Tort Law: Expanding the Scope of Recovery Without Loss of Jury Control

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TORT LAW: EXPANDING THE SCOPE OF RECOVERY WITHOUT LOSS OF JURY CONTROL

David A. Fischer*

I. INTRODUCTION

Tort liability in the United States has been expanding at an accelerating rate since the turn of the century. Medical malpractice liability and products liability are the most notable examples of this expansion; however, liability has expanded significantly in many other areas as well. New actions have been created for wrongful life, wrongful birth, prima facie tort, refusal to settle, and wrongful discharge. We have also seen the law of negligence expand in

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many significant ways. Potential liability for mental distress and pecuniary loss is rapidly increasing. Furthermore, the scope of negligence liability generally is broadening due to the relaxation of traditional barriers to liability such as landowner immunities, status immunities, and contributory negligence as an absolute defense. Clearly, not all jurisdictions are following all of these trends, but a general movement toward greater liability is undeniable.

In recent years, potential defendants have become increasingly vocal in arguing that their liability exposure is so excessive that it adversely affects their willingness to engage in useful conduct. Such arguments cannot always be taken at face value; potential defendants have a strong economic incentive to protest all forms of liability, both reasonable and unreasonable. However, the dramatic expansion of liability lends credence to these claims. In fact, many eminent legal scholars have expressed concern that the traditional tort system is rapidly becoming a compensation system, and, as such, is unlikely to survive since the adversary system of justice cannot operate efficiently as a system of social insurance. Empirical evidence which would conclusively resolve the question whether tort liability has exceeded reasonable bounds in certain areas is as yet unavailable. However, the above concerns warrant an investigation into the changes that are taking place because of the possibility that they will cause adverse social effects.

This article will analyze the types of changes that are taking place by examining three expanding areas of tort law: liability for

6. See infra notes 20-110 and accompanying text.
7. See infra notes 111-41 and accompanying text.
negligently inflicted mental distress, negligently inflicted pure pecuniary loss, and harm caused by defective products. This examination will demonstrate that the scope of liability can be increased in at least two ways. One is by formally expanding the scope of existing causes of action, e.g., relaxing arbitrary barriers to liability or expanding the type of damages which may be recovered. A second method is by relaxing judicial control over the jury. This relaxation of control can take place in many forms. The least desirable form, and the one upon which this article will focus, occurs when a court submits a case to the jury under no standard or under standards so vague or couched in such general terms as to provide no real guidance. The effect of this is to permit—even force—the jurors to decide the case on a basis of their own choosing.

The thesis of this article is that the first method of expanding the scope of liability is often desirable, providing that social policy justifies the expansion and the limits on liability are clearly defined. On the other hand, the latter method of expanding the scope of liability is almost always undesirable because it permits cases to be decided on an ad hoc basis without reference to a uniform principle. Tort liability cannot successfully be used as a vehicle for implementing social policy unless the policy is uniformly implemented in every case. This can be accomplished only if a principled basis for decision controls each case and if the basis of the decision is one that is likely to further the underlying policy. The two methods of expanding the scope of liability are not mutually exclusive because a given change in the law can sometimes have both effects. Nevertheless, an analysis of some specific areas of tort law where these methods have been used, differentiating the two methods, can be helpful in formulating rules in other areas that implement social policy on a uniformly principled basis. Before we undertake this analysis, however, it will be useful to begin with some discussion of the need for uniformity and certainty in the development of rules of law and the roles of judge and jury in this development.

In determining the appropriate allocation of power between judge and jury it is useful to consider a paradox inherent in the lawmaking function. Each rule of law is the product of an attempt to achieve two conflicting and irreconcilable goals. One goal is the need to achieve certainty of result. Law is supposed to provide

14. Id.
guidance for people's behavior. Society would be stifled if people had no idea what sort of conduct was going to give rise to tort liability or if they had no idea how to enter into—or avoid entering into—legally enforceable business agreements. The other goal is the need for flexibility.\textsuperscript{15} A very rigid mechanical rule may work well in a typical case and yet result in a serious injustice in unusual cases.

Driving on the wrong side of the two-lane, two-way road in a no-passing zone provides an example of the tension between these two goals. Certainty of result would be maximized by a rule stating that a driver is always negligent if he drives in the left lane. Suppose, however, that a driver swerves into the left lane of such a street to avoid hitting a child who has darted into his path. Application of the rigid rule to such a driver to hold him negligent is clearly unjust. An alternative rule might be devised which leaves maximum flexibility so that justice to the defendant can always be achieved. Such a rule might be that people are negligent if they drive in an “inappropriate” lane of traffic. The problem with this rule is that it provides too little guidance. No driver could know for more than a minute in advance whether the left or right lane was appropriate because the decision would depend entirely upon what he found in front of him (oncoming cars, for example) at any given instant. It is obviously undesirable to attempt to achieve either goal to the complete exclusion of the other.

A middleground must be reached which necessarily results in a rule that is predictable in some cases and is flexible in others, the “gray area” cases. For example, the rule might provide that one must drive in the right lane unless there is an emergency that justifies swerving into the left lane. This rule achieves certainty to a degree because there are many cases which clearly do not constitute an emergency (swerving to avoid a slightly bumpy stretch of road), and there are some that clearly do constitute one (darting child). Flexibility is also achieved to a degree because the term “emergency” is sufficiently ambiguous so that some cases—the “gray area” ones—can fairly be determined either way (swerving to avoid hitting a dog).

The relative size of the “gray area,” compared to the area where the law is clear, will vary from rule to rule, depending on the relative need for certainty. For example, many contract rules will have smaller “gray areas” than many tort rules because people need

\textsuperscript{15} Id.
to be able to plan business transactions in advance, whereas torts by definition are usually unplanned. This article is concerned with the question of whether the discretion to determine how broad the "gray areas" ought to be in a given field of tort law and to resolve cases falling within the "gray areas" ought to lie with the judge or the jury.

In typical negligence cases these functions are shared. The judges set the parameters by defining the rule of law (e.g., reasonable care as the standard of conduct) and by regulating the kinds of cases the jury may consider. The jury also exercises discretion by evaluating the defendant's conduct and determining whether it is reasonable or unreasonable. This is distinguishable from its pure fact-finding function as an evaluation which obviously calls for the exercise of discretion.

At the time when the law of negligence developed, this division of power was quite appropriate. Tort law was regarded as a way of resolving disputes among individuals. The court determined that fault was required in some cases and not in others. In those cases where liability was based on fault the jury was a very appropriate body to evaluate the conduct and determine whether it was reasonable or not. This judgment is merely a reflection of community values, and the jury is apparently just as qualified as the judge to determine whether the conduct was reasonable, at least in the type of simple accident cases that often arose in those days. When judges felt that certain classes of defendants needed special protection for policy reasons, they were free to intervene by devising arbitrary rules that would prevent the jury from having an opportunity to decide many of these cases. For example, special immunities were created to protect landowners and governments, and special defenses were created to protect employers.16 In addition, certain general immunities were derived which apply to all defendants. For example, liability for pecuniary loss and mental distress was generally denied unless accompanied by physical harm.17

It is not clear that juries have always exercised their discretion in an impartial manner. Many commentators have noted that juries are often plaintiff-oriented.18 Judges, however, do possess some

17. See infra notes 21, 112 and accompanying text.
18. That juries are often plaintiff-oriented has been noted by various commentators. See, e.g., G. E. White, Tort Law in America: An Intellectual History 77-78; Landes &
power to protect the parties from incorrect verdicts that are based on such biases. The power to direct verdicts, for example, enables judges to deny juries the opportunity to decide cases in which a finding of negligence would be unreasonable. This is an important protection for defendants because it prevents a large class of cases from reaching the jury room. Furthermore, judges may set aside verdicts as being against the weight of the evidence.

Although this approach to allocating power continues to be used today, it is inappropriate in many cases. Tort law today is often thought of as a method of social engineering—encouraging socially or economically useful behavior, deterring wasteful or inefficient behavior, spreading accident costs—rather than as simply a method for resolving unrelated disputes among private individuals. To succeed as a method of social engineering, however, such a tort system must operate as an integrated whole, with desirable policies defined clearly and pursued consistently and uniformly. This can only be done when such policies are implemented by someone with the ability to create clear guidelines but who at the same time is sufficiently constrained by the system to ensure the desired consistency and uniformity. An examination of how such policies have been implemented in three areas of tort law will demonstrate that more often it is the judge, not the jury, who must have that power.

II. DAMAGES FOR MENTAL DISTRESS

The traditional common law rule is that there is no duty to protect another person from negligently induced mental distress. Such damages can be recovered only if they are parasitic to another recognized injury. Thus, one who negligently inflicts physical harm is responsible for resulting mental harm as well. Courts have given several reasons for the traditional rule. First, it is undesirable to give a remedy for trivial claims. Second, fraudulent claims are somewhat more likely in the case of mental distress than physical harm since such distress can easily be feigned. Third, granting an action for

Posner, supra note 11, at 917; Schwartz, supra note 16, at 1763-65.
20. See Restatement (Second) of Torts §§ 436A, 306 comment b (1965) [hereinafter cited as Restatement].
21. Id. at § 905 comment c; Maragos, Negligent Infliction of Mental Distress—Mixed Signals?, 8 W. St. U.L. Rev. 139 (1981).
mental distress creates the spectre of unlimited liability.24

This third reason is most germane to the subject of this article. In a typical accident a certain limited number of individuals, usually a small number, suffer what we shall call direct physical harm—harm caused by the impact itself, e.g., the contact between the front of a defendant's car and the plaintiff's leg, causing the fracture of bone, the rupture of blood vessels, etc. The victims of such direct physical harm will normally also suffer resulting mental distress, e.g., pain and suffering, fright, panic, humiliation, etc.; such mental distress may itself bring about physical manifestations which we will call resulting physical harm—harm brought about not directly by the impact, but rather by the victim's own mental state, e.g., loss of sleep, high blood pressure, nausea, etc. For every individual who suffers direct physical harm from an accident, however, there are many others who will experience mental distress and even resulting physical harm. If a person is killed or seriously injured all his friends and relatives and even some in neither category—a distraught bystander frightened by the accident—are likely to suffer varying degrees of mental distress as a result. Thus, limiting liability in such cases becomes a serious problem.

The use of foreseeability to limit such liability is not very helpful; it is always foreseeable that a great many third parties will suffer mental distress as a result of the direct physical injury to each person caused by an accident. Beyond that, mental distress is often foreseeable even in situations where an accident does not occur; for example, an individual who negligently forgets to invite an acquaintance to a party disregards a foreseeable risk of causing mental distress to the acquaintance. Thus, the traditional rule—limiting liability for mental distress damages to only those plaintiffs who had also suffered direct physical harm as a result of the defendant's negligent act—was adopted to shield defendants from crippling liability.25

The trend, however, has recently been to relax this traditional restriction on recovery for mental distress. This section of the article will focus on the problem of accomplishing relaxation while at the same time limiting the scope of liability within reasonable bounds.

The traditional rule was first liberalized so that even if the im-

25. See Williams v. School District, 447 S.W.2d 256 (Mo. 1969); Brisboise v. Kansas City Public Serv. Co., 303 S.W.2d 619 (Mo. 1957) (en banc); Chawkley v. Wabash Ry., 317 Mo. 782, 297 S.W. 20 (1927) (en banc).
pact did not cause direct physical harm, the plaintiff could recover damages for any resulting physical harm caused by mental distress created by the situation, i.e., fear of the impact. A trivial impact, harmless in itself, came to be recognized by many courts as an adequate basis of liability, as long as physical harm resulted from mental distress.

Most courts have now abandoned the impact requirement and permit recovery as long as the plaintiff was in the "zone of danger." Under this approach, if the plaintiff is subject to the risk of a physical impact, but the impact does not occur, the plaintiff can recover for physical harm resulting from fright caused by the near miss.

Under the Restatement (Second) of Torts [hereinafter "Restatement"] version of the zone of danger rule, a plaintiff can also recover for resulting physical harm if he feared for the welfare of a third person who was in the zone of danger, where that person was a member of his immediate family who was in his presence. Permitting a plaintiff to recover as a result of fright for a close relative within his presence represents a further liberalization. Earlier courts had taken the position that a plaintiff could not recover if the fright was for a third person rather than for himself.

Thus in many courts the traditional common law restrictions on recovery have been considerably relaxed. A plaintiff can recover for physical harm caused solely from the internal operation of mental distress. Impact is no longer required as long as the plaintiff can show that he was subject to the risk of an impact, and under some limited circumstances the plaintiff can recover even though the mental distress was suffered as a result of concern for the welfare of a third person.

The traditional zone of danger rule is sufficiently restrictive so that the scope of potential liability is kept well within acceptable limits. All persons are excluded from recovery except those that were

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26. See Note, supra note 23, at 797-98.
27. Id. at 797.
28. Id. at 798.
29. Restatement, supra note 20, at § 436.
31. See Restatement, supra note 20, at § 436(3).
subject to the risk of an impact. Furthermore, their mental distress must have produced resulting physical harm, and some courts continue to require that the distress be caused by concern for himself rather than concern for a third person. The combination of these restrictions has the effect of precluding recovery in the great bulk of situations where people experience mental disturbance from accidents.

Some courts have gone beyond the zone of danger rule and now permit recovery even where there is no risk of an impact to the plaintiff himself. Our discussion will focus on one such court—the California Supreme Court in *Dillon v. Legg*—for several reasons. First, *Dillon* is the seminal case in this area. Second, the court’s approach to expanding liability is an example of how such expansion can appropriately be done while providing adequate protection to potential defendants. Third, *Dillon* will provide a particularly apt contrast to a different case in a related area by the same court which will be used later in this article as an example of an inappropriate approach to expansion of liability.

In *Dillon*, the defendant negligently operated his car in such a manner as to kill a small child. The plaintiff’s mother witnessed the accident and suffered such severe mental distress that physical harm resulted. She brought an action seeking recovery for the physical harm. The plaintiff would not have been able to recover under the zone of danger rule because there was no risk that she would be injured by the defendant’s car herself. The court, however, rejected the zone of danger rule as being arbitrary. It recognized that a defendant can be negligent not only by virtue of subjecting a plaintiff to the risk of direct physical harm, but also by subjecting him to the risk of such serious mental distress that physical harm is likely to result. The court stated that this case would fall within the latter category if it were foreseeable to the defendant that such harm could result to the plaintiff. It held that the plaintiff could recover as long

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32. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (en banc).
34. *Id.* at 746-47, 441 P.2d at 924-925, 69 Cal. Rptr. at 84-85.
35. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
36. *Id.* at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81. Note that this reasoning is consistent with the *Restatement*, which permits recovery even when the plaintiff is not within the zone of danger. See *Restatement*, supra note 20, at § 313. However, under the *Restatement*, the plaintiff in *Dillon* would not be able to recover because she suffered the mental distress as a result of concern for her daughter rather than concern for herself. *Id.* The *Dillon* court expressly considered this limitation on liability and rejected it, too, as being arbi-
as the defendant disregarded a foreseeable risk of physical harm to the plaintiff regardless of whether the plaintiff suffered the mental distress because of concern for herself or concern for a third party. 37

The court restricted potential unlimited liability by creating a three-factor test to be applied on a case-by-case basis by the trial judge in determining whether there was a duty to the plaintiff. Only if a favorable determination is made is the case submitted to the jury. 38 The factors are:

1. Whether plaintiff was located near the scene of the accident contrasted with one who was a distance away from it.
2. Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
3. Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. 39

The Dillon court held that in light of these factors the defendant did owe a duty to the plaintiff because it was foreseeable that the child's mother might be near the scene and might suffer severe mental distress and resulting physical harm from witnessing the accident. 40

These factors restrict recovery to persons who witness an accident causing injury to a close relative. 41 Nonwitnesses are precluded from recovery because they lack a contemporaneous sensory observance (either sight or hearing) of the accident. 42 In essence, Dillon expands the scope of the cause of action one small step beyond the zone of danger rule by permitting witnesses of accidents to recover even though they were not subject to the risk of physical impact.

While the Dillon court analyzed the case as if the sole issue was whether the defendant disregarded a foreseeable risk of harm to the plaintiff, it appears that the real purpose of the three Dillon factors is to limit recovery to a specific class of plaintiffs 43 rather than to determine what is actually foreseeable to a given defendant. 44 This is

37. Id. at 741, 441 P.2d at 921, 69 Cal. Rptr. at 84-85.
38. Id. at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.
39. Id. at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
40. Id. at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.
41. See Note, supra note 23, at 809-10.
42. Id. at 803-10.
43. See Maragos, supra note 21, at 158.
44. See Note, supra note 23, at 807; but see Nolan & Ursin, Negligent Infliction of
clear since the defendant is not required to know in advance that the parent is present and therefore likely to observe the accident. In effect, the factors merely present an arbitrary method for cutting off a defendant’s liability since mere foreseeability of harm would extend liability beyond reasonable bounds. The limitation chosen by the court has a logical basis; one can easily agree, for example, that a parent who witnesses the death of a child undergoes a more horrifying experience than a parent who hears about the death a short time after it occurs. Consequently, the degree of distress suffered in the former situation is likely to be greater than that suffered in the latter, making the former a more appropriate case for an award of damages. The limitation, however, is not based on foreseeability, as both situations create foreseeable risks of serious mental distress and resulting physical harm.

Some writers have questioned whether the Dillon factors were merely considerations that the jury could take into account in determining foreseeability, or whether they were criteria for the judge to apply. In practice, subsequent cases have treated them as factors for the judge to use in determining the duty question as a matter of law.

The Dillon factors have successfully expanded the scope of liability in cases where a bystander witnesses an injury to a third person, but have done so without imposing excessive liability on potential defendants. For that reason they warrant further exploration. The factors have been successful because in subsequent cases the supreme court and the lower appellate courts have tended to apply them conservatively as criteria for determining as a matter of law whether a defendant has the duty in a given case. Certainly not all

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Emotional Distress: Coherence Emerging from Chaos, 33 Hastings L.J. 583, 609 (1982). (The authors argue that the intent of the court in Dillon has been undermined and the criteria espoused have been transformed from guidelines for determining foreseeability into duty limitations). Id. at 597.

45. See Note, supra note 24, at 857-58.
46. See Note, supra note 23, at 807-09.
47. It is indisputable that most parents who hear about the death secondhand will still suffer grievous mental distress. The loss of a child is one of the most distressing events that a human being can encounter. This has been recognized by the highest court in Hawaii, which imposed a proximity limit on such recoveries, denying recovery to a grandfather who learned about the death of a grandchild over long distance telephone lines. The court felt that the grandfather could not be permitted to recover for practical reasons. See Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975).
48. See, e.g., Note, supra note 24, at 864, 865.
49. See Nolan & Ursin, supra note 44, at 589-97; Note, supra note 23, at 803-07.
50. The cases are discussed in the sources cited at note 49.
of the subsequent California cases are consistent, but they tend to fluctuate within a fairly narrow range so that predictability of result is possible in the vast majority of bystander cases.

Some writers have forcefully argued that the factors have been applied in an excessively rigid manner and that thus the $Dillon$ rule is little better than the old zone of danger rule.\(^5\) However, it undeniably permits recovery in a broader range of cases than the zone of danger rule, and yet still provides firm guidance. In that respect one must conclude that the factor approach has been successful. If experience shows that the factors are excessively rigid, they might be modified somewhat to broaden the scope of liability and still afford adequate predictability.

The key to the success of the factors approach of $Dillon$ is that it requires the duty question to be decided as a matter of law, and provides judges with firm criteria to be used in deciding the question. Since all cases deciding the issue are subject to review in the state's highest court, misapplication of the factors is easily remedied. After sufficient precedents interpreting the guidelines accumulate, it ought to be possible for results to be predictable in the broad range of future cases.

Thus, in $Dillon$, the California Supreme Court determined as a matter of law where the balance ought to lie between certainty and flexibility; and in the gray areas where the law is flexible, California judges exercise the discretion involved by determining as a matter of law whether a duty to the plaintiff exists. They do this by considering the proximity of the plaintiff to the scene, his relation to the victim, and the contemporaneity of his observance of the accident.

We now turn to a different line of cases involving mental distress damages. This area of case law provides a significant contrast to the $Dillon$ approach because recent expansions of liability in the area were accomplished in an inappropriate manner—submitting the policy question to juries on an ad hoc basis, rather than having the policy decision made by courts and implemented uniformly in cases as they arise.\(^6\)

The area in question involves negligent infliction of emotional distress without any accompanying physical harm. Cases granting such recovery are an outgrowth of a more restrictive theory of recovery—cases where the defendant disregards a foreseeable risk of

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51. See, e.g., Nolan & Ursin, supra note 44, at 597.
52. See supra text accompanying notes 12-13.
causing physical harm through mental distress rather than impact. That is, the defendant creates a risk of such severe mental distress that physical harm was likely to result from the distress. For example, suppose hospital personnel negligently confuse the identity of newborn infants and send the wrong baby home with a new mother. She could recover on showing (i) that it was foreseeable that switching babies would cause such severe distress to the mother that she might suffer physical harm as a result of the distress and (ii) that she did in fact suffer such physical harm. Here the impact rule and its descendant, the zone of danger rule, have no application because defendant did not disregard a risk of an impact. Logic requires instead that the defendant merely disregard a foreseeable risk of physical harm through mental distress and that the distress result in physical harm.

The Restatement recognizes this theory of recovery for resulting physical harm as well as some very specific limitations. While the Restatement position obviously cannot faithfully embody the rules recognized in every jurisdiction, it may usefully be studied both as an example, along with Dillon, of a reasonable approach to the problem of limiting the scope of excessive liability and as a contrast to later developments in the same area.

The Restatement version of this theory places certain restrictions on recovery which inherently prevent defendants from being subjected to excessive liability. First, physical harm must result to the plaintiff. Second, and probably more importantly, the defendant must have disregarded a foreseeable risk of causing such resulting physical harm. A defendant who carelessly or even intentionally inflicts a moderate degree of mental distress upon another would never be liable under the Restatement rule even if physical harm results. This is because resulting physical harm is not a foreseeable consequence of moderate mental distress. Accordingly, the foreseeability of resulting physical harm is an important restriction.

Third, the Restatement prohibits recovery where the plaintiff suffered the mental distress as a result of concern for a third per-

54. The hypothetical is based on Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 249 P.2d 843 (1952). Recovery was denied because the mother suffered no physical harm.
55. RESTATMENT, supra note 20, at §§ 306, 312, 313, 436(1).
56. Id. at § 436A.
57. Id. at §§ 306 comment b, 312, 313(1)(b), 436(1) comment a.
Concern for a third person can only result in actionable mental distress where that distress is intentionally, rather than negligently inflicted. In *Whetham v. Bismarck Hospital*, for example, the mother of a newborn infant suffered physical harm as a result of seeing hospital personnel negligently drop her baby on its head. The plaintiff could not recover under the zone of danger rule since she was never subject to the risk of a physical impact herself. She was forced to rely on the theory that the defendant carelessly disregarded a risk of causing such serious mental distress to the plaintiff—by dropping her baby—that she was likely to suffer physical consequences. The plaintiff was, however, barred from recovery under the Restatement rule because she suffered the mental distress as a result of concern for a third person—the baby—rather than concern for herself. The Restatement would have permitted recovery only if the defendant had intentionally dropped the baby for the purpose of causing distress to the mother.

The Restatement rule, like the Dillon factors, provides this area of tort law with a restriction on liability that is certain enough, and can be applied uniformly enough by courts, to allow potential defendants to engage in useful conduct with assurance that liability for negligence is sufficiently limited to afford protection from liability disproportionate to the risk taken. However, at least two states—California and Hawaii—have, in expanding liability from the Restatement base, substantially undercut the policies of uniformity and certainty and in doing so have opened the door to excessive and unlimited liability against potential defendants.

The California Supreme Court case, *Molien v. Kaiser Foundation Hospitals*, greatly expanded the scope of recovery in mental distress cases by eliminating the resulting physical harm requirement. In *Molien*, a doctor negligently examined and tested a woman and erroneously concluded that she had syphilis. The defendant advised the woman to undergo treatment for the disease and to inform her husband about the diagnosis. The husband, the plaintiff in this case, also underwent testing to determine whether he had contracted syphilis.

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58. *Id.* at § 313(2).
59. *Id.* at § 312(b).
60. 197 N.W.2d 678 (N.D. 1972).
61. *Id.* at 684.
62. See Restatement, supra note 20, at § 313(c).
63. See id. at § 312.
64. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (en banc).
the disease. As a result of the diagnosis, the wife became upset and suspicious that the plaintiff had engaged in extramarital sexual activities. Tension and hostility arose, and this lead to a breakup of the marriage.65

The plaintiff-husband brought suit, alleging that he suffered extreme emotional distress as a result of the negligent diagnosis and that this distress was foreseeable by the defendant-doctor. The plaintiff also sought recovery for loss of consortium occasioned by emotional injury to his wife. The court held that the petition stated a cause of action on both counts notwithstanding a failure to allege resulting physical harm. Thus, the court recognized a new cause of action for “negligent infliction of serious emotional distress.”66

The court rejected the resulting physical harm requirement as being arbitrary and artificial,67 especially in light of the difficulty in distinguishing between physical and mental harm.68 It stated that the primary justification for the requirement is to guard against fraudulent claims,69 and concluded that “in the light of contemporary knowledge...emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress.”70 Consequently, the court held that liability should be imposed if the plaintiff suffered serious injury and that this is basically a question of proof.71

Language in Molien also clearly indicates an intent to place maximum discretion with the jury in such cases. The court stated that the seriousness of the mental distress claimed is a matter of proof to be presented to the trier of fact.72 It felt that “[t]he screening of claims on this basis at the pleading stage is a usurpation of the jury’s function.”73 The standard of proof, according to the court, was to be merely “some guarantee of genuineness in the circumstances.”74 The court concluded that “the jurors are best situated to determine whether and to what extent the defendant’s conduct

65. Id. at 919-20, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.
66. Id. at 930, 616 P.2d at 821, 167 Cal Rptr. at 839.
67. Id. at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.
68. Id. at 929, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39.
69. Id. at 925, 616 P.2d at 818, 167 Cal. Rptr. at 836.
70. Id. at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.
71. Id. at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.
72. Id.
73. Id.
74. Id. at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839 (quoting Rodrigues v. State, 52 Hawaii 156, 171, 472 P.2d 509, 520 (1970)).
caused emotional distress, by referring to their own experience.\textsuperscript{76}

This conclusion is bolstered by \textit{Molien}'s great reliance on \textit{Rodrigues v. State}.\textsuperscript{78} This is a Hawaii case involving a suit by property owners for mental distress caused by the defendant's negligent damaging of the property. The highest court in Hawaii agreed that the plaintiffs had stated a cause of action for negligently inflicted emotional harm despite the fact that they had not suffered any resulting physical harm. The court did so by placing great discretion with the jury.

\textit{Rodrigues} recognized that the need to protect defendants from potentially unlimited liability was an important consideration.\textsuperscript{77} Accordingly, the court stated that it was appropriate to restrict recovery to cases where the mental distress is "serious."\textsuperscript{776} The court proposed to implement this standard by adopting an objective test, holding that "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."\textsuperscript{779} (The \textit{Molien} court quoted this language with apparent approval,\textsuperscript{80} but it is not clear that \textit{Molien} adopted this as a standard of recovery). Viewed objectively, this standard might appear to be stringent enough to restrict adequately the scope of potential liability. Unfortunately, \textit{Rodrigues} indicates that the court will not use the seriousness criteria to restrict recovery to the most severe cases. Rather, trial judges will normally submit cases to juries and permit the jurors to decide, on the basis of their experience, whether the plaintiff has suffered serious mental distress.

An analysis of \textit{Rodrigues} bears this out.\textsuperscript{81} In that case the defendant negligently failed to clean out a drainage culvert. As a result, the plaintiff's house was flooded to a height of six inches, causing extensive damage to the house and its furnishings. Mr. Rodrigues testified that he was "'heartbroken' and 'couldn't stand to look at [the house].'"\textsuperscript{82} Mrs. Rodrigues testified that she was

\textsuperscript{75} Id. (citations omitted).
\textsuperscript{77} 52 Hawaii at 172-73, 472 P.2d at 519-20.
\textsuperscript{78} Id. at 172, 472 P.2d at 520.
\textsuperscript{79} Id. at 173, 472 P.2d at 520.
\textsuperscript{80} Molien v. Kaiser Found. Hosps., 27 Cal. 3d at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38.
\textsuperscript{81} 52 Hawaii at 175 n.8, 472 P.2d at 521 n.8.
\textsuperscript{82} Id. at 159, 472 P.2d at 513.
"'shocked' and cried because [she and her husband] had waited fifteen years to build their own home." There was no proof of traumatically induced neurosis or psychosis. Nor was there any allegation of inability to function normally in the work or social environment. Without such allegations, it is difficult to see how the case involves a violation of the court's own standard, i.e., that a reasonable person would be unable to cope adequately with the mental distress engendered by the circumstances of the case.

The defendants argued that the new standard left juries without sufficient guidance. In response, the court conceded that it intended to shift a greater part of the burden of administering mental distress claims from the courts to juries. The court stated "the jury, representing a cross-section of the community, is in a better position to consider under what particular circumstances society should or should not recognize recovery for mental distress." The court stated that the jury is the appropriate body for determining whether people can reasonably be so attached to their property that they might reasonably suffer serious mental distress as a result of damage to that property. Of course, it is still appropriate for the trial court to direct a verdict where no reasonable person could believe that severe mental distress could result, but the court clearly indicated an intent to give maximum discretion to the jury.

The Rodrigues court elected to resolve mental distress cases by applying the same general tort principles that are applied in direct physical harm cases with the additional criteria that the mental distress be serious. The court indicated an intention to give great discretion to juries in determining the propriety of awarding damages for mental distress. One writer who advocated this approach has summed up the result as follows:

The guidelines are few and broad: with respect to duty, the jury must find objectively verifiable actions by defendant and a reasonably foreseeable risk to a reasonably foreseeable plaintiff; with respect to limiting liability, the test is one of seriousness. With the exception of the seriousness requirement, this is simply a standard.

83. Id.
84. Id. at 175 n.8, 472 P.2d at 521 n.8.
85. Id.
86. Id.
87. Id.
88. Id. at 175, 472 P.2d at 521.
89. Id. at 174, 472 P.2d at 520-21.
negligence equation with all of its attendant problems of proof.\(^9\)

That writer argues that jurors are best suited to determine the genuineness of claims, in light of modern medical information and the testimony presented,\(^9\) because the jury can draw upon its life experiences to determine the extent of the damage.\(^9\)

This approach, however, fails to restrict the scope of liability to only the most severe cases of mental distress. This creates the risk of subjecting defendants to excessive liability. This is not meant to imply that damages for "pure" mental distress, no matter how serious, should never be recoverable. The rationale of \textit{Molien}—that a cause of action is justified because "emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress"\(^9\)—is noteworthy. Several authors have agreed that it is unfair to deny recovery to such deserving plaintiffs. For example, authors of a recent article\(^9\) have argued that severe and debilitating emotional harm can cause interference with normal employment or household duties, and relationships with other persons. Furthermore, such distress can cause a person to become "unproductive, distracted, aimless, and prone to fits of temper or emotional outbursts."\(^9\)

Such serious emotional distress can include "traumatically induced neurosis, psychosis, chronic depression or phobia."\(^9\) It can also result in physical harm such as strokes, miscarriages, heart attacks, physical exhaustion, muscle tension, and loss of strength.\(^9\) These authors argue that the seriousness criteria is an appropriate screening device, and it should be used to "select for compensation those cases that are most deserving."\(^9\)

The difficulty is that the standard adopted by \textit{Rodrigues} and \textit{Molien} in no way assure that only such devastatingly serious cases of mental distress will result in recovery. Neither court apparently requires either pleading or proof of the sorts of specific manifestations of severe mental distress described above. Rather they prefer to have the jury determine

\(^9\) Maragos, \textit{supra} note 21, at 157-58 (footnotes omitted).
\(^9\) \textit{Id.} at 157.
\(^9\) \textit{Id.} at 155-56.
\(^9\) \textit{Molien v. Kaiser Found. Hosps.}, 27 Cal. 3d at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.
\(^9\) \textit{Nolan & Ursin}, \textit{supra} note 44, at 617.
\(^9\) \textit{Id.} (footnote omitted).
\(^9\) \textit{Id.} at 611.
whether the distress was serious by evaluating the conduct in light of human experience.

Juries with such broad discretion will probably not uniformly restrict recovery only to cases of very serious mental distress. For one thing, it is commonly believed that juries sometimes disregard instructions and decide cases on the basis of emotion. This may be an inevitable cost of the jury system, and one well worth paying, but the *Rodrigues* approach maximizes the risk of this occurring because it does little to screen out cases involving trivial distress. If the jury is permitted to find that a six inch flood of a home is likely to cause serious mental distress, then a great many similar cases—which potentially involve only minor distress—will be submissible.

Furthermore, even in cases where the jury honestly attempts to restrict recovery to cases of severe mental distress, the approach is inconsistent with the suggestion that the seriousness requirement be used as a screening device to limit liability by restricting recovery to claims that are most serious, and thus most deserving of recovery. The seriousness of the harm will vary with the circumstances of each individual case. The seriousness requirement cannot be used to consistently grant recovery only in the most deserving (most serious) cases because a different jury will decide each case without reference to any other mental distress case. If the mental distress produced by a six inch flood presents a jury question, consistency of result is not likely to be obtained. Some people would regard such distress as trivial or moderate, while others might find it to be serious. The result would depend on the composition of the jury in any given case. If the facts of *Rodrigues* present a jury question, it is difficult to imagine very many cases that do not present jury questions. Potential defendants and their insurance carriers would have to be concerned because the approach creates the potential for an enormous increase in the scope of liability. They are not assured that recovery will be limited to cases of severe mental distress.

It is useful to compare the *Molien-Rodrigues* standard with that adopted in *Dillon v. Legg*. In *Dillon*, trial courts were given specific standards to apply in determining whether cases could be submitted to juries. These standards were sufficiently specific so that in future cases one would expect a fair degree of uniformity of result. By contrast, in *Molien* and *Rodrigues*, lower courts and juries

99. See supra note 18 and accompanying text.
100. 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968) (en banc).
101. See supra text accompanying notes 48-51.
were only given vague general standards, i.e., foreseeability of risk to the plaintiff and of serious mental distress. Both courts emphasize that it is a jury function to apply these standards and to determine such questions on the basis of life experience. Trial courts are not encouraged to exercise jury control. They still have the power to withhold cases from juries on the basis that no reasonable person could conclude that the risk was foreseeable or that the distress was serious, but they are certainly not encouraged to exercise that power freely. Furthermore, if the courts were to attempt to control juries by directing verdicts, each court would have to do so on its own by establishing its own guidelines concerning how to impose this vague standard. The Molien and Rodrigues courts set no tangible, workable standard.

Since Dillon and Molien take fundamentally different approaches to the problem of limiting liability for mental distress, it is not clear how courts will decide which approach to apply in future cases. This is important because it can affect the ultimate scope of liability. Suppose a doctor negligently diagnosed the plaintiff's wife as having terminal cancer. After being informed of the diagnosis, the plaintiff suffered serious mental distress because of concern for his wife. Would the California court in such a case apply Molien and permit the plaintiff to recover upon a showing that it was foreseeable to the doctor that negligent diagnosis of cancer would cause mental distress to the spouse, or would the court apply the Dillon v. Legg factors and preclude the husband's recovery because he was not present at the time that the negligence took place and because he heard about the negligence from a third person rather than having received it himself directly?

Molien did not repudiate the Dillon factors; it instead distinguished Dillon as a case involving a percipient witness to an accident involving a third person, rather than a case like Molien where the plaintiff was a “direct” victim of the defendant's negligence. The court stated that the underlying issue in such cases is foreseeability of harm and that in Molien the tortious conduct was directed to the plaintiff as well as to his wife. The court reached this conclusion by demonstrating that the risk of harm to the plaintiff was reasonably foreseeable: "It is easily predictable that an erroneous diagnosis of syphilis and its probable source would produce marital discord

103. Id. at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
and resultant emotional distress to a married patient’s spouse."\textsuperscript{104} The court stated that foreseeability was bolstered in the case because the doctor told the plaintiff's spouse to inform the plaintiff about the disease.\textsuperscript{105} Hence, the \textit{Dillon} factors did not apply in \textit{Molien} because plaintiff was a direct victim of the negligence.

That raises the question of how to ascertain whether a person is a direct victim. Foreseeability of a risk of harm to plaintiff is one possible criterion. If a risk of harm to the plaintiff is foreseeable, then he is a direct victim. Under this view the husband, in the misdiagnosis of cancer hypothetical, is a direct victim of the doctor’s negligence because it is foreseeable that the patient’s spouse will suffer distress upon hearing of the diagnosis. A problem with using foreseeability as the criteria for determining directness is that—if carried to its logical extreme—it would completely supercede \textit{Dillon v. Legg}. That case was decided on the explicit assumption that a risk of harm to the bystander witness was foreseeable, and that the defendant was negligent in disregarding an unreasonable risk of harm to the bystander. Using this reasoning, the plaintiff in \textit{Dillon} was a direct victim of defendant’s negligence.

An alternative method of determining directness is to ascertain whether the plaintiff suffered emotional shock as a result of a risk of harm to himself (direct victim) or as a result of harm to a third person (indirect victim). In this latter case the plaintiff is always unforeseeable as a matter of law unless the three \textit{Dillon} factors are met. Some language in the \textit{Molien} opinion supports this interpretation, and the holding of the case is consistent with it. The plaintiff’s mental distress in \textit{Molien} resulted from a personal loss—the breakup of his marriage. Under this view the husband in the cancer misdiagnosis hypothetical would be unable to recover unless he satisfied \textit{Dillon} because he was distressed about the condition of a third person, his wife. While it is too early to tell if either of these competing theories will be used to determine directness, some subsequent California appellate court decisions have apparently used the latter theory. In \textit{Cortez v. Macias},\textsuperscript{106} a child died at the emergency room of a

\begin{itemize}
  \item \textsuperscript{104} \textit{Id.}
  \item \textsuperscript{105} \textit{Id.}
  \item \textsuperscript{106} 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980); \textit{see} Maragos, \textit{supra} note 21, at 154-55 (criticizing \textit{Cortez} and arguing that plaintiff could have been characterized as a direct victim). \textit{See also} Hathaway v. Superior Court, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1981) (distinguishing \textit{Molien} from \textit{Dillon} on the basis that \textit{Dillon} applies to bystander cases. \textit{Id.} at 737, 169 Cal. Rptr. at 440.)
\end{itemize}
hospital because of the alleged negligent refusal of a doctor to leave his home and treat the child. The mother brought an action against the doctor for mental distress. The appellate court refused to apply Molien, and denied the plaintiff recovery because she was not a direct victim.

The method of determining who is a "direct" victim will significantly affect the scope of liability for mental distress actions in California. If foreseeability is used as the criteria for identifying direct victims, the Dillon approach could be severely restricted or even completely abrogated. Several writers advocate this. It is an obvious fiction to claim that the three Dillon factors are really used to determine foreseeability. Recognition of this could lead to less reliance on the factors in future cases. If this is done the scope of liability for negligently inflicted mental distress in California would be significantly expanded because many more cases would get to the jury. The Dillon factors preclude most cases where distress is experienced as a result of concern for a third party from getting to the jury. If the factors no longer applied, Molien would permit all such cases to go to the jury as long as reasonable people could believe that a risk of serious mental distress was reasonably foreseeable. The third party limitation is an arbitrary but effective limit on the scope of liability. If the Dillon factors are retained in all cases where distress is experienced because of concern for a third person, then the range of application of Molien is considerably narrowed.

In the event that Molien only applies when plaintiff suffers distress because of concern for himself, then the case still represents a more expansive rule than the Restatement because the Restatement requires that defendant disregard a foreseeable risk of causing physical harm by inflicting mental distress, and it requires resulting physical harm. The Restatement definition of resulting physical harm is sufficiently restrictive so that it can be applied to preclude recovery in a great many cases. The definition is:

The rule stated in this Section [non-liability] applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation. The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are

107. See Note, supra note 19, at 154-58; Nolan & Ursin, supra note 44, at 609.
108. RESTATEMENT, supra note 20, at §§ 436, 436A.
in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character. This becomes a medical or psychiatric problem, rather than one of law.\textsuperscript{109}

The line between physical harm and mental harm is necessarily an arbitrary one, and it is possible to define resulting physical harm so broadly as to include most forms of serious mental distress.\textsuperscript{110} In a jurisdiction where this has been done, the elimination of the physical harm requirement would probably not represent a significant expansion of the scope of liability.

To sum up, Dillon and Molien represent two approaches to expanding the scope of liability for mental distress, one good and one bad. Foreseeability by itself is not adequate to limit the scope of liability. If the Molien approach of governing cases strictly with reference to foreseeability of a risk of serious mental distress is applied to all future mental distress cases—including ones where the distress is caused by concern for a third person—then the risk of uncontrolled liability will be very real for two reasons. First, a geometric increase in the number of actionable claims would result because every harm to one person—whether it be physical, mental, or pecuniary—potentially gives rise to numerous mental distress claims by that person’s friends and relatives. It is not clear that tortfeasors could afford to pay for all of these claims even if liability is restricted to cases of serious distress. Whether such liability ought to be imposed is a question of policy which is beyond the scope of this article. The second reason, which is the concern of this article, is the practical problem of implementing the policy of compensating only for serious distress. Mental distress falls on a continuum from trivial distress on one extreme to very severe distress on the other. Where the line is to be drawn along that continuum is the policy question, and it ought to be implemented consistently. Submitting such cases to the jury under very vague guidelines cannot achieve this consistency since each jury may have a different concept of “serious” dis-

\textsuperscript{109} Id. at § 436A comment c.

tress. On the other hand, Dillon v. Legg represents an example of a proper approach: The state's highest court establishes relatively clear standards to be considered in the trial court's determination of whether a particular case should be given to the jury. A fair degree of consistency can be expected from such an approach.

III. Pure Pecuniary Loss

An area of significant expansion in the scope of liability is that involving negligently inflicted pure pecuniary loss. The traditional common law rule gave a cause of action only for negligently inflicted physical harm to person or property. With physical harm as the basis of the action, pecuniary loss, such as lost profits and wages, could be recovered only as "parasitic" damages. There are a number of well-recognized exceptions to this rule, the major one being liability for negligent misrepresentation that results in pecuniary loss. Closely related to this exception is the liability sometimes imposed on the supplier of services which involve something other than supplying information, e.g., liability of a person who negligently prepares an invalid will to the intended beneficiary; liability of a telegraph company that negligently transmits a message.

The most likely reason for the limitation of liability to cases involving physical harm is the belief that a limitation of this sort is necessary to protect potential defendants from liability so potentially excessive as to subject them to an unreasonable burden. For example, a defendant who negligently causes a fire in a business is liable to the owner of the business for physical harm to property and for lost profits if the owner can prove them with sufficient specificity. The defendant is not liable to the employees of the business who may suffer a loss of wages during the period that the business is closed, to the suppliers of the business who suffer a loss of sales during the

112. See Restatement, supra note 20, at § 766C comment b; Probert, supra note 111, at 485.
113. See Restatement, supra note 20, at §§ 552, 766C comment e.
114. Id. at § 766C comment e.
115. Id. at comment a.
time that the business is closed, or to the customers of the business who suffer a disruption because their usual source of supply has become unavailable. The financial repercussions of such accidents are almost inevitable and may affect a great many people other than the direct victims of the accident. Furthermore, such pecuniary losses can occur even when there is no physical harm to person or property. A defendant who negligently causes a plaintiff to miss a day's work by blocking traffic foreseeably causes pecuniary harm that potentially radiates far beyond the plaintiff's immediate loss of wages.

In the past, courts have restricted potential liability in such cases by restricting recovery for interference with an existing contract or interference with a prospective economic advantage to intentional interferences. The defendant must either act for the purpose of interfering with a contract or the prospective economic advantage or he must act with knowledge that such interference is substantially certain to result. Such knowledge cannot exist unless the defendant knows of the specific contract or prospective advantageous economic relationship. This requirement places an effective limit on the scope of liability.

In J'Aire Corp. v. Gregory the Supreme Court of California created a cause of action for negligent interference with prospective advantage. The plaintiff operated a restaurant in premises that he leased. The landlord entered into a contract with the defendant to renovate the premises. The plaintiff alleged that the defendant negligently failed to complete the renovations within a reasonable time in breach of his contract. The breach caused the plaintiff to lose business, and thus lose profits, because it could not operate the restaurant during part of the construction period. The trial court sustained a demurrer to the plaintiff's petition. The Supreme Court of California reversed, holding that negligent loss of expected economic advantage is actionable under these facts.

The court determined that the following six-factor test be used for ascertaining whether a duty exists in such cases:

118. Id.
119. Id. at 204.
120. See RESTATEMENT, supra note 20, §§ 766, 766B.
121. Id. at §§ 766 comment j, 766B comment d.
122. Id. at § 766 comment i.
124. Id. at 805, 598 P.2d at 64, 157 Cal. Rptr. at 411.
The extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm.

The court rejected the excessive liability argument. It stated that the six-factor test and the ordinary principles of tort law such as proximate cause are adequate to limit potential liability. According to the court, the factors limit recovery by requiring foreseeability of the injury and a nexus between the defendant's conduct and the plaintiff's injury.

The six-factor test is to be used by the court to determine duty as a matter of law. The nature of the test is such that all factors probably need not be met in order for the court to impose a duty. Furthermore, other factors may be considered when appropriate, such as the public policy favoring organized activity by workers and risk of deterring the actor from fulfilling his duty to the government.

The six-factor test was devised and originally used by a California court for the purpose of determining when it is proper to hold the

125. Id. at 804, 598 P.2d at 63, 157 Cal. Rptr. at 410 (citation and footnote omitted).
126. Id. at 808, 598 P.2d at 65, 157 Cal. Rptr. at 412-13.
127. Id. at 808, 598 P.2d at 65-66, 157 Cal. Rptr. at 412.
129. The 'Aire court derived its six-factor test from Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (en banc). See 'Aire, 24 Cal. 3d at 804, 598 P.2d at 63, 157 Cal. Rptr. at 410. In Biakanja the intended beneficiary of a will sought to recover damages from the notary public who had improperly prepared the will. In finding that the plaintiff should be allowed to recover despite the absence of privity, the court enumerated and applied the six factors. The court prefaced its enumeration of the factors as follows: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [the six factors]." 49 Cal. 2d at 650, 320 P.2d at 19. See also DeVoto v. Pacific Fidelity Life Ins. Co., 618 F.2d 1340, 1349 n.8 (9th Cir.), cert. den., 449 U.S. 869 (1980) (assuming the 'Aire criteria to be "merely considerations to be blended from case to case"); Gay v. Broder, 109 Cal. App. 3d 66, 74, 167 Cal. Rptr. 123, 127 (1980) (list of factors in Biakanja not intended to be all-inclusive; liability dependent upon judicial weighing of policy considerations); Stoiber v. Honeychuck, 101 Cal. App. 3d 903, 930-31, 162 Cal. Rptr. 194, 208-09 (1980) (not considering each factor separately); Chameleon Eng'g Corp. v. Air Dynamics, Inc., 101 Cal. App. 3d 418, 423, 161 Cal. Rptr. 463, 465 (1980) (moral blame not a factor to be considered in this case).
negligent drafter of an invalid will liable to intended beneficiaries of
the will for the resulting lost legacies. A similar test has also been
used by other courts to determine whether an individual who makes
a negligent misrepresentation is liable to a person other than the
individual to whom the representation was made. The Restatement
takes a closely analogous approach in negligent misrepresentation
cases. Rather than rely on pure foreseeability, the Restatement
limits the liability of one negligently supplying false information to
those persons who are either known or intended recipients of the
information and to those transactions which he either intends to influ-
ence or knows that the information will influence. J'Aire expanded
the scope of liability by simply applying an established test to all
cases of negligent interference with prospective advantage rather
than limiting its application to a few specific instances.

J'Aire involves basically two issues. The first issue is the desira-
bility of expanding the scope of liability to include a greater number
of cases involving pure pecuniary loss. The second issue is deciding
the best approach to achieving this expansion of liability. The resolu-
tion of the first issue must be based on an evaluation of social policy.
Considerations of compensation and deterrence must be weighed
against the possibility of placing excessive liability on potential de-
fendants which might unduly inhibit their willingness to engage in
otherwise useful conduct. This author will not attempt to resolve the
question whether increased liability is desirable in such cases. It is
clear that in substituting negligence for intent as the basis of liabil-
ity, J'Aire did significantly broaden the scope of liability in prospec-
tive advantage cases.

The second issue is the propriety of the court's approach to im-
plementing the policy of expanded liability. In this regard, the J'Aire
decision is sound. By using a six-factor test to determine the duty
question as a matter of law, the court has taken responsibility for
defining the scope of liability. Each trial judge must use the same
factors to resolve individual cases. All decisions at the trial level are
subject to review by intermediate appellate courts and ultimately by
the state's highest court. While it is too early to tell how the factors

133. Aluma Kraft Mfg. Co. v. Elmer Fox & Co., 493 S.W.2d 378 (Mo. Ct. App. 1973);
See Probert, supra note 111, at 496-97; Casenote, Aluma Kraft Manufacturing Co. v. Elmer
134. See RESTATEMENT, supra note 20, at § 552; Probert, supra note 111, at 496.
135. RESTATEMENT, supra note 20, at § 552.
will be applied, it is quite possible for courts to apply them consistently to a wide variety of cases. If this approach were taken, then over a period of years, the case law should become sufficiently developed so that a degree of predictability is achieved. For example, the factors could be applied conservatively so as to permit recovery only when the third person who was injured is either identified (or the defendant knows that such person exists even though he does not know his identity) and the prospective advantage of which the third person is deprived is known or clearly contemplated by the defendant. J'Aire itself is clearly such a case since the defendant knew specifically of the plaintiff's identity and was specifically told by the plaintiff about the harm that he was suffering.

The J'Aire case is very similar to Dillon v. Legg in that both cases adopt a proximity test as the basis for limiting the scope of liability. The Dillon test is more specific because it deals with a narrow situation—bystander recovery for mental distress. The J'Aire test is necessarily more general since it can apply to all prospective advantage cases. It is also more flexible because in addition to requiring close proximity (knowledge of the plaintiff and the transaction involved) it also permits relevant policies such as the need for deterrence to be considered on a case-by-case basis. Both cases deny recovery in many situations where pure foreseeability would yield a different result because very close proximity between the negligence and the harm is required.

By way of contrast, if a rule similar to that adopted in Molien v. Kaiser Foundation Hospitals had been adopted—foreseeability of serious harm—responsibility for limiting the scope of liability would largely have fallen to the jury by default because the criteria for limiting liability are regarded as questions of fact for the jury. At the same time, the standards are quite vague because reasonable people can easily disagree concerning what risks are foreseeable and what harms are serious. These criteria could be applied in such a way as to increase vastly the scope of liability over and above that actually imposed by J'Aire. As stated earlier, financial repercussions to third parties are an inevitable result of most accidents and thus

137. See J'Aire, 24 Cal. 3d at 804-05, 598 P.2d at 63, 157 Cal. Rptr. at 410.
138. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal Rptr. 72 (1968) (en banc).
139. 27 Cal. 2d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (en banc).
140. See supra notes 117-20 and accompanying text.
can easily be characterized as foreseeable.\footnote{141} Social policy may not justify shifting all such losses to negligent defendants. Yet under this approach, judges would play a relatively minor role in making the policy decision. Furthermore, consistency would be sacrificed because a different jury would decide each case.

**IV. PRODUCTS LIABILITY**

Products liability law has evolved in this century from a position of virtual immunity for product manufacturers to the extensive strict liability that exists today. The traditional rule—the doctrine of \textit{Winterbottom v. Wright} \footnote{142} for many years limited a manufacturer's liability for injuries caused by product defects to persons with whom the manufacturer contracted.\footnote{143} Since manufacturers seldom dealt with accident victims, the privity requirement effectively protected manufacturers from liability. A narrow exception to the privity rule applied to products that were inherently dangerous. The landmark case of \textit{MacPherson v. Buick Motor Company} \footnote{144} virtually eliminated the privity of contract requirement by characterizing any product as inherently dangerous if the product were dangerous and negligently manufactured. The case has been extensively followed,\footnote{145} and the effect has been to hold product manufacturers liable under the normal rules of negligence.

The next step in the evolution of products law was the transformation of liability based on breach of implied warranty of merchantability into strict liability in tort. The common law recognized that a warranty of merchantability was implied in the sale of goods.\footnote{146} This warranty was that the goods would be reasonably fit

\footnotesize
\begin{footnotes}

\footnote{141. \textit{See In re Kinsman Transit Co. v. Buffalo}, 388 F.2d 821 (2d Cir. 1968).
\footnote{142. 152 Eng. Rep. 402 (Exch. of Pleas 1842).
\footnote{144. 217 N.Y. 382, 111 N.E. 1050 (1916); \textit{see G. E. White}, supra note 18, at 120.
\footnote{145. Mississippi was thought to be the only American jurisdiction that did not embrace the \textit{MacPherson} rule, \textit{see Prosser, Assault on the Citadel} (Strict Liability to the Consumer), 69 YALE L. J. 1099, 1100 (1960). While Mississippi has yet to expressly declare its agreement with \textit{MacPherson}, Mississippi courts have "jumped over it" to strict liability, \textit{see State Stove Mfg. v. Hodges}, 189 So. 2d 113, 118 (Miss. 1966). Indeed, in a diversity case decided before \textit{State Stove}, a federal appeals court determined that a Mississippi court presented with the question would be in agreement with \textit{MacPherson}, \textit{see Mason v. American Emery Wheel Works}, 241 F.2d 906, 909-10 (1st Cir. 1957).
\footnote{146. \textit{See Chesapeake & Virginia Coal Co. v. Rich Block Coal Co.}, 291 F. 1011 (4th Cir. 1923); \textit{Prosser, The Implied Warranty of Merchantable Quality}, 27 MINN. L. REV. 117, 120 (1943).}
for the ordinary purposes for which they were used.\textsuperscript{147} The warranty was later embodied in the Uniform Sales Act\textsuperscript{148} and subsequently in the Uniform Commercial Code.\textsuperscript{149} Breach of warranty was a matter of strict liability,\textsuperscript{150} and it applied to personal injury and property damage as well as pure pecuniary loss.\textsuperscript{151} However, accident victims encountered difficulty because of the contractual defenses available for breach of the implied warranty of merchantability. A form of privity of contract was required;\textsuperscript{152} the manufacturer was permitted to disclaim the warranty;\textsuperscript{153} and prompt notice of breach of implied warranty was required to be given by the accident victim to the manufacturer.\textsuperscript{154}

In a long series of cases involving personal injury or property damage, common law courts began to disallow the contractual defenses of lack of privity, disclaimer, and lack of notice.\textsuperscript{155} Gradually, courts realized that since a contract was no longer required (privity of contract not necessary) and contractual defenses of disclaimer and lack of notice were not recognized, they were in reality imposing strict liability in tort rather than in contract.\textsuperscript{156} The \textit{Restatement} explicitly recognized the tort nature of the recovery in section 402A.\textsuperscript{157} Many courts have adopted section 402A of the \textit{Restatement}\textsuperscript{158} as the starting point for the imposition of strict liability in tort.


\textsuperscript{148} 1 Uniform Sales Act (ULA) §§ 12-16 (1950).

\textsuperscript{149} Uniform Commercial Code (ULA) § 2-314(c).


\textsuperscript{151} See \textit{Prosser, supra} note 145, at 1100-03; \textit{but cf. Seavey, Actions for Economic Harm—A Comment, 32 N.Y.U. L. Rev. 1242 (1957)}.

\textsuperscript{152} \textit{See Atkins v. American Motors Corp., 335 So. 2d 134, 137 (Ala. 1976) (dicta); Carter v. Yardley & Co., 64 N.E.2d 693, 695-96 (Mass. 1946) (dicta); Fleming, \textit{supra} note 150, at 193-96}.

\textsuperscript{153} \textit{See Prosser, supra} note 146, at 157-76; Fleming, \textit{supra} note 150, at 210-12.

\textsuperscript{154} \textit{See Atkins v. American Motors Corp., 335 So. 2d 134, 137 (Ala. 1976); Prosser, \textit{supra} note 146, at 163; Fleming, \textit{supra} note 150, at 211}.


\textsuperscript{156} \textit{See Greenman v. Yuba Power Products, Inc., 50 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (en banc)}.

\textsuperscript{157} \textit{See \textit{Restatement}, supra} note 20, at § 402A comment a.

\textsuperscript{158} \textit{See 1 PROD. LIAB. REP. (CCH) ¶¶ 4015, 4016 (May 1982) for a list of the 36 jurisdictions accepting the doctrine}.
The strict liability doctrine has evolved considerably since the Restatement was promulgated in 1965. Two aspects of modern products liability law will be discussed as they relate to the problems under consideration in this article. These subjects are the definition of defect and the requirement of causation of harm by the defect.

A. Defect

Strict liability as imposed by section 402A of the Restatement is fairly conservative. The basis of liability is that the product be defective, and that the defect cause physical harm to person or property. The scope of liability is thus much narrower than a scheme whereby a manufacturer is strictly liable for all harm caused by its products regardless of whether the product is defective. The requirement of defect is one of the main devices used to limit the scope of potential liability in products cases. Courts have increased the scope of liability since 1965 at least in part by modifying the definition of defect. It is useful to look at some of these changes to see how the increase in the scope of liability was accomplished.

Courts have recognized two main tests of defect, the “unreasonably dangerous” test and the “consumer expectations” test. Both tests are embodied in the Restatement and utilized to some degree. The consumer expectations test provides that a product is defective if it is “in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.” The consumer expectations test in effect uses the market place to determine how much safety must be built into a product. As long as the danger is known and appreciated by consumers who use the product, there is no liability. Liability is imposed only for hidden, unexpected, latent dangers. The policy of the law was to let consumers decide the degree of safety for which they were willing to pay. If the product was obviously dangerous, the manufacturer was not liable even though it would have been technologically feasible for him to eliminate or reduce the danger. Liability was only imposed for latent, unexpected dangers which resulted in injury to the user or consumer.

159. Restatement, supra note 20, at § 402A.
160. Id. at comment g.
161. See id. at comment i; Noel, Products Defective Because of Inadequate Directions or Warnings, 23 Sw. L.J. 256, 274 (1969).
163. Id. at 1561.
The unreasonably dangerous test of defect provides that a product is defective if the danger posed by the product is unreasonable in light of the product's utility.\textsuperscript{164} Dean Wade has stated\textsuperscript{165} that the following factors should be considered in making this determination of defectiveness:

1. The usefulness and desirability of the product—its utility to the user and to the public as a whole;
2. The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury;
3. The availability of a substitute product which would meet the same need and not be as unsafe;
4. The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
5. The user's ability to avoid danger by the exercise of care in the use of the product;
6. The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions;
7. The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.\textsuperscript{166}

This test calls for the subjective exercise of judgment in the application of these factors. If the question of reasonableness of danger were submitted to a jury,\textsuperscript{167} it would be called upon not only to determine questions of fact, such as the usefulness of the product and the magnitude of the risk, but to exercise its subjective judgment in evaluating the significance of these factors, i.e., concluding that the risk is justified or unjustified.

The consumer expectations test provides very firm judicial control over juries in the process of imposing strict liability. A single criterion is used for imposing liability, and it is so clear cut that it can be applied with precision in a large majority of cases. In cases where there was no dispute that the danger is known or obvious, the

\textsuperscript{166} \textit{Id.} at 837-38.
\textsuperscript{167} Dean Wade discourages telling the jury of these factors and advocates that the use of these criteria be limited to judges, students and commentators. \textit{Id.} at 840.
trial court would have a duty to take the issue away from the jury. Appellate control of trial court decisions would also be a fairly simple matter because the question whether the danger is obvious is usually clear, and the appellate courts can decide the issue just as easily as the trial courts. For these reasons the test is capable of achieving a high degree of predictability and uniformity of result within a given jurisdiction.

Many courts, however, have rejected the consumer expectations test of defect because they perceive it to be so rigid that it yields unjust results in a great many cases. The injustice appears especially compelling in cases where the dangerous aspect of the product places at risk individuals who did make the economic choice to purchase the product without a feasible safety device. Suppose a homeowner purchases a lawnmower with an inadequate bladeguard because it is cheaper than a mower with an adequate guard. While he is using the mower, the blade hits a stone and throws it into a bystander's face, causing serious injury. Using the consumer expectations test to bar recovery by the bystander on the basis that the purchaser was aware of the danger appears unfair because the accident victim lacked power to control the risk either by making a different purchasing decision or by exercising care in the use of the mower.

In rejecting the consumer expectations test courts often impose liability exclusively on the basis of the unreasonably dangerous test of defect. They take the position that a product can be defective in the sense that it presents an unreasonable risk of danger notwithstanding that the danger is known or obvious. Obviousness of the danger is merely one factor to be taken into account in determining

168. See, e.g., Brawner v. Liberty Indus., Inc., 573 S.W.2d 376 (Mo. App. 1978) (gasoline can without child-proof cap not defective because danger is obvious).
reasonableness. A punch press, for example, which is not equipped with a safety device might be regarded as defective, notwithstanding that the danger is known to the operator, if it presents a serious risk and if the risk could have been greatly reduced by the installation of an inexpensive safety device.

The unreasonably dangerous test, when used as the sole test of defect, provides a degree of flexibility not available with the consumer expectations test; at the same time, however, it also provides a significantly lesser degree of judicial control than the consumer expectations test, and consequently sacrifices the degree to which uniformity and predictability of result can be achieved. The question of reasonableness of a particular risk is often one upon which reasonable people can disagree because a great many factors must be taken into account, and those factors must be subjectively evaluated. As long as there is room for disagreement, the issue is properly submission to the jury. Inconsistent results in similar cases will necessarily occur since each jury is composed of a different group of people. A judge is permitted to direct verdicts under this test only if he feels that no reasonable person could believe that the risk is unreasonable. Under a general test of this sort verdicts are not likely to be directed nearly as often as in cases where the legal standard leaves much less room for the exercise of judgment.

Even in the rare situation where verdicts are directed, uniformity of result within a given state is unlikely to be achieved. In determining whether a directed verdict is appropriate each judge will necessarily have to develop his own criteria for determining reasonableness. Since each judge will be applying his own criteria it may be possible for each judge to act consistently with respect to the cases he decides, but it will be more difficult for the ultimate reviewing authority to successfully impose its views of how judgment ought to be exercised on each trial judge. Such a general test, which requires the subjective evaluation of so many factors, can consistently be applied within a jurisdiction only if the ultimate reviewing authority is willing to exercise very close supervision over trial courts.

173. See Henderson, supra note 162, at 1557-58.
175. See id. at 496.
The unreasonably dangerous test of defect is particularly susceptible to unpredictable and even inconsistent results in cases involving design defects. These are cases where there is no physical flaw in the product that causes harm. Rather, the product is alleged to be defective in that it was designed in such a way as to be unduly dangerous. Plaintiffs in such cases will almost always be able to point to a specific design change that would have prevented the specific accident in question. The difficulty is that any design change may affect the product in many other ways as well, and a jury that is focusing on prevention of a particular accident may not adequately take this consideration into account.

Professor Henderson has characterized the question of reasonableness of design as one involving polycentricity. The ultimate design of a car, for example, must be made in view of many competing considerations that cannot be dealt with in isolation. Suppose a passenger in an automobile is injured by glass from a side window broken in a roll-over accident. A jury might find that the car was unreasonably dangerous because the manufacturer failed to equip the side windows with safety glass. Suppose further that in response to this decision the manufacturer equipped future cars with safety glass in all windows. In a subsequent accident a passenger in such a car is severely burned because the car caught fire after an accident and rescuers were unable to break through the safety glass and rescue the passenger. Here the jury could find that the car was unreasonably dangerous because the manufacturer installed safety glass in the side windows since more persons are likely to be injured by being trapped in burning cars than are likely to be injured by shattered side window glass. The risk of inconsistent verdicts places the manufacturer in an awkward if not impossible position, and because virtually any design can be attacked in this manner the risk is present in many cases.

Some courts have increased the scope of liability further by using "hindsight" rather than "foresight" in determining whether a product is unreasonably dangerous in design cases and warning cases. This test differs from negligence in that fault is not re-

176. Henderson, supra note 162, at 1547, 1557-58. "[P]olycentric problems are many-centered problems, in which each point for decision is related to all others as are the strands of a spider web. If one strand is pulled, a complex pattern of readjustments will occur throughout the entire web." Id. at 1536.
quired. Knowledge of the risk is imputed to the manufacturer as of the time of trial. Thus, a manufacturer could be held liable for marketing a product that turned out to be dangerous even though the risk was scientifically unknowable at the time that he produced the product.\textsuperscript{178} Such a manufacturer would not be negligent because the risk of harm was unforeseeable to him at the time of his conduct.\textsuperscript{179} True strict liability is imposed by such courts.

Since the origin of strict liability, hindsight was always used to determine whether a product possessing a physical flaw was unreasonably dangerous.\textsuperscript{180} Yet the \textit{Restatement} expressly required that foresight be used in warning cases,\textsuperscript{181} and although the comments are somewhat ambiguous on the point, it impliedly used foresight in determining whether a product was defective in design.\textsuperscript{182} Some courts have followed this distinction and in essence require negligence in design and warning cases.\textsuperscript{183} More recently a number of courts have stated that hindsight was to be used in both design and warning cases as well as in cases involving manufacturing flaws.\textsuperscript{184}

The use of hindsight increases the scope of liability in cases

\begin{itemize}
\item \textsuperscript{181} \textit{Restatement}, supra note 20, at § 402A comment j.
\item \textsuperscript{182} \textit{Restatement}, supra note 20, at § 402A comment k, which exempts from strict liability products creating risks that cannot be eliminated “in the present state of human knowledge” if marketing the product is justifiable because of its apparent utility. There is no liability for marketing such products as long as a proper warning is given. \textit{Id}. Since a warning must be given only with respect to hazards which a manufacturer knew or could have known about, \textit{Id} at comment j, it follows that there can be no liability for marketing apparently useful products containing unknown dangers arising from the products’ design.
\end{itemize}
where there is a change in knowledge or a change in technology between the time of manufacture and the time of trial. Where no such change occurs the foresight standard and the hindsight standard yield the same result since under the law of negligence a manufacturer is held to the knowledge of an expert and is required to keep up with technological advances. In such cases knowledge of the latest technology is imputed to manufacturers whether they are actually aware of the technology or not. The difference between hindsight and foresight, therefore, is significant only in the rather infrequent cases where there has been a change in scientific knowledge of a given risk or technological ability to reduce or eliminate a known risk between the time of manufacture and the time of trial.

While this development, like the move away from the consumer expectations test, increased the scope of liability, it did so without decreasing jury control. The basic determination to be made by the jury is essentially the same under either test, i.e., reasonableness of the risk. The only difference is that in a negligence case the jury must resolve an additional question of fact, i.e., foreseeability of risk. Whether the increase in the scope of liability represents good public policy is a difficult question which need not be addressed here, but at least it is a policy decision which was consciously made and which can uniformly be implemented within the jurisdiction adopting this approach.

In *Cronin v. J. B. Olson, Corp.* the California Supreme Court reduced judicial guidance in the determination of defectiveness to a minimum. The court rejected the unreasonably dangerous test of defect, feeling that its close resemblance to negligence created an apparent inconsistency with the concept of strict liability. The court substituted no new test of defect for use by lower courts and juries. This apparently left the state without a test for determining defectiveness in design cases since earlier California cases had already rejected the consumer expectations test.

One solution to this dilemma might be to tell juries in design cases that they must decide whether the product was defective without defining “defect.” This solution has a serious flaw, however; the

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187. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (en banc).
188. *Id.* at 134-35, 501 P.2d at 1162, 104 Cal. Rptr. at 443.
term "defect" has a common sense meaning in cases where a physical flaw is present in the product, but it has no independent significance in cases where appropriateness of design or warning is in question. This method would leave juries completely on their own to determine defectiveness in design cases on a case-by-case basis.

In any event, Cronin meant that the state of California had for a time no uniform policy for determining when to impose strict liability on product sellers since determination of defectiveness is the primary criterion for deciding whether to impose strict liability. If such important social policy questions as whether to impose strict liability or fault-based liability ought to be consciously decided by responsible officials (either the legislature or common law courts) and uniformly implemented within the jurisdiction, Cronin represents the wrong approach.

Recently, in Barker v. Lull Engineering Co., the California court retreated from its position in Cronin by adopting a specific test for determining defectiveness in design cases. The court combined the two traditional tests of defect (consumer expectations test and unreasonably dangerous test) in the disjunctive. Thus, in California, a product is defective in design either if it contains a hidden or unknown danger, or if the danger is unreasonable in hindsight. The court refers to the latter test as the "risk-benefit" test because it regards the "unreasonably dangerous" formulation to be misleading, but the test is clearly the same. The product is defective "if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design." In design defect cases in California, the jury may be advised as follows:

[A] product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably fore-

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189. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
190. Id. at 429-32, 573 P.2d at 454-56, 143 Cal. Rptr. at 236-37.
191. Id. at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
192. See id. at 424-26, 573 P.2d at 450-51, 143 Cal. Rptr. at 232-34.
193. See id. at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. The relevant factors to be considered include the gravity of the danger, the likelihood of the danger, the feasibility of a safer alternative design, the cost of the improved design, and the adverse consequences of the alternative design. Id. These factors are essentially the same as in the "unreasonably dangerous" test.
194. Id. at 430, 573 P.2d at 454, 143 Cal. Rptr. at 235 (citations omitted).
seeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.\textsuperscript{198}

By adopting this test, California increased the scope of liability from the pre-\textit{Cronin} "unreasonably dangerous" standard in two ways. First, combining the tests in the disjunctive increases the scope of liability. This is because there are some products which are defective under one test but not the other, and the test is broad enough to deem a product defective if it violates either test. For example, if a new drug contains an unknown danger which is reasonable in retrospect, the product would be defective because it violates consumer expectations notwithstanding that the drug is not unreasonably dangerous. On the other hand, if the product contains an obvious danger which is unreasonable in retrospect, such as a lawnmower without a blade guard, it would be defective because it violates the unreasonably dangerous test. In California, a product is nondefective in design only if the danger is both known and reasonable in retrospect.

As the \textit{Barker} court noted, its approach differs from the \textit{Restatement} in that the latter "treats such consumer expectations as a 'ceiling' on a manufacturer's responsibility under strict liability principles, rather than as a 'floor.'"\textsuperscript{198} That is, the most a manufacturer had to do under the \textit{Restatement} was to make the dangers of his product known to consumers. But even in the case of products containing hidden dangers he could escape strict liability by showing that the product was "unavoidably unsafe."\textsuperscript{197} There was never liability if the danger was obvious or known, but even if the danger was hidden the manufacturer could sometimes escape liability. Under \textit{Barker}, "at a minimum a product must meet ordinary consumer expectations as to safety to avoid being found defective."\textsuperscript{198} However, even a product with known dangers is defective if those dangers are not reasonable in retrospect. The California courts thus increased the scope of a product manufacturer's potential liability by holding him liable if the product is defective under either test.

The second way that the \textit{Barker} court significantly increased the scope of liability over pre-\textit{Cronin} products law was by placing

\textsuperscript{195} \textit{Id.} at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40. \textsuperscript{196} \textit{Id.} at 426 n.7, 573 P.2d at 451 n.7, 143 Cal. Rptr. at 233 n.7. \textsuperscript{197} \textit{Restatement}, supra note 20, at § 402A comment k. \textsuperscript{198} 20 Cal. 3d at 426 n.7, 573 P.2d at 451 n.7, 143 Cal. Rptr. at 233 n.7.
the burden of proving reasonableness of design on the defendant. A plaintiff can raise the issue of defectiveness under the second prong of the *Barker* test—unreasonably dangerous in hindsight—by merely showing that "the product's design proximately caused his injury." The defendant can then exonerate himself only by showing, "in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." For example, in *Campbell v. General Motors Corp.*, the plaintiff bus passenger fell while standing in a bus that lurched unexpectedly. She claimed that the absence of a handle on a nearby wall was the design feature of the bus that caused her injury. She argued that if there had been such a handle she might have been able to grab it and use it to avert her fall. The court held that with this testimony she made a submissible case. The burden then shifted to the defendant to prove that the design of the bus without the handle was reasonable in light of the risks, benefits, and costs involved.

The first method the *Barker* court chose to expand liability—adopting the disjunctive two-prong test of defect—is an appropriate one; it accomplishes the desired expansion without a significant loss of jury control over that which existed under the "unreasonably dangerous" test standing alone. The second method, however—shifting the burden to defendant—potentially increases the scope of liability because of a significant loss of jury control. True, if juries really follow the *Barker* instructions, only a small increase in the number of plaintiff's verdicts will result; these will be in the few cases where the evidence concerning reasonableness of design is evenly balanced. Defendants will lose such cases since they now bear the risk of nonpersuasion. If one agrees, however, that juries are often plaintiff-oriented and occasionally disregard the judge's instructions in order to find for the plaintiff, the risk of incorrect verdicts based on jury bias will be greatly increased by shifting the burden to the defendant.

This is because additional cases will be submissible—cases previously withheld from juries because of insufficient evidence of defect—thus increasing the opportunity for such jury misconduct. This

199. *Id.* at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.
200. *Id.*
201. *Id.* at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.
203. *Id.* at 125, 649 P.2d at 232, 184 Cal. Rptr. at 899.
risk of jury misconduct is minimized in jurisdictions where the burden is on the plaintiff; to prevail in such jurisdictions, the plaintiff must present sufficient evidence so that reasonable people could believe that the design was unreasonable. For example, at a minimum he might be required to present evidence sufficient for a jury to believe that an alternative design which would have prevented the harm was economically and technologically feasible. Where the design issue is sufficiently technical that the jury could not base its conclusion on common knowledge, technical evidence of feasibility of an alternative design is required. Absent such a showing, the plaintiff has not made out a submissible case, and the trial judge would direct a verdict. Consequently, the jury would not have a chance to decide such a case. Under the Barker formulation, however, such a case would go to the jury merely upon a showing that some design feature of the product caused plaintiff's harm. The jury would then have an opportunity to decide the case in favor of the plaintiff in disregard of the court's instructions even though it believed the defendant's evidence that the design was reasonable because the utility outweighed the risk.

Thus the second Barker approach gives juries maximum reign to disregard the court's instructions and implement its own notions of justice and social policy because it eliminates a screening mechanism which keeps many unmeritorious claims away from the jury. Some totally frivolous cases can still be kept from the jury because in extraordinary cases the judge is permitted to take a case away from the jury by directing a verdict in favor of the party with the burden of proof. Such directed verdicts will probably be rare because even in cases where all the evidence concerning reasonableness of design comes from the defendant, and is to the effect that the design is reasonable, the plaintiff is entitled to a verdict if the jury disbelieves all of the defendant's evidence. A case is submissible in order to give the jury the opportunity to disbelieve the defendant's evidence.

It is true that even in jurisdictions where a plaintiff must make

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204. See Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322 (1977) (en banc). The court required that the plaintiff provide a practical and technically feasible alternative to show that the present design was defective. Id. at 67, 577 P.2d at 1327.
205. Id. at 69, 577 P.2d at 1327.
206. See id.
a prima facie showing of defect in order to get to the jury there is always the possibility that the jury will disregard the court’s instructions and find for the plaintiff even though it does not believe that the product is defective. While this thwarts the state’s social policy, the harm done by the faulty decision in such a case is ameliorated, to some degree at least, in the sense that a different jury could have decided the case the same way for a proper reason, i.e., it could have found the product defective. A greater departure from social policy occurs when the jury imposes strict liability under circumstances where no reasonable person could believe that the product was defective under the risk-utility test.

B. Causation

Another important basis for restricting the scope of potential liability in products liability cases is the requirement that the plaintiff prove that the defendant’s defective product caused the plaintiff’s harm. Several courts have expanded the scope of liability either by relaxing the plaintiff’s burden of proof on this issue, or shifting the burden to the defendant, or both. So far, these courts have relaxed these rules only in some fairly specific situations, and consequently their impact is limited. However, the approach is well worth analyzing because it could be applied very generally in all tort cases. There is already considerable scholarly sentiment in favor of such expansion, and if this occurs, tort law would change dramatically because the causation requirement would no longer restrict the scope of potential liability.

_Sindell v. Abbott Laboratories_ is the leading case in this trend toward relaxation of the causation requirement. The case involved the problem of harm caused to the female offspring of pregnant women who took diethylstilbestrol (“DES”) to prevent miscarriage. Quite often the “DES daughter” discovers that she has one of several disorders caused by the DES years after the drug was con-


sumed by her mother. In such cases it is often impossible for the victim to identify the manufacturer or distributor of the DES that was consumed by her mother because of the lapse of time, the lack of adequate records, and the large number of manufacturers and distributors of DES. Such a person would fail to recover under the traditional rules of negligence or strict liability because she could not prove that the defendant sold the drug that caused her disorder.

The California court in Sindell rectified this problem by creating a new theory of recovery called "market share liability," which dispenses with the need to identify the source of the drug. Under this theory, the plaintiff is required to join a sufficient number of manufacturers so that a "substantial share" of the DES market is represented. Damages are then apportioned among defendants according to each defendant's relative share of the DES market. Any defendant able to prove that it could not have supplied the drug that caused the plaintiff's harm is exonerated.

The policy underlying the decision to implement market share liability is that as between an innocent victim and a negligent manufacturer, fairness requires that the manufacturer bear the cost of the injury. The court reasoned that the theory was fair to manufacturers even though a given plaintiff was not required to establish which defendant caused her harm because each defendant will ultimately be held liable only for approximately the amount of harm it actually caused. The idea is that if a given defendant manufactured 10% of the DES used for the prevention of miscarriage, he probably caused 10% of the harm caused by the use of DES for that purpose. If all plaintiffs had full information, 10% of them would elect to sue this manufacturer because he was the source of the drug consumed by their mothers, and this manufacturer would end up satisfying the judgments in these cases. It is thus fair, according to this theory, to hold this defendant liable for 10% of the judgments in all cases since this is equal to the amount that he would pay if plaintiffs had perfect information. In another forum the author criticized the ability of the

212. 26 Cal. 3d at 610-13, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.
213. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.
214. *Id.*
215. *Id.*
216. *Id.* at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.
217. *Id.* at 612-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.
theory to achieve its objective with fairness to defendants.\textsuperscript{218} The critical issue here is the effect of the theory on the court's ability to uniformly implement policy decisions.

In \textit{Sindell} the court relaxed the traditional burden of proof with respect to causation of harm in two ways. First, it shifted the burden of proving the source of the drug to the manufacturer. A defendant can escape liability only by proving that it could not have been the source of the drug.\textsuperscript{219} Without such evidence the defendant becomes liable for the proportional amount of the judgment equivalent to its share of the market.\textsuperscript{220}

The second relaxation of the burden of proof relates to proof of market share. The court recognized that it was impossible to prove market share with mathematical exactitude\textsuperscript{221} because of such factors as lapse of time, absence of adequate records, and the multiple uses to which the drug was put.\textsuperscript{222} The court concluded that if because of such circumstances the jury cannot make a correct determination it "may make it the best it can."\textsuperscript{223} The quoted language was taken from \textit{Summers v. Tice},\textsuperscript{224} an analogous California case upon which \textit{Sindell} heavily relied in formulating the market share theory. \textit{Summers} explained the meaning of the quoted language, stating that the jury's decision is "more or less a guess."\textsuperscript{225} The relaxation of the burden of proof with respect to market share is not total since the plaintiff is required to introduce some evidence of market share, but it is clear from this language that the traditional standard of proof need not be met.

Both methods of changing the traditional burden of proof requirement have serious implications with respect to increasing the scope of potential liability. Shifting the burden of proof on the question of identity of the manufacturer increases the scope of potential liability in several ways. First, because there is no evidence of causation in a great many cases, the party with the burden of proof will lose all such cases by default. Under the traditional rule the plaintiff

\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.} at 613, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46.
\textsuperscript{223} \textit{Id.} at 613, 607 P.2d at 937, 163 Cal. Rptr. at 145.
\textsuperscript{224} 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948).
\textsuperscript{225} \textit{Id.}
will lose such cases because she has the burden of proving causation as an essential element of her case. Under Sindell, however, defendants will lose all such cases because they have no evidence available to prove absence of causation. The impact of a shift in the burden of proof is considerably different here compared to the impact of the shift in Barker v. Lull which dealt with the issue of reasonableness of design. Ample evidence will always be available on that issue, and a shift in the burden of proof should in theory cause defendants to lose relatively few additional cases—those where the jury finds the evidence to be evenly balanced.

This result of Sindell inexorably flows from the logic of a rule adopted specifically to implement the policy of shifting such losses to defendants. Assuming that the policy decision is wise, this consequence of the rule cannot be faulted because it does uniformly implement a policy decision deliberately made by an appropriate body. All DES cases within the state, where there is no evidence of the manufacturer's identity, will be resolved in the same way, i.e., the manufacturers involved in the case will lose.

The second way the shift in the burden of proof increases the potential scope of liability is by creating a loss of jury control. This loss of jury control is the same as in the case of shifting the burden of proof on the question of defect. There is no screening device to protect against an adverse jury decision even when the evidence is clear that the defendant did not supply the drug. The jury is free to disregard the court's instructions even in frivolous cases.

However, unlike the design cases, it is not clear that this sort of jury misconduct will thwart the policy underlying Sindell. The basic policy of Sindell is risk-spreading in order to relieve plaintiffs of catastrophic losses and to provide manufacturers with an incentive to improve the safety of their products. These objectives can be achieved by imposing liability on any DES manufacturer without regard to whether he supplied the drug consumed by the plaintiff's mother. A jury verdict holding a manufacturer who did not supply the drug liable is consistent with the risk-spreading policy. Sindell
was also based on an unarticulated countervailing policy, i.e., protecting manufacturers from such potential excessive liability that they become unwilling to provide society with desirable and useful products because they are potentially harmful. The court attempted to implement this policy by apportioning liability in accordance with market share. Permitting defendants to escape liability in selected cases because of the fortuitous presence of exculpatory evidence distorts this apportionment scheme and defeats the underlying policy of protecting manufacturers because some manufacturers will be held liable for more than their market share.  

3 Under this line of reasoning, the loss of jury control which might lead to jury misconduct in disregarding a defendant's exculpatory evidence, furthers the policy underlying Sindell.

The second way in which Sindell relaxed the plaintiff's traditional burden of proof—permitting the jury to decide each defendant's market share on the basis of otherwise inadequate evidence—can impede the policy underlying Sindell by seriously distorting the damage apportionment scheme. The obvious reason for restricting each defendant's liability to his approximate market share is to prevent defendants from being subject to such excessive liability that he and others like him will be deterred from marketing useful products in the future. The prospect of being held liable for significantly more harm than a given defendant actually caused creates a real likelihood of such excessive deterrence, and the relaxed burden of proof—coupled with other features of market share liability—create just this possibility.

Serious distortion will inevitably result from a number of factors. In many cases there is a lack of sufficient evidence to determine the market share of a given defendant with anything approaching precision. 231 Since the jury is permitted to "do the best it can" 232 even if the evidence is inadequate, it is quite conceivable that a jury could make a significant mistake in many cases. For example, in a case where the evidence of market share is sparse, a jury doing the best it can might well find that a given defendant's market share is 30% when in fact it was only 20%. In such a case, if the plaintiff's damages were $1,000,000 and if each defendant was liable for his

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pro rata share of the judgment, then the defendant's true share of the judgment would be $200,000; but because of the jury error the defendant's share would be increased by 50% to $300,000.

This distortion would be further magnified by another feature of the theory. Sindell apparently requires defendants to pay 100% of the plaintiff's judgment even though the plaintiff has not joined 100% of the producers of DES which might have supplied the offending drug to the plaintiff's mother. The plaintiff is merely required to join a sufficient number of producers so that a "substantial share" of the producers of DES are joined. The court has not defined just what a "substantial share" is, but assume for purposes of the hypothetical that the plaintiff has joined manufacturers representing 60% of the market and that this satisfies the substantial share requirement. Under these circumstances a defendant whose true share of the market is 20% would be liable for one-third of the judgment, or $333,333.33, because his market share represents one-third of the share of the market represented by the joined defendants. However, if the jury errs and finds that defendant represents 30% of the relevant market, the defendant would be liable for one-half of the plaintiff's judgment, or $500,000, because his market share is 50% of the total share of the market represented by all of the defendants joined in the suit. The combination of the jury error and the requirement that defendants pay all of the judgment even though less than all possible suppliers of the drug have been joined results in a distortion of a defendant's liability by 250%, i.e., defendant pays $500,000 of the judgment even though his true pro rata share is $200,000.

Other courts have resolved the DES problem by permitting plaintiffs to recover under a theory that creates even greater distortion than the market share theory. These courts have modified the concert of action theory to permit recovery in DES cases even though the traditional elements of concert of action are not met.


234. Sindell, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.


236. See infra text accompanying notes 237-42.
For example, in *Bichler v. Eli Lilly & Co.* the Appellate Division of the New York Supreme Court approved a modification of the concert of action theory to permit recovery in DES cases where plaintiffs would be expected to have difficulty identifying which of numerous manufacturers produced the product that caused the harm. The court held that each manufacturer that committed the wrongful act of negligently selling DES for purposes of preventing miscarriage would be held liable for the acts of other such manufacturers if the defendant's conduct had the effect of substantially encouraging or assisting the wrongful conduct of the other manufacturers. This represents a significant departure from the traditional concept of liability for aiding and abetting. Traditionally, an aider and abettor was required to intend to lend encouragement or assistance to the wrongdoer. *Bichler* apparently requires no such intent, and furthermore does not require that the defendant foresee an unreasonable risk that his conduct will encourage similar misconduct by other manufacturers. A negligent manufacturer is liable for the acts of another if his conduct merely substantially encourages the other's misconduct.

*Bichler* was affirmed by the New York Court of Appeals on fairly narrow procedural grounds; however, the court in dicta indicated its approval of the lower courts' expansion of products liability law in order to meet the exigencies of the case. The court said "products liability law cannot be expected to stand still where innocent victims face 'inordinately difficult problems of proof.'" While this view is certainly commendable in theory, the *Bichler* solution to the


241. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 583-84, 436 N.E.2d 182, 187-88, 450 N.Y.S.2d 776, 781-82 (1982). The court did not decide the merits of Lilly's objections to the jury charge on the issue of concerted action since it found that the objections had not been appropriately preserved for review. Accordingly, the court only assessed the legal sufficiency of the evidence to determine if it supported the jury's finding of concerted action.

problem in practice ends up distorting liability even more than the Sindell approach because any negligent producer would be liable for 100% of any given plaintiff's damages under a concert of action theory. 243

A major problem with Bichler is that the rule it adopted is not sufficiently restricted. Bichler revised the concert of action theory specifically so that DES daughters could avoid particularly difficult proof problems. The theory, however, appears sufficiently broad to apply to future cases where no such proof problems exist. For example, if many pedestrians in a town jaywalk in violation of the law, the conduct of each of them probably encourages the others. Under the Bichler theory each pedestrian might be liable for all accidents resulting from jaywalking in the town even though none of them intends to encourage the others. Even if this result is desirable it cannot be justified for the reasons articulated in Bichler (particularly difficult proof problems) and the result should not be an accidental by-product of that decision.

To a lesser degree the same criticism is true of Sindell; however, market share liability is clearly much more restricted than it might have been. It apparently only applies to fungible goods, and it may be limited to negligence actions rather than strict liability. 244 Furthermore, it restricts its probabilistic approach to determining causation to the question of identity of the manufacturer. Another causation question in DES cases, to which Sindell apparently does not apply, is whether DES caused the plaintiff's condition. Traditionally, a plaintiff must prove this by a preponderance of the evidence. At a minimum this requires evidence of a 51% probability, i.e., that the drug was more likely than not the cause of the disease. 245 In a case where plaintiff can only show a 20% chance that DES caused the harm, she would fail. It is possible to apply a probabilistic theory here and hold DES manufacturers liable for 20% of a plaintiff's harm, but Sindell did not extend the theory this far.

Yet the theory may still be broader than necessary to accomplish its objectives. The rationale of Sindell is to spread the risk and

243. The liability imposed by the concert of action theory is joint and several. See W. Prosser, supra note 239, at 292; Restatement, supra note 20, at § 876. While the court did not directly consider the merits of the concert of action theory, it did indicate approval of it. See supra notes 241-42 and accompanying text.


245. See Restatement, supra note 20, at § 433B, comment a.
provide manufacturers of fungible goods with an incentive to improve the safety of their products.\footnote{246} A countervailing policy is to keep the scope of potential liability within reasonable bounds so that such manufacturers will be willing to continue to produce useful products even though there is a risk that they will turn out to be harmful. In view of the enormous potential damage in the DES cases and in view of the substantial chance that certain manufacturers will be held liable out of proportion to their actual market share, it is quite possible that the theory will adversely affect the willingness of businesses to provide useful fungible goods.

It is possible to apply the theory more selectively so as to reduce the risk of this undesirable consequence. The DES cases can be broken down into two categories. A relatively small number of cases involve adenocarcinoma, a very serious form of cancer.\footnote{247} The damages in such cases are catastrophic from the victim's point of view. The other category of cases involve conditions such as vaginal adenosis, a minor physical condition which may turn out to be harmless.\footnote{248} In cases where cancer or other specific harm does not develop, the damages resulting from this condition are likely to be largely intangible, such as mental distress resulting from fear of cancer. If it is not feasible to spread all the losses caused by DES because of the reasons discussed above, it may be an appropriate compromise for a court to limit the market share theory to cases involving specific serious harm. In the cancer cases, for example, risk-spreading is very desirable because the losses are too high to be

\footnote{246} See supra notes 228-30 and accompanying text.  
\footnote{247} Herbst, Cole, Norusis, Welch & Scully, Epidemiologic aspects and factors related to survival in 384 Registry cases of clear cell adenocarcinoma of the vagina and cervix, 135 AM. J. OBSTET. GYNECOL. 876 (1979); see also Note, DES and a Proposed Theory of Enterprise Liability, 46 FORDHAM L. REV. 963, 964 (1978). A worldwide registry indicates that 384 women born between 1940 and 1971 contracted adenocarcinoma; 213 of these cases were associated with the use of DES. Herbst, Cole, Norusis, Welch & Scully, supra, at 877.  
\footnote{248} Weitzner & Hirsch, Diethylstilbestrol—Medicolegal Chronology, 1982 MED. TRIAL TECHNIQUE Q. 145, 148. Vaginal adenosis is a disorder that results from the growth of mucinous products in the vagina. See R. Epstein, supra note 231, at 158 (1980); Note, Beyond Enterprise Liability in DES Cases—Sindell, 14 IND. L. REV. 695, 696 n.12 (1981); Interview with Dr. A.L. Herbst, reprinted in 30 CA-A-CANCER J. FOR CLINICIANS 326 (1980) [hereinafter Interview]. This appears as normal tissue which has developed in an abnormal location. Interview, supra, at 329. While this growth was once suspected of being pre-cancerous, recent studies indicate otherwise. See R. Epstein, supra, at 158; Weitzner & Hirsch, supra, at 157. Note, supra, at 696 n.12; Interview, supra, at 329. However, recent studies indicate that some "DES daughters" may experience increased reproductive difficulties. Weitzner & Hirsch, supra, at 148-54. This risk may be enhanced in the case of women with adenosis. Id. at 154.
born by the average person. Yet because the number of cancer cases is rather small, manufacturers may well be able to bear these losses without serious adverse consequences.

The need for risk-spreading in the adenosis cases is much less. These victims are better able to bear the harm they suffer than the cancer victims because the total harm suffered by a given individual is less and because the harm is largely intangible, as opposed to the out of pocket losses such as medical expenses and lost wages frequently incurred by the cancer victims. The feasibility of spreading these losses is much less than in the cancer cases because the total cost of all such damages will probably be extremely high in view of the number of potential plaintiffs in this category and because of the litigation expenses associated with the trial of so many cases.249 By limiting market share liability to the cancer cases, the practical consequences of the inability of the theory to apportion damages appropriately would be greatly mitigated, yet the risk-spreading policy would be implemented in the cases where it is most needed.

The Sindell approach to causation can be expanded beyond DES cases and applied to all cases of multiple causation where it is not clear which of several tortfeasors caused the harm. This could be done where the conduct of the potential tortfeasors was different and where the conduct occurred at different times. That is, each tortfeasor could be held liable on the basis of the probability that his conduct caused the harm. This approach to resolving causation questions is becoming increasingly popular with legal scholars.250

One author has suggested an example that clearly illustrates the nature of the problem and how the theory might work.251 Suppose a cancer victim can establish that exposure to asbestos created a 6% risk of causing his cancer, exposure to hazardous wastes created a 2% risk, and exposure to a certain medication accounted for an additional 2% risk. Environmental conditions accounted for the other 90% of the risk. Under the traditional rule none of the defendants would be liable because none created a 51% risk of causing the victim’s cancer, the percentage necessary to meet the more probable

249. Between one-half million and three million DES users exposed their offspring to the drug during pregnancy. Note, supra note 247, at 965, & n.6. Potential total damages are estimated in the billions of dollars, see Note, A Remedy for the "DES Daughters": Products Liability Without the Identification Requirement, 42 U. Pitt. L. Rev. 669, 691 (1981); Note, supra note 247, at 968, & n.21. See also Henderson, supra note 210, at 143.

250. See, e.g., Robinson, supra note 208, at 736-49; Rizzo & Arnold, supra note 208. See also King, supra note 208, at 1376-88; Twerski, supra note 208, at 819-29.

251. Robinson, supra note 208, at 762.
than not test. In such a case, however, a court using a probabilistic approach could impose complete liability on each of the three manufacturers, but only for the amount of harm that each potentially caused under the probabilistic theory. That is, the asbestos manufacturer would be liable for 6% of plaintiff's damages, and the other two manufacturers would be each liable for 2% of the damages. 252

Advocates defend this approach as a more precise method of apportioning liability than the traditional all or nothing rule. 253 In a case where the plaintiff can prove that the defendant created a 51% risk of causing his harm, the common law holds that defendant liable for 100% of the damages, and in cases where a defendant creates a 49% risk of causing the harm, the common law rule exonerates the defendant entirely. This is very crude because the defendant is held liable for a disproportionately large share of the damages in the former case and a disproportionately small share of the damages in the latter case. 254 A probabilistic theory of determining causation holds the defendant liable for the correct amount of the harm caused in all cases. 255

While this argument sounds plausible, it is not clear that the results it reaches are theoretically desirable. In a fascinating article, Professor Kaye concluded that in most cases the traditional rule yields more desirable results. 256 His work is based in part on the thesis that it is just as undesirable to pay an undeserving plaintiff too much as it is to pay a deserving plaintiff too little. 257 The probabilistic theory yields incorrect results in every case because each defendant will pay every plaintiff the wrong amount—he pays too little to those plaintiffs whose harm he caused and too much to those plaintiffs whose harm he did not cause. 258 Of course the traditional rule yields some incorrect results as well, but Professor Kaye has demonstrated mathematically that the magnitude of damages produced by the wrong decisions is greater under the probabilistic theory than under the traditional rule. 259

252. See id. at 750-53, 761-64.
253. See, e.g., King, supra note 208, at 1381-87; Robinson, supra note 208, at 751.
254. See Robinson, supra note 208, at 751-52.
255. See id. at 757.
257. See id. at 488-91, 516.
258. See id. at 501-02.
259. Id. at 496-503.
Regardless of whether the probabilistic theory yields theoretically correct results or not, it certainly raises several practical problems. Foremost among these is the extreme difficulty of determining the risk associated with each potential defendant’s activity. There is no body of science that resolves such questions with precision. A precisely individualized determination would have to be made in each case in order to estimate probability accurately. All persons are subject to a multitude of carcinogenic environmental factors in widely varying degrees and amounts. Furthermore, the genetic makeup of each individual must be considered. The jury could not possibly decide such questions without the aid of experts, and their testimony would obviously be based on judgment to a large degree. One can imagine a “battle of the experts” in such cases where the plaintiff’s and the defendant’s respective experts are miles apart and the jury has no basis for deciding between the two extremes. The jury would be forced to decide such cases “the best it can,” and this is likely to yield a very crude approximation of the risk created by each defendant. Any error of this sort will distort the apportionment scheme, e.g., finding a 3% risk when defendant created only a 2% risk will result in defendant paying one-third more than he ought.

A counter-argument is that a rough approximation of the probability of harm is sufficient because if mistakes are made in all cases, the chances are that they will even out in the long run, i.e., sometimes the estimate of risk created by a given manufacturer will be too high but at other times it will be too low. This is true only if juries are plaintiff-defendant neutral, i.e., make just as many mistakes in favor of defendants as in favor of plaintiffs. If the majority of juries are plaintiff-oriented—as many people believe—then it seems likely that more of the mistakes will favor plaintiffs. This seems especially likely in cases where less than 100% of the causes of the plaintiff’s harm are represented in the suit because the jury determination does more than just apportion damages among defendants, it apportions damages between the plaintiff and defendants. An under-estimation of a given defendant’s liability in such a case will result in a diminished recovery for the plaintiff.

Beyond this, the characterization problems presented by this approach are so vast that it is unlikely that any two cases would be treated alike. This would defeat the purpose of the theory because

260. See Note, supra note 248, at 713-14.
uniformity of result can be achieved only if all similar cases are treated the same.

The initial problem requires a determination whether the case involves multiple causation and is thus appropriate for application of the theory. Assume a car is defectively designed in that an excessively rigid knob protruding from the dashboard creates an unreasonable risk of injury to a passenger in a collision. The risk is that if the passenger is not wearing a seat belt he may be thrown against the protrusion. In a great many second collision cases involving this model car we will know only that the passenger was injured because he came into contact with something in the interior of the car, but we will be unable to tell whether the protrusion in question was involved. Suppose expert testimony establishes that the protrusion is probably involved in 10% of these second collision cases. We could treat each such case as a multiple causation case and hold the manufacturer liable for 10% of the damages. However, other cases will arise where we can show conclusively that the protrusion was involved—perhaps an indentation in plaintiff's skull matches the shape of the protrusion exactly. Here there would be great temptation to treat this as a sole causation case rather than as a multiple causation case, and hold the manufacturer liable for 100% of the damages. The net effect of this difference in characterization is to require the defendant to pay more than he should. Assume the evidence is conclusive in 5% of the cases. Under these circumstances the defendant would pay 100% of the damages in five cases out of 100 and 10% of the damages in the remaining 95 cases. If there are 100 cases and the damages are $1,000 in each case, then the total damages in the 100 cases is $100,000. The defendant should pay $10,000 total damages since this is what he caused. He therefore ended up paying $4,500 too much because he paid $5,000 in the five cases and $9,500 in the other 95 cases.

One could argue that the result is skewed because my figures were wrong. Actually, the argument goes, there are two classes of cases: those where the risk of harm approaches certainty and those where the risk of harm is .0526315 per cent. If defendant pays this latter percentage in the 95 cases ($52.63) and all damages in the 5 cases ($1,000) the result will come out exactly correct. The difficulty with this argument—even if it were possible to come up with these percentages with precision—is that there are not just two classes of cases. There are 100 classes of cases because the risk of the protrusion harming a given passenger in a given accident varies with the
precise circumstances of each case. Such factors as the size of the passenger, his position in the vehicle, the existence and location of other objects and persons in the vehicle, the speed of the vehicle, the passenger's wearing apparel, force of impact, direction of impact, characteristics of object with which the impact occurred, and an infinite variety of other factors all affect the likelihood that a given passenger will harm himself by coming into contact with the dashboard protrusion. The exact probability of harm will vary subtly in each case, and it is obviously impossible to pinpoint this with accuracy.

The best way to achieve consistency is to make an estimate of probability of harm in all cases and require the defendant to pay that amount in each case. This would result in the defendant paying 10% of the damages in the five cases where causation is certain as well as in all other cases. It is, of course, inconceivable that a court would do this. The more likely approach would be the selective use of the multiple causation theory in cases where it appears convenient, an approach that guarantees skewed results.

Another problem with the probabilistic approach is the increase in litigation costs generated by the method. The cost of determining the magnitude of risk of each possible cause of each accident or injury is likely to be very great. Furthermore, a great many more potential defendants can be sued under the probabilistic theory. Under present law, plaintiffs would only have a motive to sue people who can be proved to be the probable causes of the accident or injury. Under a probabilistic theory anyone who creates any risk of the harm is a potential defendant. For example, the three manufacturers in the cancer hypothetical would probably not be sued under present law; under the probabilistic theory they would be. Each defendant would incur substantial litigation costs in defending the case. None of these costs would be incurred under present law.

Imposing liability on the basis of a rough approximation of the chance that a defendant caused the plaintiff's harm would bring the tort system one step closer to becoming a lottery. The next step might be to determine fault on the basis of probability as well. To illustrate, suppose a pedestrian is hit by a speeding car. The only evidence is that the car was blue, there are 50 blue cars in town, and 100 people drive these cars. Using a probabilistic approach, we might permit plaintiff to sue all 100 drivers of blue cars and recover 1% of his damages from each on the basis that there is a 1% chance

261. See Kaye, supra note 256, at 514 n.76.
that each is the negligent driver that caused the harm. Carrying the case one step further, if we did not know the color of the car, we might hold each driver in town liable for his respective share of the damages on the theory that there is an equal risk that each is the culprit. In the event that we are uncertain that the car was driven negligently, we could discount the plaintiff's recovery accordingly. If there is a 50% chance that a car involved in such an accident was driven negligently, we could permit plaintiff to recover 50% of his damages and apportion this among all drivers in town. This could be justified on the basis that innocent accident victims who cannot prove their cases through no fault of their own need to be compensated. Carried to this extreme, however, the tort system becomes purely a method for spreading risks. The costs of the adversary system are too great to administer such a system efficiently. 262

CONCLUSION

As we have seen, tort law today is often thought of as a method of social engineering rather than just a method for resolving disputes among private individuals. 263 For example, much of products liability law is based on the desirability of risk-spreading rather than as a vehicle for dispute resolution. 264 On this basis courts have imposed strict liability in design and warning cases. They have done so, however, by using a negligence analogy—unreasonableness of conduct evaluated in hindsight rather than with foresight. The functions of the judge and jury are essentially the same in these cases as in negligence cases.

The difficulty of applying the old approach to the new generation of torts is that it is often too crude an instrument to uniformly implement the social policies that justify expanded liability. Use of arbitrary inflexible rules to screen cases from juries—such as the patent danger rule in products cases—may achieve undesirable results in many cases. For example, the patent danger rule in products cases would prevent recovery by a bystander who was injured by an obviously dangerous product which created the sole risk of injuring

262. See Epstein, supra note 229, at 660-61.

263. See supra notes 13-15 and accompanying text.

bystanders. The buyer of the product has no incentive to pay extra for a safety device, unless the product is so dangerous that it is negligent to operate it at all without the safety device. Here there is no intelligent economic decision as to whether the cost of the device is outweighed by the risk of potential harm it causes. On the other hand, submission of all products cases to juries under the very general reasonableness standard is equally undesirable because it provides manufacturers with too little certainty in selected cases, especially complex design and warning cases. Present law permits juries to decide reasonableness of design of very complex products on the basis of wildly conflicting expert testimony. It is very unlikely that consistent results can be achieved in such cases, but even if they could be, the design achieved by this process is not likely to be a very intelligent one. A committee of laymen probably ought not have the final word on the design of very complex products. The negligence analogy is simply inadequate to decide when social policy justifies risk-spreading and when it does not.

When courts decide that social policy justifies an expanded scope of liability they ought to devise an approach that will uniformly implement the change within the jurisdiction. The rules implementing these policies must reach an accommodation between the need for flexibility and certainty, just as all rules of law must. However, where flexibility lies in these rules, it ought to be exercised by judges so that the underlying policy can be uniformly implemented, at least unless the determination is one the jury is peculiarly able to make.

One of the main criticisms of modern products liability law is not that it imposes excessive liability, but rather that the law is so uncertain that the possibility of excessive liability adversely affects manufacturers and insurers. If this is a problem, courts ought to formulate rules that lead to greater predictability of result. One method of accomplishing this is to be much more selective in applying traditional rules to specific cases. For example, rather than reject the patent danger rule in all cases or apply it in all cases, courts could decide to apply it in cases where it makes sense in theory and reject it in other cases, e.g., apply the rule in design cases unless a third party is the most likely victim of the dangerous defect.

265. See Henderson, supra note 162, at 1557-58.
If this were done the marketplace could be used to determine how much safety ought to be designed into a product except in cases where the buyer is indifferent to questions of safety.

Another instance where the normal rules might be modified is the situation where factually the liability imposed is so onerous that the industry involved is unable to spread the risk. Asbestos litigation presents a possible example. Potential liability for asbestos-related deaths has been estimated in the $38,000,000,000.00 range, more than the combined book value of the major defendants and their insurance companies involved in the asbestos litigation.267 A recent New Jersey case used the "hindsight" test for determining whether there was a duty to warn about the dangers of asbestos, i.e., manufacturers are liable for damages resulting from a failure to warn occurring prior to the time that it was scientifically knowable that asbestos was dangerous.268 While liability of bankrupting magnitude might be justifiable in cases where the defendant has negligently or intentionally caused harm, one must question the wisdom of imposing such liability without fault. Risk-spreading hardly justifies the result because it is not feasible for the companies involved to spread risks of this magnitude. A better approach would be for courts to decline to apply the hindsight test in design and warning cases where the consequences for the industry would be potentially disastrous.

Perhaps a better approach in strict liability cases is for courts to abandon the negligence analogy altogether and determine on the basis of several policy oriented factors whether liability is appropriate. This is the approach courts use in deciding whether to impose strict liability for abnormally dangerous activities. The court determines whether strict liability is appropriate on the basis of several factors.269 A similar scheme could be employed in products liability cases.270 Even in negligence cases courts can successfully use a factor test to determine when to expand the scope of liability beyond normal limits. This is what the California courts do to determine whether to impose fault-based liability for pure pecuniary loss. This approach has the advantage of placing basic policy questions in the

267. See 1 J. PROD. LAW 2 (1982).
270. For a discussion of how such a scheme might work, and what factors might be considered, see Fischer, Products Liability: Functionally Imposed Strict Liability, 32 OKLA. L. REV. 93 (1979).
hands of judges. These are appropriate officials for deciding such questions, and because all trial court decisions are subject to ultimate review in a single state supreme court, the chance that the policy will be uniformly implemented is maximized.

If the negligence analogy is retained there are other methods that courts can use to increase the degree of jury control where this is desirable. Use of special verdicts or general verdicts with interrogatories would be an effective control device in appropriate cases. Judges could also increase the use of remittitur and directed verdicts. This could be done now as a matter of discretion, but in the case of directed verdicts appellate courts could force trial courts to impose greater scrutiny by raising the standard of proof. Recovery for pure mental distress, for example, must be limited in some way because the potential liability is so great. If the court chooses not to limit recovery by imposing arbitrary barriers—such as the requirement that the plaintiff be within the zone of danger or that he fear for himself—then it might limit recovery by imposing a higher standard of proof. Plaintiffs might be required to prove by "clear and convincing evidence" that they suffered "serious mental distress." Under this standard the highest court of a state could force trial courts to direct verdicts against plaintiffs in all cases except where the plaintiff introduces substantial objective evidence of the severity of his distress. Plaintiffs might be permitted to prove this in a variety of ways, such as by showing a resulting serious nervous disorder or resulting physical harm. However, without such substantial evidence the case would not go to the jury.

Regardless of what approach is taken, liability cannot consistently be limited within appropriate bounds unless the judges who enforce these rules appreciate the necessity for such limits. There is no magic in any approach; a rule of law is nothing more than a group of words that can be interpreted in a wide variety of ways. A judge who believes that an accident victim ought to be compensated can often achieve the desired result as easily under one approach as under another. Bichler v. Ely Lilly271 provides an example. The court imposed liability because of the desirability of risk-spreading. It did so by modifying a narrow traditional theory of recovery (concert of action) so as to impose a very broad-based form of vicarious liability.

The tort system as we know it cannot survive as a pure compen-

sation system. There are many areas of the law where the scope of recovery can be broadened without producing adverse consequences. But this can be accomplished only if the rules governing liability are administered in such a way as to provide an appropriate degree of certainty and to keep the scope of liability within reasonable bounds.