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Stargazing: The Future of American Products Liability Law

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COMMENTARY

STARGAZING: THE FUTURE OF AMERICAN PRODUCTS LIABILITY LAW

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INTRODUCTION

Over the past decade the authors have had the privilege of publishing numerous monographs on the pages of this Review. In earlier years we published separately;[1] more recently, we have jointly authored articles on the subject of products liability.[2] Drawing on this work, including especially our most recent jointly authored piece in this issue, we now wish to predict the future. All scholarship has a predictive quality to it. By offering a convincing hypothesis, an author seeks to persuade the reader that the line of analysis set forth deserves adoption. However, there are times in the lives of academics when the world, so to speak, comes crashing in on them. It is no longer sufficient to offer marginal alternatives for consideration. One sometimes reaches the point where the outline is clear and the picture unclouded. We conclude, for better or worse, that we have reached such a point.

Predicting the future is an ultrahazardous activity. Especially if one eschews the terms of the fortune teller and speaks in unambiguous language, one invites disaster. Yet to remain tentative at a time when we believe that clear prediction is in order would be intellectually dishonest. What follows, therefore, is more than a retrospective of the conclusions that we have reached on the pages of this and other law reviews.[3] It is

[1] Henderson, Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality, 58 N.Y.U. L. Rev. 765 (1983); Henderson, Should a "Process Defense" Be Recognized in Product Design Cases?, 56 N.Y.U. L. Rev. 585 (1981); Twerski, Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts, 57 N.Y.U. L. Rev. 521 (1982) [hereinafter Twerski, Seizing the Middle Ground]; Twerski, Weinstein, Donaher & Piehler, In Defense of Process, 56 N.Y.U. L. Rev. 616 (1981); Twerski, Weinstein, Donaher & Piehler, Shifting Perspectives in Products Liability: From Quality to Process Standards, 55 N.Y.U. L. Rev. 347 (1980).

[2] Henderson & Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. Rev. 1263 (1991) [hereinafter Henderson & Twerski, Closing the Frontier]; Henderson & Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. Rev. 265 (1990) [hereinafter Henderson & Twerski, Doctrinal Collapse].

[3] The following is a partial listing of the authors' other publications that have particular relevance to the predictions made herein: Henderson, Expanding the Negligence Concept: Retreat from the Rule of Law, 51 Ind. L.J. 467 (1976); Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531

our statement as to where the world of products liability is now and where it inevitably must be in the foreseeable future. We are somewhat emboldened in this endeavor because five years ago we tried our hands at prognostication in an endnote to our products liability casebook.[4] Gamblers are notorious for expecting dumb luck to continue. Nonetheless, in the face of the law of small numbers,[5] we engage in some star gazing.

I

DEFECT

Almost a half-century ago, Mr. Justice Traynor, concurring in a famous products liability decision, suggested that strict liability apply in manufacturing defect cases.[6] He argued that the law should confess to what already had become a reality. Res ipsa loquitur effectively had made proof of negligence, in cases where defect was established, a mirage. Traynor, of course, was correct. And he was correct again almost twenty years later when he placed the right to a defect-free product squarely within the parameters of tort law.[7] From that point on, products liability law has been in a tither because courts have sought to transplant the concept of strict liability from manufacturing defects to generic defects—that is, design defects and failures to warn.[8] Traynor himself was at least partially responsible for this confusion.[9] After a quarter-

(1973); Twerski, A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution, 18 U. Mich. J.L. Ref. 575 (1985); Twerski, Weinstein, Donaher & Piehler, The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age, 61 Cornell L. Rev. 495 (1976).

[4] See J. Henderson & A. Twerski, Products Liability, Problems and Process 836-37 (1987) ("We believe that the tort system will begin to constrict the currently open-ended definition of defect in design litigation. Not only will courts abandon the crazier tests for defect such as 'the manufacturer is a guarantor of product safety,' and 'products must meet consumer expectations,' but they will also begin to bring risk-utility balancing under control. Courts will stop talking about 'strict liability' in design and warning cases.").

[5] See Tversky & Kahneman, Belief in the Law of Small Numbers, 76 Psychological Bull. 105, 106 (1971) (discussing gambler's fallacy).

[6] See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

[7] See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

[8] The text of Restatement (Second) of Torts § 402A (1965), does not explicitly state that it applies to design and warnings claims. But its comments, especially comments h, i, j, k, and p, make clear that the drafters intended that result. And courts have followed this intent ever since. See, e.g., Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 132-33, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 441-42 (1972).

[9] Justice Traynor's failure to define clearly the defect concept in *Greenman*, see 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701, and his failure to identify whether the defect was a production or design defect, see id. at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701, resulted in considerable confusion. The use of a consumers-expectation test for defect which Traynor seems to adumbrate in *Greenman*, may be appropriate for production-defect cases. It is of

century of experience, we now know that strict liability has almost no meaning in defining defectiveness in generically dangerous product cases. It provides no standard for measuring liability. Only risk-utility balancing can serve as a workable standard for defining defect. Admittedly, some courts still pay allegiance to other tests,[10] and some foolishly insist on making distinctions without a difference.[11] But nothing is to be gained by hedging on this issue. Risk-utility, without doubt, will emerge victorious as the liability standard in generic defect cases.[12] And we might as well acknowledge that once risk-utility becomes the operative theory in generic litigation, negligence will reign supreme.[13]

We undoubtedly will be treated to a period of confused decisions until the courts give up on the charade. It took almost a decade for courts to understand that "malice" under *New York Times Co. v. Sullivan* did not mean "malice" but rather "knowledge of falsity or reckless disregard of the truth."[14] Similarly, it will take a while until the senseless rhetoric of strict liability is purged from generic defect litigation. But it shall come. It must. False logic has a limited life expectancy.

The truly interesting question is not whether the theoretical base for generic defect litigation will come to rest within negligence doctrine but rather, given the negligence framework, what limits courts will set on such litigation. We have a firm prediction on this matter as well. It will

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questionable utility in design-defect litigation. See Henderson & Twerski, Closing the Frontier, supra note 2, at 1293-96.

[10] For jurisdictions that apply the consumers-expectation test, see Henderson & Twerski, Closing the Frontier, supra note 2, at 1293 n.118. For discussion of the other idiosyncratic tests for defect, see id. at 1291-93, 1295-96.

[11] See, e.g., Anderson v. Owens-Corning Fiberglass Corp., 53 Cal. 3d 987, 993-1000, 810 P.2d 549, 552-59, 281 Cal. Rptr. 528, 531-36 (1991) (holding that there would be no liability for failure-to-warn of unforeseeable risks, but insisting that there was distinction between negligence and strict liability). For a critique of this position, see Henderson & Twerski, Doctrinal Collapse, supra note 2, at 275-76.

[12] See J. Henderson & A. Twerski, supra note 4, at 836-37 (predicting this standard for design and warning cases).

[13] The strongest judicial statement to this effect was made in Prentis v. Yale Mfg. Co., 421 Mich. 670, 691, 365 N.W.2d 176, 186 (1984) ("[W]e adopt, forthrightly, a pure negligence, risk-utility test in products liability actions against manufacturers of products, where liability is predicated upon defective design.").

[14] In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court established the "knowledge of falsity or reckless disregard of the truth" standard as the constitutional liability standard for suits brought on behalf of public officials. See id. at 279-80. Regrettably, the Court used the words "actual malice" as the label for the more specific liability test. See id. It cleared up the confusion in St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."). But several years later Prosser bemoaned the confusion spawned by use of the term "malice." See W. Prosser, Handbook of the Law of Torts § 118, at 821 (4th ed. 1971) ("It is certainly highly unfortunate that the Court chose to cling to the discredited term 'malice,' which has meant all things to all men, and is here highly misleading. A much better word would have been scienter . . . .").

be "leaner and meaner" than it was in the seventies and early eighties. Courts, assisted here and there by legislatures, will shift more of the responsibilities for managing generic risks to product users and consumers.

In one area of generic defect litigation, prophecy is almost unnecessary. Design-defect litigation already has become more balanced. State-of-the-art statutes, or common-law defenses that are their functional equivalents, are already the law in most jurisdictions.[15] Courts are demanding that experts demonstrate the feasibility of alternative designs.[16] State court decisions calculated to expand the limits of liability have been subject to legislative override.[17] One of the authors, in an article in this Review, suggested a structure for courts to follow to assure that design-defect litigation be held within proper restraints.[18] Evidence suggests that courts are paying attention to the kinds of considerations set forth in that article.[19] Courts clearly are more concerned with the polycentricity of design cases and the open-ended nature of the decisions being forced upon them.[20]

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[15] See, e.g., Sturm, Ruger & Co. v. Day, 594 P.2d 38, 45 (1979), modified, 615 P.2d 621 (1980), on reh'g, 627 P.2d 204 (Alaska), cert. denied, 454 U.S. 894 (1981); Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 748 (Tex. 1980); Ariz. Rev. Stat. Ann. § 12-683(1) (1982); Iowa Code Ann. § 668.12 (West 1987); Ky. Rev. Stat. Ann. § 411.310(2) (Michie/Bobbs-Merrill Supp. 1990); La. Rev. Stat. Ann. § 9:2800.56 (West 1991); N.J. Stat. Ann. § 2A:58C-3(a)(1) (West 1987); Ohio Rev. Code Ann. § 2307.75(f) (Anderson Supp. 1989).

[16] See, e.g., Seese v. Volkswagenwerk, A.G., 648 F.2d 833, 843 (3d Cir.), cert. denied, 454 U.S. 867 (1981); Dawson v. Chrysler Corp., 630 F.2d 950, 957 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981); Huddell v. Levin, 537 F.2d 726, 737 (3d Cir. 1976); Crispin v. Volkswagenwerk, A.G., 248 N.J. Super. 540, 560, 591 A.2d 966, 975-76 (1991); Wilson v. Piper Aircraft Corp., 282 Or. 61, 69, 577 P.2d 1322, 1327-28 (1978).

[17] See Henderson & Twerski, Closing the Frontier, supra note 2, at 1315.

[18] See Twerski, Seizing the Middle Ground, supra note 1, at 526-27.

[19] See, e.g., Camacho v. Honda Motor Co., 741 P.2d 1240, 1246-47 (Colo. 1987) (considering factors such as usefulness of product, safety features, availability of substitute, ability to eliminate product's danger without impairing usefulness, user's ability to avoid danger, user's awareness of danger, and feasibility of manufacturer spreading loss in case involving motorcycle), cert. dismissed, 485 U.S. 901 (1988); Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410, 414 (Colo. 1986) (applying risk-benefit analysis focusing on practical policy issues in context of oral contraceptives); Prentis v. Yale Mfg. Co., 421 Mich. 670, 688, 365 N.W.2d 176, 184-85 (1985) (adopting negligence standard for design-defect cases; applying multifactor risk-utility balancing); Brown v. United States Stove Co., 98 N.J. 155, 165, 169-71, 484 A.2d 1234, 1239, 1241-42 (1984) (applying risk-utility analysis, considering evidence of product's usefulness and effect of alternate designs on product's utility). For further discussion on practical considerations as put forth by Professor Twerski and the trade-offs between these considerations and product safety, see Schwartz, The Role of Federal Safety Regulations in Products Liability Actions, 41 Vand. L. Rev. 1121, 1124 (1988); Siliciano, Wealth, Equity and the Unitary Medical Malpractice Standard, 77 Va. L. Rev. 439, 441, 443-45 (1991); Note, A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform, 14 Hofstra L. Rev. 319, 321 (1986).

[20] See, e.g., Bowman v. General Motors Corp., 427 F. Supp. 234, 242 (E.D. Pa. 1977) (noting that in cases where jury evaluates conscious design choices they are making judgments as to social acceptability of design choice trade-off); Przeradski v. Rexnord, Inc., 136 Mich.

We have little doubt that the attempts by some courts to use risk-utility analysis to impose liability on entire product categories in the absence of feasible alternative designs are doomed to failure. Thus, the movement to declare such products as cigarettes,[21] handguns,[22] and aboveground swimming pools[23] categorically defective will be over and done with well before the end of the century. As we explained in our most recent article in this Review, there is no intellectually respectable way to accomplish the imposition of product-category liability.[24] Similarly, the attempt to push failure-to-warn doctrine to extremes in order to impose liability in both cigarette and alcohol litigation is doomed to failure.[25] The implications for broad areas of litigation are so extensive, should such attempts be successful, that they will never happen. We should add to the list of dead-in-the-water causes of action the flurry of air-bag litigation.[26] All of these cases share a common denominator. They involve high-profile products with strong consumer demand whose dangers are well-known. They also are unpopular in some quarters. Courts will refuse to enter the political thicket to impose the kinds of liability that likely would spell the death knell to such products.

One further observation. Asbestos litigation has been a bitter pill for the American judicial system to swallow.[27] Instead of Congress creating a legislative solution to this horrific problem, it has been dumped on the courts. It has come close to crippling the entire litigation capabilities of the American judiciary. Courts will think long and hard before they once again allow such a litigation disaster through the cracks. Asbestos was factually unique. The dangers were hidden and the defen-

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App. 349, 352, 360, 356 N.W.2d 634, 635, 637-39 (1984) (raising issue of polycentricity in wrongful death action where woman's hair became entangled in mechanism of cement mixer); Owens v. Allis-Chalmers Corp., 83 Mich. App. 74, 79, 268 N.W.2d 291, 294 (1978) (holding that adjudication must play limited role in questioning design choices because of polycentric considerations involved in wrongful death action against forklift manufacturer), aff'd, 414 Mich. 413, 326 N.W.2d 372 (1982); Grundberg v. Upjohn Co., 813 P.2d 89, 95-96 (Utah 1991) (holding that questioning prescription drug design raises polycentric problems due to complex nature of drugs).

21 See, e.g., Dewey v. R. J. Reynolds Tobacco Co., 121 N.J. 69, 94-95, 577 A.2d 1239, 1252 (1990).

22 See, e.g., Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 773-75 (D.N.M. 1987), aff'd, 843 F.2d 406 (10th Cir. 1988).

23 See, e.g., O'Brien v. Muskin Corp., 94 N.J. 169, 175-79, 463 A.2d 298, 301-03 (1983).

24 See Henderson & Twerski, Closing the Frontier, supra note 2, at 1300-14.

25 See id. at 1322-26.

26 See, e.g., Wood v. General Motors Corp., 865 F.2d 395, 412, 416 (1st Cir. 1988), cert. denied, 110 S. Ct. 1781 (1990); Kelly v. General Motors Corp., 705 F. Supp. 303, 305 (W.D. La. 1988); Kolbeck v. General Motors Corp., 702 F. Supp. 532, 538-42 (E.D. Pa. 1988).

27 For a recent discussion of the history of the asbestos litigation and the havoc it has wrought on the court system, see In re Joint E. & S. Dist. Asbestos Litig., 129 Bankr. 710, 734-76 (E.D. & S.D.N.Y. 1991).

dants arguably malevolent. If such a set of facts should return to haunt us in the future, courts will have to cope. But they will not change the law in ways that generate such overwhelming spectacles on a routine basis. Thus to expect that courts will open their doors to litigating the fate of politically unpopular products such as cigarettes and alcoholic beverages, providing causes of action to hundreds of thousands of alleged victims, is fantasy. One way or another, these category-liability cases will be brought to heel.

The only area that remains truly troublesome is failure-to-warn. It has been the sleeper of products liability law. Precisely because it is so unpretentious, it has the ability to wreak havoc. After all, a warnings claim is so modest, asking only for a small tidbit of information that would inform the plaintiff of some risk or other. Only an ogre would deny consumers relevant information. Nonetheless, as we indicated in an earlier article in this Review, failure-to-warn products litigation only appears unpretentious.[28] In fact, it asks the judiciary to deliver a verdict on little more than empty rhetoric or say-so. Failure-to-warn must be recognized as a legitimate basis of liability. But courts will have to cut back on the more flighty warning cases. We predict that the next decade will bring to warnings cases what the last decade brought to design cases. Courts will deal more rigorously with claims that slight modifications in language would have altered consumer behavior and they will read the rule that one need not warn of obvious dangers much more broadly.

We are thus quite confident in our conclusion that generic products litigation will become "leaner and meaner" and almost certain that political attacks on controversial product categories will fail. How such attacks will be blunted is not of major importance. Federal preemption will play a role;[29] deference to government regulation will take on greater importance;[30] and more demanding standards for expert testimony will be forthcoming.[31] State legislative reform will continue in those states

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[28] See Henderson & Twerski, Doctrinal Collapse, supra note 2, at 289-311.

[29] For a discussion of the role of preemption in negating some forms of category liability, see Henderson & Twerski, Closing the Frontier, supra note 2, at 1277 n.61. A significant number of courts have declared the air-bag litigation to be preempted. See cases cited in note 26 supra. Given the enactment of the Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, 102 Stat. 4517, 4518 (1988), it is likely that all post-1988 alcohol beverage failure-to-warn claims will be preempted.

[30] See, e.g., Moore v. Kimberly-Clark Corp., 867 F.2d 243, 245-46 (5th Cir. 1989); Grocery Mfrs. of Am., Inc. v. Gerace, 755 F.2d 993, 1001-03 (2d Cir.), aff'd, 474 U.S. 801 (1985); Bejarano ex rel. Bejarano v. International Playtex, Inc., 750 F. Supp. 443, 446 (D. Idaho 1990). But see Schwartz, supra note 19, at 1163-68 (rejecting tort reform proposals calling for federal product safety standards).

[31] Commentators have taken note of the more restrictive attitude of courts to expert testimony. See, e.g., Epstein & Klein, The Use and Abuse of Expert Testimony in Product Liability Actions, 17 Seton Hall L. Rev. 656, 657 (1987); Hoenig, Drawing the Line on Expert

that have idiosyncratic doctrines.[32] There will be understandable pressure to bring such states within the mainstream.

II

CAUSATION

The move to proportionalization in the law of torts has an inexorable quality about it. Comparative fault is now the law in forty-five jurisdictions.[33] It has all but wiped out such venerable doctrines as last clear chance[34] and assumption of risk.[35] As the Uniform Comparative Fault Act indicates, it has carved a significant chunk out of proximate cause.[36] Beginning with the landmark case of *Herskovits v. Group Health Cooperative*,[37] it increasingly has been suggested as a method for resolving difficult cause-in-fact questions. In several major areas of litigation, courts have utilized proportionalization to resolve the problem of the indetermi-

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Opinions, 8 J. Prod. Liab. 335, 344-45 (1985). Several courts have gone out of their way to castigate expert testimony that is not well-founded. See, e.g., Chaulk by Murphy v. Volkswagen of Am. Inc., 808 F.2d 639, 643-45 (7th Cir. 1986) (Posner, J., dissenting); Rubinstein v. Marsh, Prod. Liab. Rep. (CCH) ¶ 11,624, at 33,026, 33,030 (E.D.N.Y. Dec. 10, 1987).

[32] For example, Pennsylvania, which follows Azzarello v. Black Bros. Co., Inc., 480 Pa. 547, 391 A.2d 1020 (1978), has been targeted by manufacturers for legislative reform. S. 400, Pa. (Feb. 11, 1991) (proposed amendment to title 42) (on file at New York University Law Review). Precisely because Pennsylvania's law is so idiosyncratic there is a fair likelihood that some form of the products liability reform legislation pending in the state legislature will be enacted.

[33] Only Alabama, Maryland, North Carolina, South Carolina, and Virginia have not enacted some form of comparative fault. H. Woods, Comparative Fault § 1:1 (2d ed. 1987 & Supp. 1991).

[34] Only a handful of states have retained the last clear chance rule subsequent to their adoption of comparative negligence. Id. § 8.3.

[35] See, e.g., Wilson v. Gordon, 354 A.2d 398, 401-02 (Me. 1976); Wentz v. Deseth, 221 N.W.2d 101, 104-05 (N.D. 1974); McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 378, 113 N.W.2d 14, 16 (1962); Brittain v. Booth, 601 P.2d 532, 534 (Wyo. 1979); Ariz. Rev. Stat. Ann. § 12-2505(a) (Supp. 1990); Ark. Stat. Ann § 16-64-122 (1987 & Supp. 1991); Conn. Gen. Stat. Ann. § 52-572h(c) (West Supp. 1991); N.Y. Civ. Prac. L.&.R. 1411 (Consol. 1978). Some courts continue to deny all recovery in cases of primary assumption of risk. See, e.g., Andren v. White-Rodgers Co., 465 N.W.2d 102, 105 (Minn. Ct. App. 1991); Turcotte v. Fell, 68 N.Y.2d 432, 432-38, 502 N.E.2d 964, 967, 510 N.Y.S.2d 49, 52 (1986); see also H. Woods, supra note 33, §§ 6:1-6:9 (noting that many states abolished or merged assumption of risk after adoption of comparative fault; only few specifically retained it).

[36] Unif. Comparative Fault Act § 2(b) (1977). The official comment to that section provides:

> In determining the relative fault of the parties, the fact-finder will also give consideration to the relative closeness of the causal relationship of the negligent conduct of the defendants and the harm to the plaintiff. Degrees of fault and proximity of causation are inextricably mixed, as a study of last clear chance indicates, and that common law doctrine has been absorbed in this Act. This position has been followed under statutes making no specific provision for it.

Id.

[37] 99 Wash. 2d 609, 664 P.2d 474 (1983).

nate plaintiff and the indeterminate defendant.[38] We have not seen the last of it.

We believe that in those areas where statistical and probabilistic information is scientifically acceptable,[39] courts will be pressed to utilize such information to help resolve causation issues on a proportional basis. This issue is still in its infancy. Having abandoned all-or-nothing approaches to damages assessment, it is almost inevitable that, as statistics become more readily available, courts will become increasingly more comfortable with them.

III

DAMAGES

No existing jurisprudence adequately explains why we make the kinds of awards we do in tort litigation.[40] To borrow from Mr. Justice Jackson's famous dicta in *Williams v. North Carolina*,[41] we allow for the transfer of billions of dollars in our tort system utilizing standards that

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[38] See, e.g., In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 819-43 (E.D.N.Y. 1984) (indeterminate plaintiff), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); Sindell v. Abbott Labs., 26 Cal. 3d 588, 610-13, 607 P.2d 924, 937-38, 163 Cal. Rptr. 132, 144-46 (indeterminate defendant), cert. denied, 449 U.S. 912 (1980). For a discussion of the impact of proportionalization, see generally Twerski, Market Share—A Tale of Two Centuries, 55 Brooklyn L. Rev. 869 (1989).

[39] The problem of scientific acceptability of statistical data has become a hot topic in the Bendectin litigation. See DeLuca by DeLuca v. Merrell Dow Pharmaceuticals, 911 F.2d 941, 955 (3d Cir. 1990) (assessment of reliability of statistical study "should be conducted with an eye to all the risks of error posed by the proffered evidence."). We believe that *DeLuca* notwithstanding, the courts are likely to rely heavily on scientific acceptability as the determining factor in directing whether a prima facie case has been made for tort recovery.

[40] The absence of academic literature on this subject is shocking. Only recently have academics begun to investigate the intellectual foundations for noneconomic-loss damages. See, e.g., Blumstein, Bovbjerg & Sloan, Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury, 8 Yale J. on Reg. 171 (1991); Bovbjerg, Sloan & Blumstein, Valuing Life and Limb in Tort: Scheduling "Pain and Suffering," 83 Nw. U.L. Rev. 908 (1989); Leebron, Final Moments: Damages for Pain and Suffering Prior to Death, 64 N.Y.U. L. Rev. 256 (1989); Note, Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie," 22 U. Mich. J.L. Ref. 303 (1989).

To date the judicial standards utilized for reviewing whether damages are excessive have been vague and unenlightening. See, e.g., Precopio v. City of Detroit, 415 Mich. 457, 465, 330 N.W.2d 802, 805 (1982) (asking whether award "shocks the judicial conscience, appears unsupported by the proofs, or seems to be the product of improper methods, passion, caprice or prejudice"); Atlantic Coast Line R.R. v. Withers, 192 Va. 493, 511, 65 S.E.2d 654, 664 (1951) (upholding damage award by jury where verdict did not shock court's sense of justice); see also W. Viscusi, Reforming Products Liability 87-116 (1991) (discussing problem of high damage awards in tort cases); Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 Law & Contemp. Probs. 219, 221 (1953) (suggesting crucial controversy is over damages); Plant, Damages for Pain and Suffering, 19 Ohio St. L.J. 200, 205 (1958) (noting problem of placing standards on pain and suffering damages).

[41] 317 U.S. 287 (1942).

would not pass scrutiny if they were used for the collection of a grocery bill.[42] But here, too, the lay of the law is changing.

Punitive damages are coming under much heavier scrutiny. Some twenty-five states have passed legislation limiting punitive damages.[43] A major American Bar Association report has suggested significant restrictions on punitives.[44] And the United States Supreme Court, while upholding punitive damages in general, has demanded that appellate courts scrutinize them with a jaundiced eye.[45]

As for caps on damages, the story is somewhat more mixed but the trend is quite clear. Several states have enacted legislative caps on noneconomic losses.[46] Some ceilings have not withstood constitutional challenge,[47] but others have survived.[48] The common-law rule allowing for joint and several tortfeasor recovery is now the minority rule in this country.[49] By limiting a defendant's liability to the percentage of its fault, the legislatures have accomplished significant capping albeit indirectly. Courts are getting the message. Appellate reversals of high trial awards are becoming more frequent and the cuts deeper than before.[50]

With the expansion of the common market and the breaking of trade barriers, the move to moderation in connection with damage awards will become even more aggressive.[51] It is debatable whether

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[42] Mr. Justice Jackson said: "In other words, settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill." Id. at 316 (Jackson, J., dissenting).

[43] For a listing of the relevant statutes, see J. Henderson & A. Twerski, Products Liability, Problems and Process 58-59 (Supp. 1989).

[44] American Bar Ass'n, Report of the Action Committee to Improve the Tort Liability System 15-19 (February 1987).

[45] See Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1035 (1991).

[46] See, e.g., Alaska Stat. § 09.17.010(b) (Supp. 1988) (cap of $500,000 per incident for noneconomic damages); Colo. Rev. Stat. § 13-21-102.5(3) (1987) (cap of $500,000 if clear and convincing evidence, otherwise $250,000).

[47] See, e.g., Smith v. Department of Ins., 507 So. 2d 1080, 1087-89 (Fla. 1987); Brannigan v. Usitalo, 587 A.2d 1232, 1233 (N.H. 1991).

[48] See, e.g., Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1330-32, 1336-38 (D. Md. 1989); Samsel v. Wheeler Transp. Serv., Inc., 246 Kan. 336, 362, 789 P.2d 541, 558 (1990).

[49] At last count, 34 jurisdictions had enacted some form of legislative modification of the common-law joint-tortfeasor doctrine. See J. Henderson & A. Twerski, supra note 43, at 10-11.

[50] See, e.g., Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1330 (2d Cir. 1990); see also D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, Trends in Tort Litigation: The Story Behind the Statistics 22 (1987) (discussing likelihood of reduction of jury awards); Hoenig, Product Liability Recent Developments, N.Y.L.J., Aug. 25, 1988, at 3 (same).

[51] See generally Cortese & Blaner, The Anti-competitive Impact of U.S. Product Liability Laws: Are Foreign Manufacturers Beating Us at Our Own Game?, 9 J.L. & Com. 167 (1989); Stiefel, Resolution of International Products Liability Disputes: An Emerging Procedural Framework, 16 Brooklyn J. Int'l L. 267 (1990); Thieffry, Doorn & Lowe, Strict Liability in the EEC: Implementation, Practice and Impact on U.S. Manufacturers of Directive 85/375, 25 Tort & Ins. L.J. 65 (1989).

American tort damages place American business at a competitive disadvantage.[52] We take no sides in that controversy. However, we believe that some simple facts will become clear in the next decade. We are the only country on the face of this globe that provides such high damages in tort cases.[53] Other legal systems view our awards as outrageous and unconscionable.[54] The United States has been unable to negotiate a treaty for recognition of its judgments abroad because other countries simply refuse to buy into our damages jurisprudence.[55] As we become members of a truly global economy, the pressure to bring our tort damages in line with those of the rest of the world will become significant. Conflict-of-law doctrine[56] and forum non conveniens practice[57] will reduce some of the pressure by forcing foreign plaintiffs to satisfy themselves with home state law. Nonetheless, we see a downward pressure on damages that will remain relentless for the foreseeable future. Whether one agrees with those pressures,[58] we predict that ultimately they will be felt.

IV

EMPIRICAL DATA REGARDING LIKELY TRENDS

The question arises: do the authors have empirical data to back their hunches? For that, too, there is a story. We first detected a shift in judicial attitudes while preparing a supplement to the first edition of our products liability casebook in the fall of 1988. "[W]e have a hunch that the courts have turned decidedly more conservative in the last two years

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[52] Compare Stayin, The U.S. Product Liability System: A Competitive Advantage to Foreign Manufacturers, 14 Canada-U.S. L.J. 193 (1988) (contending that American products liability law puts United States manufacturers at competitive disadvantage) and Cortese & Blaner, supra note 51 (same) with Croley & Hanson, What Liability Crisis? An Alternative Explanation for Recent Events in Products Liablity, 8 Yale J. on Reg. 1 (1990) (disputing existence of liability crisis) and Wagner, The Two Faces of Strict Liability: Strict Liability Isn't a Problem—It's a Solution, 19 Brief 13 (1989) (same).

[53] For a discussion of the unique liberality of the United States award system, see Stayin, supra note 52, at 195-97.

[54] See id. at 206.

[55] See E. Scoles & P. Hay, Conflict of Law 972 (1984 & Supp. 1988-1989).

[56] For an excellent discussion of the impact of choice-of-law doctrine on products liability, see R. Weintraub, Commentary on the Conflict of Law § 6.29 (3d ed. 1986 & Supp. 1991).

[57] For cases dismissing foreign tort plaintiffs on forum non conveniens grounds, see In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F.2d 195, 197 (2d Cir.), cert. denied, 484 U.S. 871 (1987); de Melo v. Lederle Labs., 801 F.2d 1058, 1059, 1062-64 (8th Cir. 1986); Bergquist v. Medtronic, Inc., 379 N.W.2d 508, 513-14 (Minn. 1986).

[58] There may be valid grounds for much higher damage awards in the United States. Many foreign countries have much more elaborate welfare and medical care schemes that provide broader and deeper protection to their citizenry than does the United States. See Cortese & Blaner, supra note 51, at 184-85. Higher tort recovery in the United States thus may serve to provide coverage for services covered by welfare systems in other more socialized economies.

[since the first edition appeared]."[59] At that juncture, Henderson teamed up with a colleague at Cornell, Ted Eisenberg, to determine whether empirical data would support our guess that there had been a turn in products liability law.[60] The result was an article that received considerable attention in both academic journals and the popular press.[61] The evidence supported our visceral reactions. After systematically reviewing thousands of published products liability decisions and tens of thousands of federal district court products filings from 1979 through 1988, it was clear that a "quiet revolution" was underway. Additional data gathered more recently, through 1990, reinforce that conclusion.[62]

CONCLUSION

For the reasons set forth, we believe that the quiet revolution in American products liability law will continue. Statutory changes may yet come at the federal level[63] and still others among the several states. But primary movement will come in the courts, which will continue to be tougher on claimants; it can go no other way. American judges have had to face the reality that the tort theater is more limited than they once believed. They have had to confront institutional limitations and have found them to be formidable. What will remain will not necessarily be an anemic tort system incapable of challenging and correcting grievous wrongs. With sharper focus and fewer distractions, American products liability may be better equipped than ever to provide appropriate incentives for product manufacturers and distributors to act responsibly in the public interest. But the days of wretched excess are over, very probably for the indefinite future.

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[59] J. Henderson & A. Twerski, supra note 43, at xv.

[60] See Henderson & Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479 (1990).

[61] See, e.g., Schuck, Introduction: The Context of the Controversy, in Tort Law and the Public Interest 17, 30 (P. Schuck ed. 1991); Viscusi, The Dimensions of the Product Liability Crisis, 20 J. Legal Stud. 149, 159 (1991); Cordtz, The Losers Lottery, Fin. World, Sept. 4, 1990, at 72, 72-74; Gest, Why the Injured Lose Suits, U.S. News & World Rep., April 8, 1991, at 15; Henriques, Friendlier Legal Climate for Insurers, N.Y. Times, Mar. 4, 1989, § 3, at 27; Labaton, Product Liability's "Quiet Revolution," N.Y. Times, Nov. 27, 1989, at D2.

[62] See Eisenberg & Henderson, Inside the Quiet Revolution, 39 UCLA L. Rev. — (1992) (forthcoming).

[63] Several bills are pending in Congress. See Product Liability Fairness Act of 1991, S. 640, 102d Cong., 1st Sess.; Fairness in Product Liability Act of 1991, H.R. 3030, 102d Cong., 1st Sess.