disproportionate distribution of costs among multiple defendants, and because policy considerations dictate allocating the collection burden to defendants at fault, the legislature should leave the doctrine of joint and several liability to develop through the common law process.

VIII. Statute of Repose

A fifth area of proposed reform of product liability law is adoption of a statute of repose,\footnote{155. See Phillips, supra note 1, for a well-reasoned analysis of the distinctions between a statute of limitations and a statute of repose. This comment’s opposition to a statute of repose does not detract from the fact that the legislature, as a corollary to adopting a single definition of the product liability cause of action, should also adopt a single statute of limitations for all such cases. See Sherman, supra note 49.} the most coveted item on the manufacturers’ wish list and the most harmful proposal from the consumers’ viewpoint. A statute of repose is a fixed limitation period running from the date of manufacture or the date of entry of the product into the market,\footnote{156. Phillips, supra note 1, at 663-66.} whereas a statute of limitations requires the plaintiff to initiate suit within a given
period after the claim accrues. The impetus for reform in this area has generally arisen from those occasional situations where manufacturers have had to litigate cases alleging defects in products that were many years old at the time of injury. Manufacturers are concerned that even a successful defense may be quite expensive, and the possibility of losing may create pressures to settle cases they might win with enough time and money. They argue that the law should not permit plaintiffs to sue on an old product, that no one can make products that last forever, and that after a product has had time to wear out, the manufacturer should not be liable. Thus, the goal is to shield manufacturers from claims arising many years after the product enters the market.

This interest of manufacturers in statutes of repose stands in stark contrast to the interests of consumers, and is in discord with the tradition of the common law. The policy behind statutes of limitations is to penalize a plaintiff's failure to pursue his cause of action within a reasonable time after it accrues and, thus, to protect the courts and defendants from stale claims.

159. Id.
160. Id. at 613.

The U.P.L.A. drafters formulated the rationales for a statute of repose somewhat differently:

The rationale of such statutes is threefold. First, the fact that a product has been used safely for a substantial period of time is some indication that it was not defective at the time of delivery. Second, if a product seller is not aware of a claim, the passing of time may make it extremely difficult to construct a good defense because of the obstacle of securing evidence . . . . The third rationale is that persons ought to be allowed, as a matter of policy, to plan their affairs with a reasonable degree of certainty . . . . There is always the possibility that the number of claims for older products will increase.


161. Although no reliable data is available, there are indications that such long-tail claims are not a significant problem. Of the cases surveyed by the Federal Interagency Task Force on Product Liability, in the machinery category, the second fastest growing segment, only 11 of 28 cases occurred more than nine years after manufacture. NATIONAL TECHNICAL INFORMATION SERVICE, U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT II-79 (1978) [hereinafter cited as FINAL REPORT]. In the automobile category, the fastest growing segment, approximately half the cases arose within the first year, approximately 90% within the first four years, and only three of 117 cases arose after more than ten years. Id.


163. Note, When the Product Ticks: Products Liability and Statutes of Limita-
Unlike a traditional statute of limitations, which focuses on the plaintiff's conduct in not asserting his claim in a timely manner, a statute of repose constitutes a substantive immunity from suit focusing on the age of the product, which is beyond the plaintiff's control.\textsuperscript{164} The effect of a statute of repose would be to suppress the merits of the claim behind an arbitrary procedural barrier.\textsuperscript{165}

By potentially barring suit even before an injury occurs,\textsuperscript{166} and in some cases before the plaintiff's initial contact with the product,\textsuperscript{167} statutes of repose are unfair to plaintiffs. Such limitations alter the balance of rights in favor of the manufacturer, denying recovery not because of the merits of the claim or the plaintiff's conduct, but because the product was beyond a certain arbitrary age.\textsuperscript{168} Such a denial of the right to assert an otherwise valid claim for compensation for injury is patently unfair. The already difficult requirement that plaintiffs must prove the product was defective when it left the defendant's control adequately protects the manufacturer from claims based on old products.\textsuperscript{169} The manufacturer derives sufficient benefit from the increased difficulty of the plaintiff's burden of proof as time passes.\textsuperscript{170}

A statute of repose also would be inconsistent with the underlying policies of product liability law.\textsuperscript{171} It would be con-
trary to the policy of risk distribution in that a repose statute would leave individual plaintiffs to bear the full burden of product-related injuries after an arbitrary point in time. 172 Similarly, a statute of repose would be inconsistent with the consumer protection policy by failing to account for the complexity of our modern society, a society extremely reliant upon remote manufacturers to supply most consumer and industrial products. Generally, manufacturers are far more able to protect against consequential damages than are injured plaintiffs. 173 Such date-of-sale limitations would provide incentives for manufacturers not to report known defects and instead to remain quiet until the statutory period expired. 174 Thus, "rather than protecting innocent manufacturers from unwarranted claims, the adoption of [a statute of repose] may result in shielding clearly culpable defendants from the valid claims of severely injured plaintiffs." 175 Likewise, a statute of repose would be inconsistent with the safety incentive policy 176 by removing the need to make products safer. The manufacturer would not need to strive for durability, but merely to make products that would last for the statutory period. 177 Manufacturers do base design decisions on product and component life, and when liability is unlimited, economic motives occasionally compel a decision for longevity. 178 However, when manufacturers know they are not liable after a certain period of time, the incentive to prolong the product's safe life dissipates. 179 Therefore, because it would disserve the underlying policies of product liability law, the legislature should not adopt a statute of repose. 180

173. Massery, supra note 164, at 542.
174. See id. at 543.
175. Id. at 544.
176. Elfin, supra note 166, at 326.
177. Massery, supra note 164, at 544.
178. Note, supra note 163, at 714.
179. Id.
180. Some commentators have argued that a statute of repose may violate the constitutional guarantees of equal protection and due process. See Massery, supra note 164; Note, supra note 163, at 717-24. See also Knapp & Lee, Application of Special Statutes of Limitations Concerning Design and Construction, 23 St. Louis U.L.J. 351 (1979). Under traditional constitutional analysis, however, the courts would probably sustain the constitutionality of a repose statute. See, e.g., McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."). Nevertheless, because a number of state supreme courts have found similar statutes applying to the construction industry unconstitutional by
A statute of repose also would treat different manufacturers disparately. Several factors cause the lives of products to vary: frequency of use, conditions under which they are used, adequacy of maintenance, and the characteristics and habits of the individual user.\textsuperscript{181} The manufacturer of long-life products could escape liability during a long period when the product should function safely, while the manufacturer of less durable products might have to defend a strict liability action years after the product's reasonably expected useful safe life had expired.\textsuperscript{183} It is therefore apparent that such a limitation period would not be fair as among manufacturers.

In an effort to overcome the inadequacies of a fixed term statute of repose, various groups have proposed a \textit{useful safe life} approach.\textsuperscript{183} These proposals would bar all claims arising after the product's useful safe life has expired.\textsuperscript{184} The problems with a useful safe life statute of repose are deciding who will set the various standards\textsuperscript{185} and deciding how the designated party will arrive at a decision.\textsuperscript{186}

Proponents of a useful safe life statute of repose have suggested at least three approaches to the problem of designating a standard-setter. Manufacturers could set the standards through disclaimers on product labels, but that would serve as a disincentive for improving product life-expectancies.\textsuperscript{187} Manufacturer disclaimers would be subject to manipulation by establishing

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\textsuperscript{181} Phillips, \textit{supra} note 1, at 673.
\textsuperscript{182} Comment, \textit{supra} note 17, at 570.
\textsuperscript{183} See, e.g., U.P.L.A., \textit{supra} note 3, \textsection 110(A). The U.P.L.A. drafters, in their apparent haste to give every group what it wanted, proposed both a useful safe life statute of repose, \textit{id}., and a fixed term statute of repose expressed in terms of a rebuttable presumption with a number of express exceptions, \textit{id}. \textsection 110(B). This comment will not address the confusion, protracted litigation, and possible harm that might result from that superimposition. The drafters' error, however, does not detract from the value of the U.P.L.A. useful safe life proposal for comparative purposes.
\textsuperscript{184} The U.P.L.A. proposal provides: "[A] product seller shall not be subject to liability to a claimant for harm . . . if the product seller proves by a preponderance of the evidence that the harm was caused after the product's 'useful safe life' had expired." \textit{Id}. \textsection 110(A)(1).
\textsuperscript{185} Gingerich, \textit{supra} note 46, at 288; Comment, \textit{supra} note 17, at 570-74.
\textsuperscript{186} Gingerich, \textit{supra} note 46, at 288; Comment, \textit{supra} note 17, at 570-74.
\textsuperscript{187} Comment, \textit{supra} note 17, at 570-74.
self-servingly short periods.\textsuperscript{188} The probable result would be increased litigation on the reasonableness of the period set, before reaching the merits of the claim. Another suggestion would entrust the standard-setting responsibility to an independent agency.\textsuperscript{189} While such an agency might be more neutral, it would still be susceptible to undue influence by the manufacturers it regulated.\textsuperscript{190} Such influence could be indirect, such as controlling access to information and influencing the selection of samples for testing, as well as direct. In addition to the new litigation an agency's standard-setting would generate, this method inevitably would result in a huge bureaucracy to evaluate and reevaluate millions of products, with the usual bureaucratic slowness and meaningless paper shuffling. Finally, the U.P.L.A. drafters proposed that the courts determine the useful safe life of each product on a case-by-case basis.\textsuperscript{191} Although the U.P.L.A. proposal presents fewer problems than the other useful safe life proposals, it would place a heavy burden on the already overloaded court system. The result would be longer trials and appeals and additional costs to the parties in legal fees and experts to litigate the life expectancy issue prior to reaching the merits of the plaintiff's claim. Rather than averting litigation, the U.P.L.A. proposal would invite it because the court would make the useful safe life determination only after the trial was complete. While the plan might discourage some plaintiff suits

\textsuperscript{188} Id.

\textsuperscript{189} Id.

\textsuperscript{190} Id. at 573.

\textsuperscript{191} See U.P.L.A., supra note 3, § 110(A). The U.P.L.A. states that:

[A] product seller shall not be subject to liability to a claimant for harm under this Act if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired.

Examples of evidence that is [sic] especially probative in determining whether a product's useful safe life had expired include:

(a) The amount of wear and tear to which the product has been subject;

(b) The effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;

(c) The normal practices of the user, similar users, and the product seller with respect to the circumstances, frequency, and purposes of the product's use, and with respect to repairs, renewals, and replacements;

(d) Any representations, instructions, or warnings made by the product seller concerning proper maintenance, storage and use of the product or the expected useful safe life of the product; and

(e) Any modification or alteration of the product by a user or third party.

Id. § 110(A)(1).
because of the additional proof it would make necessary, it would also increase the pressure on manufacturers to settle questionable cases to avoid the higher costs of litigation. Thus, the problem of who would determine the useful safe life of products is insurmountable.

Proponents of a useful safe life statute of repose have failed to propose a workable methodology for setting the various standards. The task of wear-dating all products for all situations could prove very difficult, if not impossible. The issue of whether to date the final product as a unit or to date each component part would be in constant dispute. The useful safe lives of identical products vary according to conditions of use, such as temperature and humidity, and according to the frequency of use. Even a standard useful safe life for just one product could not account for all the variables. The difficulty becomes even greater for new and recent products without a historical data base upon which to make a judgment. Predictions necessarily would become ad hoc and arbitrary. Every decision would be an invitation to additional litigation, increasing costs to all parties, often without reaching the merits of the claim. Thus, the superficial appeal of a useful safe life statute of repose dissolves in light of the problems inherent in its application.

A serious policy question concerning adoption of any type of repose statute is how to deal with the need for exceptions or tolling provisions. Courts and legislatures have long recognized that certain circumstances beyond the plaintiff's control, such as infancy, insanity, or imprisonment, and certain acts by the defendant, such as absence from the jurisdiction, should toll any limitation statute. In addition to such obvious exceptions, a number of others would logically carry over from existing law. These include continuing duties and subsequently arising duties, where denial of tolling would encourage manufacturers to delay warning or repair of defects. Instead, they would have an incen-

192. Comment, supra note 17, at 573.
193. Id.
194. Id.
195. Id.
tive to wait until the statute had run to escape liability. Where the product causes cumulative injuries, such as those involving drugs and chemicals, and where the injury is not discoverable for many years, fairness demands an exception. Finally, an exception is necessary to permit claims for contribution and indemnity. A statute of repose would give the state a choice between two undesirable alternatives. If the legislature and the courts permitted exceptions, the exceptions either would swallow the rule, or they would result in random application of the statute of repose, which would at best be arbitrary. On the other hand, prohibition of exceptions would freeze common law development and would cut off many valid claims before plaintiffs could assert them. It seems unreasonably harsh to cut off a large number of such claims prematurely by operation of a repose statute in combination with the normal delays in the judicial system. This need for exceptions is another powerful argument against adopting a statute of repose.

Even if the legislature were to overcome all the above objections to a statute of repose, it would have to deal with the fact that such a statute might not help manufacturers in the manner intended. It would not necessarily result in lower product liability insurance premiums, because few product injuries occur after the six to ten year period usually suggested. Indeed, the best information available indicates that less than three percent of all product liability claims result from products more than six years old. Therefore, the public relations cost of cutting off an occasional meritorious but late-developing claim may well exceed the value to manufacturers of the certainty of not having to defend

199. Id. at 667-69.
200. Id. at 670-71.
201. Id. at 672.
202. Id.
203. Id.
204. Final Report, supra note 161, at VII-20 to -21; Gingerich, supra note 46, at 287; Massery, supra note 164, at 545.
205. "[P]roducts liability insurance claims are rarely based on older products. Only 1.8% of the property damage claims and 2.6% of the bodily injury claims studied were based on products sold more than six years before the injury occurred." Note, supra note 168, at 151 (citing Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results (1977)). The study examined claims filed with 23 major United States product liability insurers between July 1, 1976 and March 15, 1977. Id. at 151 n.17. The study is important because the insurance industry initiated it and the industry's ratemaking agency conducted it. Massery, supra note 164, at 542 n.40.
those occasional claims.

Thus, the reasons for rejecting a proposed statute of repose outweigh the arguments supporting such a statute. It would be inconsistent with the policies behind limitation statutes, it would seek to further protect product sellers who already have adequate protection, and it would unfairly burden injured plaintiffs. A repose statute would violate all of the underlying policies of product liability law. The alternative useful safe life proposal is unworkable. Under any formulation the problem of accommodating exceptions and tolling provisions would prove insurmountable. Even if someone could resolve these problems, there is no evidence a statute of repose would accomplish its objectives. For these reasons, the Washington Legislature should not adopt a product liability statute of repose.

IX. CONCLUSION

In conclusion, careful consideration of the proposals for legislative reform, in light of the important product liability policies, suggests the legislature should adopt a single, clear definition of the product liability cause of action, a comparative fault statute, and the doctrine of contribution among joint tortfeasors. On the other hand, these same policies require retaining the doctrine of joint and several liability and rejecting proposals for a statute of repose. Clearly, the Washington State Legislature faces a difficult and complex task in dealing with the polarized interest groups. However, the legislature can rise above the fray by adopting three simple and direct measures to correct the real problems with the common law of product liability while preserving the remainder of that common law and the policies it implements. By keeping in mind the underlying policies of risk distribution, consumer protection, and safety incentive, the legislature can further those policies while addressing the problems of uncertainty, lack of predictability, and inequities in the balancing process.

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206. See text accompanying notes 23-28 supra.