Michigan
Law Revision Commission

SEVENTEENTH ANNUAL REPORT
1982

MICHIGAN
LAW REVISION COMMISSION

Term Members:

TOM DOWNS, *Acting Chairman*
DAVID LEBENBOM
RICHARD C. VAN DUSEN

Ex-officio Members:

Senators:

BASIL W. BROWN
DAN L. DeGROW

Representatives:

PERRY BULLARD
ERNEST W. NASH

Director, Legislative Service Bureau

ELLIOTT SMITH, *Secretary*
125 West Allegan, 3rd Floor
Lansing, Michigan 48913

Executive Secretary

PROF. JEROLD H. ISRAEL
University of Michigan Law School
341 Hutchins Hall
Ann Arbor, Michigan 48109

TABLE OF CONTENTS

MICHIGAN LAW REVISION COMMISSION
Seventeenth Annual Report to the Legislature

To the Members of the Michigan Legislature:

The Law Revision Commission hereby presents its seventeenth annual report pursuant to Section 14(e) of Act No. 412 of the Public Acts of 1965.

The Commission, created by Section 12 of that Act, consists of the chairperson and ranking minority members of the Committees on Judiciary of the Senate and House of Representatives, the Director of the Legislative Service Bureau, being the five ex-officio members, and four members appointed by the Legislative Council. Terms of appointed Commissioners are staggered. The Legislative Council designates the Chairman of the Commission.

Membership

The ex-officio members of the Commission during 1982 were Senator Basil W. Brown of Highland Park, Senator Donald E. Bishop of Rochester, Representative Perry Bullard of Ann Arbor, Representative Richard D. Fessler of Pontiac, and Elliott Smith, Director of the Legislative Service Bureau. The appointed members of the Commission were Tom Downs, David Lebenbom, and Richard C. Van Dusen. Professor Jerold Israel of the University of Michigan Law School served as Executive Secretary.

In December 1981, Mr. Jason L. Honigman resigned from the Commission, effective December 31, 1981. No person has been more instrumental in the success the Commission has achieved than Mr. Honigman. He was one of the original appointees to the Commission, and served as its chairman from 1967 through 1981. Mr. Honigman was the guiding force behind various Commission proposals that were enacted into law. In many instances, he not only initiated proposals, but also drafted the proposed legislation and presented it before the appropriate legislative committee. The Commission will sorely miss his leadership.

With the resignation of Mr. Honigman, Tom Downs, vice-chairman, became the acting chairman. It is anticipated that a replacement for Mr. Honigman will be appointed in 1983.

The Commission's Work in 1982

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reform.

2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers and the public generally as to the defects and anachronisms in the law.

4. To recommend, from time to time, such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

The problems to which the Commission directs its studies are largely identified by a study of statute and case law of Michigan and legal literature by the Commission members and the Executive Secretary. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

The Commission's efforts during the past year have been devoted primarily to three areas. First, Commission members met with legislative committees to secure disposition of 15 proposals recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National Conference of Commissioners on Uniform State Laws, and the Law Revision Commissions of various jurisdictions within and without the United States (e.g., California, New York, and British Columbia).

Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

As in previous years, the Commission studied various proposals that did not lead to legislative recommendations. In the case of several Uniform or Model Acts, we found that the subjects treated had been considered by the Michigan legislature in recent legislation. Similarly, various aspects of Michigan law were examined, but were viewed as inappropriate for legislative recommendation at this time.

The Commission at this time recommends immediate legislative action on only one of the topics studied. On one additional topic, the Commission has prepared a study report that may lead to further action. The two topics are:

(1) Repeal of M.C.L. §764.9.

(2) The Model Uniform Product Liability Act.

The recommendation and proposed statute on M.C.L. §764.9 and the study report on the Model Uniform Product Liability Act accompany this report.

Proposals for Legislative Consideration in 1982

In addition to the recommendation on M.C.L. §764.9, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1982.

(1) Appeals to the Tax Tribunal -- H.B. 4094 in the last legislative session. See Recommendations of 1978 Annual Report, page 9.

(2) In Rem Jurisdiction by Attachment or Garnishment Before Judgment -- H.B. 4416 in the last legislative session. This bill was passed by the House. See Recommendations of 1978 Annual Report, page 22.

(3) Disclosure of Treatment as an Element of the Psychologist/Psychiatrist-Patient Privilege -- introduced as H.B. 5297 in 1979. See Recommendations of 1978 Annual Report, page 28.

(4) Elimination of various Statutory References to Abolished Courts -- H.B. 4498 in the last legislative session. This bill was passed by the House. See Recommendations of the 1979 Annual Report, page 9.

(5) Uniform Federal Lien Registration Act -- H.B. 4415 in the last legislative session. This bill was passed by the House. See Recommendations of the 1979 Annual Report, page 26.

(6) Amendment of R.J.A. Section 308 (Court of Appeals Jurisdiction) in accordance with R.J.A. Section 861 -- H.B. 5223 in the last legislative session. See Recommendations of the 1980 Annual Report, page 34.

(7) Uniform Extradition and Rendition Act -- S.B. 126 in the last legislative session. See Recommendations of the 1981 Annual Report, page 8.

(8) Disclosure in the Sale of Visual Art Objects Produced in Multiples -- S.B. 668 in the last legislative session. See Recommendations of the 1981 Annual Report, page 57.

Current Study Agenda

Topics on the current study agenda of the Commission are:

(1) Amendments to Article 8 -- Uniform Commercial Code
(2) Eliminating Statutory References to Justice of the Peace and Other Abolished Courts
(3) Inconsistent References to "Police Officer" and "Peace Officer"
(4) Transfer of A Business Having Liquor Sales As A Minor Portion of Its Activities
(5) Registration of Assumed Names
(6) Michigan Election Law -- Designation of Convention Delegates
(7) Granting and Withdrawal of Medical Practice Privileges in Hospitals
(8) Immunity of Legislators From Civil Process
(9) Uniform Transboundary Pollution Reciprocal Access Act

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are in the University of Michigan Law School, Ann Arbor, Michigan 48109. By using faculty members at the several law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions.

The Legislative Service Bureau has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau, who acts as Secretary to the Commission, continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

Prior Enactments

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some cases amendments thereto by the Legislature:

1967 Legislative Session

Subject	Commission Report	Act No.
Powers of Appointment	1966, p. 11	224
Interstate and International Judicial Procedures	1966, p. 25	178
Dead Man's Statute	1966, p. 29	263
Corporation Use of Assumed Names	1966, p. 36	138
Stockholder Action Without Meetings	1966, p. 41	201
Original Jurisdiction of Court of Appeals	1966, p. 43	65

1968 Legislative Session

Jury Selection	1967, p. 23	326
Emancipation of Minors	1967, p. 50	293
Guardian ad Litem	1967, p. 53	292
Possibilities of Reverter and Right of Entry	1966, p. 22	13
Corporations as Partners	1966, p. 34	288
Stockholder Approval of Mortgaging Assets	1966, p. 39	287

1969 Legislative Session

Administrative Procedures Act	1967, p. 11	306
Access to Adjoining Property	1968, p. 21	55
Antenuptial Agreements	1968, p. 27	139
Notice of Tax Assessments	1968, p. 30	115
Anatomical Gifts	1968, p. 39	189
Recognition of Acknowledgments	1968, p. 61	57
Dead Man's Statute Amendment	1969, p. 29	63
Venue Act	1968, p. 19	333

1970 Legislative Session

Subject	Commission Report	Act No.
Appeals from Probate Court Act	1968, p. 32	143
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships Act	1969, p. 44	90
Warranties in Sales of Art Act	1969, p. 47	121
Minor Students Capacity to Borrow Act	1969, p. 51	107
Circuit Court Commission Power of Magistrates Act	1969, p. 62	238

1971 Legislative Session

Revision of Grounds for Divorce	1970, p. 7	75
Civil Verdicts by 5 of 6 Jurors in Retained Municipal Courts	1970, p. 40	158
Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

1972 Legislative Session

Business Corporation Act	1970, Supp.	284
Summary Proceedings for Possession of Premises	1970, p. 16	120
Interest on Judgments Act	1969, p. 64	135
Constitutional Amendment re Juries of 12	1969, p. 65	HJR "M"

1973 Legislative Session

Technical Amendments to Business Corporation Act	1973, p. 8	98
Execution and Levy in Proceedings Supplementary to Judgment	1970, p. 51	96

1974 Legislative Session

Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Model Choice of Forum Act	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic Relations Cases	1972, p. 53	90
Technical Amendments to the General Corporations Act	1973, p. 38	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
1974 Technical Amendments to the Business Corporation Act	1974, p. 30	303
Attachment Fees Act	1968, p. 23	306
Amendment of "Dead Man's" Statute	1972, p. 70	305
Contribution Among Joint Tort-feasors Act	1968, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Elimination of Pre-judgment Garnishment	1972, p. 7	371

1975 Legislative Session

Subject	Commission Report	Act No.
Amendment of Hit-Run Provisions to Provide Specific Penalty	1973, p. 54	170
Uniform Child Custody Jurisdiction Act	1969, p. 22	297
Insurance Policy in Lieu of Bond Act	1972, p. 59	290
Uniform Disposition of Community Property Rights at Death Act	1973, p. 50	289
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 30	288

1976 Legislative Session

Due Process in Replevin Actions	1972, p. 7	79
Qualifications of Fiduciaries	1966, p. 32	262
Revision of Revised Judicature Act Venue Provisions	1975, p. 20	375
Durable Family Power of Attorney	1975, p. 18	376

1978 Legislative Session

Elimination of References to Abolished Courts		
Preservation of Property Act	1976, p. 74	237
Bureau of Criminal Identification	1976, p. 74	538
Charter Townships	1976, p. 74	553
Fourth Class Cities	1976, p. 74	539
Election Law Amendments	1976, p. 74	540
Home Rule Cities	1976, p. 74	191
Home Rule Village Ordinances	1976, p. 74	190
Village Ordinances	1976, p. 74	189
Public Recreation Hall Licenses	1976, p. 74	138
Township By-Laws	1976, p. 74	103
Study Report on Juvenile Obscenity Law	1975, p.133	33
Multiple Party Deposits	1966, p. 18	53
Amendment of Telephone and Messenger Service Act Amendments	1973, p. 48	63
Amendments of the Plat Act	1976, p. 58	367
Amendments to Article 9 of the Uniform Commercial Code	1975, Special Supplement	369

1980 Legislative Session

Condemnation Procedures Act	1968, p. 11	87
Technical Revision of the Code of Criminal Procedure	1978, p. 37	506

1981 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to the Justice of the Peace: Provision on the Sheriff's Service of Process	1976, p. 74	148

1982 Legislative Session

Revised Uniform Limited Partnership Act	1980, p. 40	213
Technical Amendments to the Business Corporation Act	1980, p. 8	407
Amendment of Probate Code as to Interest on Judgments	1980, p. 37	412

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Tom Downs, Acting Chairman
David Lebenbom
Richard C. Van Dusen

Ex-Officio Members

Sen. Basil W. Brown
Sen. Dan L. DeGrow
Rep. Perry Bullard
Rep. Ernest W. Nash
Elliott Smith, Secretary

Date: February 10, 1983

REPEAL OF M.C.L. §764.9

In the 13th Annual Report, the Commission proposed a series of technical amendments to the Criminal Procedure Code. The Commentary to Section 4 of Chapter 4 (M.C.L. §764.4) noted: "This provision is the first of several dealing with the disposition of a person arrested outside the county in which the offense was committed. Currently, two separate sets of provisions deal with this situation. The first set, M.C.L. §§764.4-764.7, applies to non-J.P. offenses. The second set, §§764.9-764.12, applies to J.P. offenses. The two sets of provisions provide for essentially the same procedures and therefore are consolidated in §§764.4-764.7."

The proposed revision of M.C.L. §764.4 was adopted in P.A. 506 of 1980. It provides:

> Sec. 4. If a person is arrested pursuant to a warrant which charges an offense other than an offense for which bail may be denied, if the arrest is made in a county other than that in which the offense is charged to have been committed, and if the person arrested requests that he or she be brought before a magistrate of the judicial district in which the arrest was made, the person arrested shall be taken before a magistrate of that judicial district and shall be dealt with as provided in sections 5, 6, and 7 of this chapter.

Unfortunately, although the commentary stated that M.C.L. §764.9 would be repealed, the repealer was not included in P.A. 506. M.C.L. §764.9 still stands, duplicating M.C.L. §764.4. It provides:

> Sec. 9. In all cases where the offense charged in the warrant is cognizable by a justice of the peace, if the arrest shall be made in another county than where the offense is charged to have been committed and if the person arrested shall request that he be brought before a magistrate of the county in which the arrest was made, it shall be the duty of the person or officer arresting him, to carry such prisoner before a magistrate of that county.

This section should be repealed. The proposed bill follows:

A bill to repeal Section 9 of Chapter 4 of Act No. 175 of the Public Acts of 1927, entitled "The Code of Criminal Procedure," being Section 764.9 of the Compiled Laws of 1970, as amended.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 9 of Chapter 4 of Act No. 175 of the Public Acts of 1927, being Section 764.9 of the Compiled Laws of 1970, is repealed.

STUDY DRAFT ON THE MODEL UNIFORM PRODUCT LIABILITY ACT*

[The Commission has decided to issue a study report at this time, rather than a recommendation. While many of the issues posed by the Model Act are worthy of serious consideration, those issues should not be resolved without further inquiry that can most appropriately be provided by legislative hearings.]

I. BACKGROUND OF THE MODEL ACT

Complaints in the mid-1970's concerning increasing premiums and decreasing availability of product liability insurance resulted in state and federal consideration of possible statutory reform of products liability law. In 1976, responding to the perceived crisis, the Economic Policy Board of the White House established a Federal Interagency Task Force to study the problem and make recommendations. Although it also issued various other reports,[1] the primary work product of the Federal Task Force was its Final Report[2] and the Model Uniform Product Liability

---

* This Study Report is based upon an initial draft prepared by Charles Wolfson, a student at the University of Michigan Law School. The Commission very much appreciated his assistance.

1. Other Task Force and related documents include: Task Force on Product Liability and Accident Compensation, Report on Product Liability Insurance Ratemaking (1980); Interagency Task Force on Product Liability, Selected Papers (1978); Interagency Task Force on Product Liability, Product Liability Industry Study (1977); Interagency Task Force on Product Liability, Insurance Study (1977); Interagency Task Force on Product Liability, Legal Study (1977); Insurance Services Office, Product Liability Closed Claim Survey (1977).

2. U.S. Dep't of Commerce, Interagency Task Force on Product Liability, Final Report (1977) [hereinafter cited as Final Report].

Act (UPLA)[3] (Appendix A). The Model Act was recommended to the states for adoption. This memorandum will first examine the nature of the "products liability crisis" which gave rise to the Model Act. It will then consider the individual provisions of the UPLA and their relationship to Michigan law.

A. The Nature of the Crisis

In March, 1978, the Michigan Department of Commerce issued its Report on Product Liability Insurance.[4] Having examined a large number of private and governmental studies of products liability, including the Federal Interagency Task Force's Final Report, the Michigan Task Force began its analysis of the nature and scope of the problem by observing that the existence of an actual crisis remained unproven:

> It is remarkable that after several years of heated debate, numerous costly surveys and a full year's study by a federal task force, there is still fundamental disagreement over the nature and scope of the product liability crisis, or indeed over whether a "crisis" even exists. Proposals to address the problem have been advanced even though these central questions have not been answered. However, without the answers, public discussion of remedial action is likely to be aimless and increasingly frustrating.[5]

Documentation of the extent of claims in the area of products liability has proven exceedingly elusive. The Federal Task Force was unable to establish that rate increases in product liability insurance were attributable to increases in the number and size of claims rather than

---

3. U.S. Dep't of Commerce, Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979) [hereinafter cited as UPLA].

4. Michigan Dep't of Commerce, Task Force Report on Product Liability Insurance (1978) [hereinafter cited as Michigan Report].

5. Id. at 9.

unrelated problems in ratemaking products,[6] or even that there was a substantial, ongoing increase in the number and size of product liability claims being asserted.[7] In its 1978 report, the Michigan Task Force recommended "enactment of statutory reporting requirements, similar to those enacted for medical malpractice, pertaining to product liability claims, actions and settlement amounts."[8] Such a statute was passed shortly thereafter.[9] Attempts to extrapolate meaningful data from the resulting reports have proven fruitless, however, and the Product and Liability Division of the Bureau of Insurance has recommended that the Bureau support legislation to repeal the reporting requirement.[10]

---

6. See Final Report, supra note 2, at I-21-24; A. Johnson, Products Liability "Reform": A Hazard to Consumers, 56 N.C.L. Rev. 677, 678-80 (1978); Note, Insurance Solution or Tort Reform? -- Iowa Joins the Nationwide Examination of Proposed Product Liability Legislation, 29 Drake L.Rev. 113, 165, n. 217 (1980). See also California Citizens' Commission on Tort Reform, Righting the Liability Balance 104-06 (1977) (loss of investment income attributable to downturn on Wall Street in 1973 and 1974 was a major factor in triggering upward spiral in liability insurance rates) [hereinafter cited as Cal. Report].

7. See Final Report, supra note 2, at I-26-27, II-43-44, VI-35-38; V. Schwartz, The Uniform Product Liability Act -- A Brief Overview, 33 Vand. L.Rev. 579, 580 (1980). See also Product Liability Task Force Interim Report, 56 Mich. St. B.J. 410, 420 (1977) ("At this time the information available to the task force does not demonstrate any kind of 'crisis' in the field of product liability which warrants drastic changes in the present tort system.") [Hereinafter cited as Bar Report].

8. Michigan Report, supra note 4, at 65.

9. Mich. Comp. Laws §500.2477a.

10. Preliminary draft of recommendation from Barbara Edwards of the Product and Liability Division of Michigan Bureau of Insurance (August 12, 1982).

Until the insurance crisis of the mid-1970's, the law of products liability, like most of tort law, was developed by the courts as part of the common law. As a result of that crisis, legislatures became more active in the area, and a large amount of both state and federal legislation[11] was adopted, including Michigan P.A. 495 of 1978 (Appendix B). There appears today to be a stabilization of insurance rates,[12] as well as a continuing inability to tie any rate difficulties to the law governing products liability. Industry spokesmen continue to press for the adoption of additional legislation, however,[13] on both the state and federal level.

---

11. The Michigan products liability statute is Mich. Comp. Laws §§600.2945-49, 600.5805. A compilation of state product liability statutes may be found in 2 Prod. Liab. Rep. (CCH) ¶¶90, 112-95, 270. See also F. Vandall, Undermining Torts' Policies: Products Liability Legislation, 30 Am. L.Rev. 673 (1981). Recent federal legislation is the Product Liability Risk Retention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (1981).

12. By the time the Interagency Task Force's Final Report was issued in 1978, product liability insurance rates were levelling off. Moreover, the last two years have witnessed heavy discounting of published rate schedules. With investment income at unprecedented levels, insurance companies have undercut each other repeatedly in competition for premium dollars, sometimes so drastically that complaints to the Bureau of Insurance have followed. Interview with Barbara Edwards, Products and Liability Division, Michigan Bureau of Insurance in Lansing (August 12, 1982). Although the Federal Risk Act of 1981, supra note 11, was enacted to reduce the cost of product liability insurance to small groups, rates have been so low that little early interest has been shown in taking advantage of the Act. Companies Show Little Interest in Forming Risk Retention Groups, Prod. Safety & Liab. Rep. (BNA) at 951 (December 18, 1981) ("[T]oday's liability insurance market is 'very soft,' and there is cutthroat competition among insurers to write new policies.")

13. It should be noted, however, that Victor E. Schwartz, former head of the Interagency Task Force on Product Liability and Professor of Law at the University of Cincinnati (and now a lobbyist representing the "Product Liability Alliance") has abandoned support of the UPLA in favor of uniform federal legislation. See Senate Consumer Subcommittee Hears Appeal for Tort Reform, Prod. Safety & Liab. Rep. (BNA) at 170-71 (March 12, 1982); Former Government Official Argues State Approach to Tort Law Unfeasible, Prod. Safety & Liab. Rep. (BNA) at 951 (December 18, 1981). See also Tort Reform, Prod. Safety & Liab. Rep. (BNA) at 463 (July 16, 1982) (noting President Reagan's decision at a Cabinet meeting on July 15 that the Administration should support federal product liability legislation).

B. The Advisability of Legislation

Two arguments are made for legislative reform. First, the advocates of a legislative solution point to the uncertainty engendered by rapidly evolving judicial standards of liability coupled with the idiosyncratic resolution of particular cases, and the lack of uniformity in the standards of liability applied in the various state courts.[14] They suggest that those factors are among the chief culprits contributing to the insurance crunch. In the absence of a clearly substantiated crisis, however, the reasonableness of this perception of the impact of instability is questionable. Moreover, insofar as that impact is the product of the lack of uniformity from one state to another, there appears to be very little that a single state can do about the problem. Indeed, since product liability insurance rates are set on the national level, legislation adopted by Michigan would have little effect on the rates paid by Michigan insureds.[15]

---

14. See J. Phillips, A Synopsis of the Developing Law of Products Liability, 28 Drake L.Rev. 317, 388 (1979) ("These proposals [for modification of products law] reflect an attempt to fashion precise rules of liability for an area of the law that has traditionally been characterized by rule flexibility. They illustrate a distrust of jury decisionmaking, and an inclination either to place the decisions in the hands of the court or to remove the controversies from the courts entirely"); A. Johnson, Products Liability "Reform" A Hazard to Consumers, 56 N.C.L.Rev. 677, 689 (1978) [hereinafter cited as Hazard to Consumers] ("Much of the impetus for the 'reforms' promoted by industry springs from a felt need for certainty. The present products liability system is unpredictable. Decisions are made by bodies immune to political pressure--courts and juries. In contrast, decisions on the administrative level are easily influenced by manufacturers. One suspects this is why manufacturers feel comfortable with government standard setting, but not with obligations generated by the courts. What industry fears is decentralized decisionmaking").

15. See e.g., Bar Report, supra note 7, at 420 ("Because products manufactured and sold in this state and other states are in most cases shipped to other states for consumption, any problems which may exist are national in scope, and piecemeal legislation in individual states will not be the answer").

The second argument advanced in favor of legislation is that, simply put, the results produced under the current law are unjust. It is argued that current standards fail to meet the two basic objectives of this field of law: (1) ensuring recovery for all those who deserve recovery,[16] and (2) avoiding the extension of the manufacturers' liability to a point where it interferes with healthy product development. While the recent legislative proposals arguably look to both goals, their primary emphasis clearly is upon the second. Most of the reforms advocated would reduce the scope of manufacturers' liability.[17]

Whether the current law does impose an inappropriate deterrent to product development is debatable. Advocates of reform point to the overall rise in insurance rates. Even if it is assumed that the rise was produced by caselaw developments, that does not necessarily establish, however, an improper balance. As observed by the Michigan Task Force, discussing the availability of affordable product liability insurance: "'Affordable' is not

---

16. See, e.g., UPLA, supra note 3, at 62,714 ("Criteria for the Act . . . (1) To ensure that persons injured by unreasonably unsafe products receive reasonable compensation for the injuries

17. This is certainly true of those provisions that have been adopted. One of the most widely adopted statutory reforms is the statute of repose, a statute of limitations which runs from the time a product leaves the hands of the manufacturer rather than the time of injury or the time when a product defect was or should have been discovered. For a list of states which have adopted statutes of repose, see F. McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am. L.Rev. 579, 638-41 (1981). The Michigan products liability statute, as originally proposed, provided for a shortened six month limitations period for any injury caused by a product more than six years old. See R. Schaden, Products Liability: Synthetic Crisis; Defective Cure, 57 Mich. St. B.J. 26, 29-30 (1978). The provision was dropped from the final version of the law. A bill introduced in the last session of the state legislature would create an absolute six year statute of repose, but has not been acted upon. H.B. 5135 (October 15, 1981).

necessarily synonymous with 'cheap,' nor with what firms have been paying in the past."[18] Some would argue that the appropriate response to rising insurance costs should be programs which result in safer products.[19] They also note that the legislature could establish "a stand-by mechanism to assure availability of any type of liability insurance which is deemed a social or economic necessity but which, due to market conditions, becomes generally unavailable,"[20] rather than adopt legislation that seeks to reduce the total cost of compensation for all industries by excluding various categories of claims.

---

18. Michigan Report, supra note 4, at 9.

19. They suggest that much of the clamor for legislative reform of products liability simply indicates that the common law doctrines have finally evolved to the point where they are beginning to exert pressure on manufacturers to avoid accidents by making safer products.

> Products liability law has for the first time called American manufacturers onto the carpet and held them accountable for their design, testing and advertising practices. It is perhaps unpleasant for manufacturers to have to justify practices which should have been discarded, and costly to have such practices rectified. It is also important to a free [and] democratic society to subject the practices of manufacturers to public scrutiny. Part of the products liability crisis has little to do with dollars and cents. It has to do with the invasion of what was previously the private domain of manufacturers by courts, lawyers, consumers, and public regulators. Manufacturers do not like it, because it costs money. And they do not like it because they simply believe that they ought to be able to go along without being held accountable.

A. Twerski and A. Weinstein, A Critique of the Uniform Product Liability Law--A Rush to Judgment, 28 Drake L.Rev. 221, 256 (1979) [hereinafter cited as UPLA Critique].

20. Michigan Report, supra note 4, at 63-64.

The Michigan Task Force Report and the report of the California Citizens' Commission on Tort Reform have both questioned the appropriateness of legislation which singles out the area of products liability from the broader system of tort liability. Although products liability insurance rates jumped substantially in the mid-70's, the cost of all liability insurance increased markedly during the same period.[21] Factors which have been suggested as contributing to the products liability crisis are identified by the California Report as pervading all areas of tort litigation -- an increasing tendency to sue,[22] uncertainty engendered by a perception of the law in flux,[23] expanding concepts of what constitutes adequate compensation,[24] and the proliferation of incalculable long-term risks.[25] Moreover, even with the short-term rise in claims, the "overhang of unfiled claims" remains so great, as to all aspects of tort law, that the actual claimants represent only the tip of the iceberg.[26] Recognizing that the overall problem extended beyond the products liability field, the Michigan Task Force recommended that a commission be appointed "to undertake a comprehensive review of our current system of dealing with personal injuries resulting from non-criminal actions; and with the compensation for them."[27]

---

21. Cal. Report, supra note 6, at 94.

22. Id. at 132-34, summarized in Michigan Report, supra note 4, at 46-47.

23. Cal. Report, supra note 6, at 134-48, summarized in Michigan Report, supra note 4, at 47.

24. Cal. Report, supra note 6, at 139, summarized in Michigan Report, supra note 4, at 47.

25. Cal. Report, supra note 6, at 139, summarized in Michigan Report, supra note 4, at 47.

26. Cal. Report, supra note 6, at 102-04, 138.

27. Michigan Report, supra note 4, at 65 (emphasis added).

Finally, the possibility of Congress adopting federal products liability legislation should be noted. The current proposal before Congress would supercede any state laws in the area, rendering further products liability legislation in Michigan meaningless.[28] Provisions of the proposed federal law (S. 2631) corresponding to sections of the UPLA discussed below are noted and briefly summarized.

II. ANALYSIS OF THE UPLA

The Interagency Task Force recommending the UPLA recognized that all states might not adopt the Act, and that particular provisions might be interpreted differently by the courts in states which did adopt it. Nevertheless, the drafters believed that a greater degree of uncertainty in products liability would result "if the Act is adopted by the states in which a substantial majority of product liability claims are brought."[29] In the first four years following its introduction, however, only two states have adopted substantial portions of the Act.[30] Moreover, it seems unlikely that the UPLA will attract substantial support in the remaining states. If uniformity is to be achieved, it will have to come

---

28. S.2631, 97th Cong., 2d Sess. (1982). The Reagan Administration is prepared to support S.2631, which was proposed by Senator Kasten. See note 13 supra.

29. UPLA, supra note 3, at 62,716 (Preamble Analysis).

30. L. Ribstein, The Model Uniform Product Liability Act: Pinning Down Products Law, 46 J. Air L. & Com. 349, 355 (1981). Connecticut and Idaho have adopted portions of the UPLA. See Id. at 355, n. 44. A UPLA-type bill passed the Kansas legislature but was vetoed. See Kansas Governor Vetoes Measure Modelled After DOC Uniform Law, Prod. Safety & Liab. Rep. (BNA) at 317 (May 2, 1980).

from the Congress. Therefore, there is no reason for a state to adopt the UPLA in its entirety unless the Act, as a whole, is viewed as the best legislative product that can be produced. In general, the most vigorous proponents of legislative reform do not take that view of the Act. Its most venturesome provisions concerning damages and litigative efficiency, discussed in Sections C and D infra, have been described as "so hedged with compromise that they are at best ineffectual."[31] The UPLA is more likely to serve as a model for individual provisions dealing with particular aspects of products liability law than as a package to be adopted in its entirety.

A. Elements of the Product Liability Cause of Action

1. Harm for which recovery may be sought in a products liability action

UPLA Sec. 102(F)

The UPLA definition of harm includes damage to the product itself, but excludes "direct or consequential economic loss" (such as "loss of bargain" or "loss of profits"). Recovery for direct or consequential economic loss is left to the field of commercial law -- i.e., the Uniform Commercial Code. S.2631, in §§2(b), 3(b), follows the UPLA. In a portion of the commentary that is not as clear as it might be, the Task Force suggests that a distinction would be drawn between recovery where the product is damaged in use and where it is simply ineffective. In the former situation, recovery would be allowed under the UPLA since the recovery would be for "harm" to the product. However, where the product simply would not perform

---

31. T. Dworkin, Product Liability Reform and the Model Uniform Product Liability Act, 60 Neb. L.Rev. 50, 51 (1981) [hereinafter cited as Reform and UPLA].

as expected, the recovery would be for "loss of bargain" and would be governed by the U.C.C..

Michigan Law

In Cova v. Harley Davidson Motor Company,[32] the court held that "the loss of bargain" and "cost of repairs" to a defective product were recoverable in a products liability action "even though the product caused neither accident nor personal injury."[33] The court deferred the question of "loss of profits" since that issue had not been briefed, suggesting that should such damages be awarded on remand, it would then be appropriate to address the issue.[34] Michigan law remains unsettled on this latter point.

Comment

If the UPLA draws the distinction noted above between damage to a product and the ineffectiveness of a product, it would be inconsistent with Cova, which treats bargain loss as a part of the products liability action, without regard to whether the product is "harmed." Of course, whether recovery is allowed under products liability law or under the U.C.C., replacement or repair cost would be the key in determining damages awarded for loss of value in the product itself. However, other

---

32. 26 Mich.App. 602, 182 N.W.2d 800 (1970).

33. Id. at 609, 620, 182 N.W.2d at 804, 811.

34. Id. at 620, 182 N.W.2d at 811.

elements of the governing law (standard for determining liability, statute of limitations, etc.) may differ depending upon whether the action is based upon products liability law or the U.C.C..

Reliance upon the products liability action, rather than the U.C.C., might be even more significant if products liability law encompassed recovery for lost profits. On this point, however, Michigan law, when settled, is likely to follow the UPLA. As the UPLA commentary notes, "almost all courts" have held that recovery for lost profits is governed by the U.C.C.. Still Cova left the issue open and a contrary ruling is possible.

UPLA Sec. 103

In the interests of simplicity, the UPLA purports to replace common law theories of action for products liability, such as strict liability, negligence, and breach of warranty, with a single unified products liability claim. "However, as commentators have noted, it does not achieve this purpose since common law theories are reintroduced into the Act under various sections."[35] Thus, different standards are employed for different types of defects, with those standards relying on different theories of liability. The current congressional proposal, S.2631, Sec. 3(a), follows the UPLA in its attempt to create a single cause of action, but it also utilizes the different theories in establishing liability limits.

---

35. Reform and UPLA, supra note 31, at 51-52.

Michigan Law

In Cova, Judge Levin suggested that "our present and misleading terminology" could be simplified by use of "the neutral term 'product liability.'"[36] To do so, he suggested, would be to "acknowledge that the consumer's remedy is an amalgam of all those concepts and of others as well, but also that it is something . . . dissimilar to any of these concepts. . . ."[37]

Public Act 495, the Michigan products liability statute, states that a "'products liability action' means an action based on any legal or equitable theory of liability. . . ."[38] While the court in Jorae v. Clinton Crop Service[39] suggested that the Act had unified "all possible theories of recovery in products liability cases into a single theory of recovery,"[40] the individual theories remain untouched by the Act.[41] An action based on any theory comes under the Public Act 495, but that Act did not create any single theory that replaces all others.

---

36. 26 Mich.App. at 614, 182 N.W.2d at 807.

37. Id. at 614-15, 182 N.W.2d at 807.

38. Mich. Comp. Laws §600.2945.

39. 465 F.Supp. 952 (E.D. Mich. 1975).

40. Id. at 954.

41. See Comment, Public Act 495--A Beginning Step in Products Liability Reform in Michigan, 1979 Det. C.L. Rev. 677, 684-85 (1979); Products Liability Task Force, Annual Report, 58 Mich. B.J. 524, 525 (1979).

Comment

As long as standards of liability differ for different types of product liability claims (e.g., workplace injuries),[42] creation of single "product liability" cause of action remains a matter of pleading rather than substance. Public Act 495 adequately treats the pleading problem.

3. Standards of responsibility for manufacturers

UPLA Sec. 104

The Act divides product liability cases into two categories. Manufacturing defects and failure to conform to express warranties are held to a standard of strict liability. Design defect and warning cases are judged by a negligence standard. Each of these types of defects are defined separately.

(A) Manufacturing defects. A product is defectively constructed if it deviates from the design specifications or performance standards of the manufacturer or other identical units. S.2631 Sec. 5(a) follows the UPLA on this point.

(B) Design defects. Existence of a design defect is determined by risk-utility analysis. Factors considered include any warnings or instructions which accompany the product, technological and practical feasibility of a design which would have prevented the harm incurred while serving the user's

---

42. See Note, Timmerman v. Universal Corrugated Box Machinery Corp.--An Exception to the Doctrine of Comparative Negligence in Products Liability Litigation: Michigan Courts Speak Out on Public Act 495, 1981 Det. C.L. Rev. 223 (1981).

needs, comparative costs of alternative designs, the likelihood that the product as designed would cause injury, and new or additional harm that might have resulted from alternative design. S.2631 Sec. 5(b) deviates from the UPLA. Rather than a risk-utility balancing test, a product is defectively designed if the manufacturer, based on sound scientific, technical, or medical evidence, knew or should have known about the existence of the danger which caused injury and the availability of a feasible and safer alternative design.

(C) Warnings. Adequacy of warnings is determined by the foreseeability of harm and feasibility of providing adequate warnings or instructions. The claimant has the burden of proving that adequate instructions would have resulted in the harm being averted. Manufacturers are not liable for dangers which are open and obvious. Manufacturers are under a post-manufacture duty to warn of dangers which become known after the product has left their control. S.2631 Sec. 6 follows the UPLA.

Michigan Law

Although Michigan has never formally adopted the term strict liability, the doctrine of implied warranty requiring that a product be reasonably safe for the purposes for which it is intended, has been interpreted as the functional equivalent of strict liability by the Michigan courts.[43] Since breach of an implied warranty may be asserted in Michigan as a theory of

---

43. See e.g., Dooms v. Stewart Bolling & Co., 68 Mich.App. 5, 12, 241 N.W.2d 738, 741 (1976) ("[I]t appears inconceivable that a plaintiff might fail to recover under our tort warranty of fitness theory, yet recover under a strict liability in tort theory.")

liability for design defects[44] and for lack of adequate warning,[45] as well as for defective construction cases, the UPLA negligence standard for design and warning cases differs from the law presently applied in Michigan. The law in Michigan does parallel the UPLA on non-liability for failure to warn of open and obvious dangers[46] and imposition of a post-manufacture duty to warn.[47]

---

44. See, e.g., Snider v. Bob Thibodeau Ford, Inc., 42 Mich.App. 708, 715, 202 N.W.2d 727, 731 (1972) ("Our Court has declared that a product is defectively designed if the product is not 'reasonably safe for the purposes for which it was intended.'" [Footnote omitted]). See also Dooms v. Stewart Bolling & Co., 68 Mich.App. 5, 241 N.W.2d 738 (1976) (rubber milling machine designed with inadequate safety features was defective by either strict liability or implied warranty standard).

45. But see Smith v. E.R. Squibb & Sons, 405 Mich. 79, 273 N.W.2d 476 (1979). The Court held that inadequate warnings alone may constitute a product defect under either negligence or implied warranty theories, id. at 89, 273 N.W.2d at 479, but that the theories require proof of the same elements in warning cases. Id. at 91, 273 N.W.2d at 480.

46. See, e.g., Mach v. General Motors Corporation, 112 Mich.App. 158, 161, 315 N.W.2d 561, 563 (1982) ("Under Michigan law, a manufacturer of a product is under no duty to warn against dangers which are open and obvious.")

47. See, e.g., Comstock v. General Motors Corp., 358 Mich. 163, 177-78, 99 N.W.2d 627, 634 (1959) ("If such a duty to warn of a known danger exists at point of sale, we believe a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market.")

As to manufacturing defects, where UPLA applies strict liability and Michigan uses an implied warranty equivalent, there also is a difference. Michigan employs an objective standard for determining the existence of product defects; if some aspect of the product is the proximate cause of injury in the course of an "intended, anticipated or reasonably foreseeable" use of the product, "liability attaches."[48] The UPLA utilizes what is basically a subjective standard of a manufacturer's compliance with its own production specifications. If there is compliance, the alleged defect must be based on the design and the negligence standard comes into play.

Comment

The major issue presented here is the desirability of restricting the range of strict liability. However, if one accepts the UPLA premise that strict liability should be limited to production errors (as opposed to design errors), has the UPLA adopted a dividing line that appropriately makes that distinction? The UPLA definition of a manufacturing defect, the sole area of strict liability, is limited to material deviations from the manufacturer's "design specifications or performance standards or from otherwise identical units of the same product line." Arguably, a manufacturer should not be able to limit the range of strict liability by setting production quality standards below levels which are fully adequate to ensure safe performance of the product.[49] Once the

---

48. Gauthier v. Mayo, 77 Mich.App. 514, 515, 258 N.W.2d 748, 749 (1977).

49. Courts have consistently rejected compliance with self-formulated standards as an absolute defense to liability if those standards are judged unreasonable. See note 59 infra.

manufacturer has a design intended to provide products suited for their intended use, the failure to fulfill that design should be viewed as a production error. On the other side, it may be argued that whether production quality standards are too low for the product's intended use is as much an issue for a negligence standard as defects in design standards. The manufacturer should have sufficient controls to meet its production standards, but the validity of those standards should be evaluated by a negligence standard.

The major innovative feature of UPLA §104 is its separate treatment of design defects. Design defect cases present the thorniest questions in the products liability field. Part of the difficulty may be that commentators have rarely differentiated between the different types of cases which occur in this area. Design cases may appropriately be divided into three categories -- limits, choices and errors. In the first category are designs which are inadequate because safe design, which would have avoided the particular danger in question, was beyond the technical capacity of the manufacturer at the time of construction. The second category encompasses conscious design choices in which competing safety factors have been weighed and one particular risk deemed on balance to be better than another. These two fact situations undoubtedly represent only a small percentage of design cases, but draw the greatest attention, since to hold a manufacturer liable in such circumstances would approach a standard of absolute liability. Much of the uncertainty felt by manufacturers and insurers may be attributable to fear of such a development

in the law, even though the rules of strict product liability (or implied warranty) preserve an element of reasonableness which would insulate manufacturers from liability in design cases falling within these two categories -- provided the manufacturer was not unreasonable to have marketed the product at all.

The vast majority of cases certainly fall in the design errors category. These are cases in which testing arguably has been inadequate, design faults overlooked which should have been detected, inexpensive safety devices omitted, or dangers inherent in a particular design known but simply ignored. They differ from the second category in one sense -- they do not involve a competing choice between designs in which each poses its own danger and one must be chosen -- but they are similar in that they involve a weighing of risks against other factors. The problem is that there is not always an open weighing of a risk. In some instances, there is simply insufficient effort made to establish that risk exists. Some would argue that the manufacturer here should be in no different position than the manufacturer who sets good standards and doesn't meet them in production. Since strict liability is applied to manufacturing defects, why not apply it to this type of design defect as well? The UPLA answers that there are differences here as to the type of judgment made and the ability of the manufacturer to ensure against error. Production defects are viewed as much easier to identify and to prevent than design defects.

The UPLA section on warnings also uses a negligence standard. In effect, the plaintiff must prove that adequate warnings should have been provided, and that those warnings would have resulted in a reasonable person avoiding harm. As to the first point, the UPLA accepts the view that a reasonable (i.e., non-negligent) judgment not to include a particular warning should relieve the manufacturer of liability. Others argue that this is not sufficient. Since manufacturers are not required to warn of dangers that are obvious (both Michigan law and UPLA so provide), they should, in turn, bear a heavier burden for dangers that are not obvious. For such dangers, it is argued, the manufacturer-defendant should be required to justify the absence of a warning or the content of the warning that was used.[50]

The UPLA standard on warnings also has been criticized as applied to warnings that go to the very use of a product, rather than to use in a certain way that will avoid harm. In such cases, the warning is present not to prevent the potential harm per se, but to allow the consumer an informed choice whether or not to use the product (e.g., drugs) and encounter the risk. The reasonable person standard, it is argued, is inapposite. Where no warning has been given and the claimant has been deprived of his opportunity to exercise "informed consent," liability should automatically follow;[51] it should not matter that many or most reasonably prudent persons would have used the product even if they had been warned of the risk.

---

50. See 2A L. Frumer and M. Friedman, Products Liability 16D.03[3] (1982).

51. UPLA Critique, supra note 19, at 235-37.

4. Non-manufacturer sellers

UPLA Sec. 105

Non-manufacturer sellers are subject to liability for their failure to use reasonable care with respect to a product or if an express warranty is made to the purchaser. The UPLA also holds product sellers liable (under the basic standards of manufacturer liability) if the manufacturer is beyond service of process, insolvent, or otherwise determined by the court to be judgment-proof. S.2631 Sec. 8 follows the UPLA.

Michigan Law

A retailer or distributor of a product is not generally responsible for injury caused by a manufacturing defect.[52] However, where the product is one that a reasonable seller would be expected to inspect or maintain while under its control, the seller owes a general duty of care to the buyer.[53] Michigan law and the UPLA are substantially the same on this point. They are also alike as to liability for breach of an express warranty. There is no counterpart in Michigan law, however, to the UPLA provisions which make product sellers "back-up" defendants.

---

52. See, e.g., Shirley v. Drackett Products Company, 26 Mich.App. 644, 648, 182 N.W.2d 726, 728 (1970) ("As a general rule, a vendor who distributes a product acquired in the open market is not liable for its negligent manufacture.")

53. See, e.g., Blanchard v. Monical Machinery Company, 84 Mich.App. 279, 269 N.W.2d 564 (1978) (Seller of used air-operated clamp owed general duty of care to purchaser even though machine was merely being held on consignment and was sold "as is.")

Comment

The key to the UPLA section is its provision which makes the product seller a "back-up" defendant for an insolvent manufacturer. The immediate need for this provision is questionable. The Interagency Task Force found no case where a manufacturer was unable to respond to an adverse product liability judgment.[54] In discussing mandatory insurance laws and government administered unsatisfied judgment funds,[55] the final report concluded that, since "data do not show that product liability judgments are likely to go unsatisfied,"[56] neither should be implemented. Should a problem of unsatisfied judgments arise in Michigan, a better solution might be an unsatisfied judgments fund.[57]

The UPLA is also innovative in making the seller a "back-up" defendant (subject to the standards for manufacturer liability) where the manufacturer is not subject to service of process. However, with the scope of the current long-arm statute, M.C.L. §§ 600.701-735, the need for such a provision is questionable.

---

54. Final Report, supra note 2, at VI-34.

55. Id. at VII-187-99.

56. Id. at VII-199.

57. Cf. Motor Vehicle Accident Claims Act, Mich. Comp. Laws §§257.1101-1132.

The UPLA "back-up" defendant provision is designed to ensure recovery by injured consumers who have a legitimate claim. The more troublesome problem of this type today -- illustrated by cases involving DES and asbestos-related injuries -- is that of the injured consumer who cannot identify the manufacturer. UPLA has no provision dealing with this problem. S.2631 addresses the problem in Sec. 4(c). Under that section suits are permitted where the particular manufacturer of an injury-causing product cannot be identified, but only if all possible defendants are included in the action, and each of the defendants is in a better position than the plaintiff to establish which was the actual source of the product because of superior knowledge or information. DES plaintiffs would not be able to meet these requirements, since the large number of DES manufacturers make it extremely difficult to join all possible defendants, and the manufacturers have no more information concerning who the ultimate purchasers of their product were than the consumers. Of course, the "market share theory" of Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924 (1980) might provide relief in such cases, but it is unclear whether adoption of §4(c) implicitly rejects that alternative. Moreover, under another S.2631 provision, §4(d), issues of fact may not be established by showing the resolution of identical questions in other cases. Hence, unless all manufacturers are joined as provided in §4(c) the courts would be forced to continue to retry the question of the defectiveness on a case-by-case basis.

B. Defenses Against and Limitations Upon Products Liability Actions

1. Unavoidably dangerous products

UPLA Sec. 106

Product sellers are not liable for harm caused by unavoidably dangerous aspects of a product, unless it was unreasonable to sell the product at all, or the product was otherwise defective under Sec. 104. S.2631 Sec. 5(c) follows the UPLA on this point.

Michigan Law

Michigan law follows the UPLA in exempting from liability manufacturers of unavoidably unsafe products, such as experimental drugs, provided these products are accompanied by adequate warnings of inherent risks.[58]

Comment

Adoption of UPLA Sec. 106 basically would codify the current law of Michigan.

2. Relevance of industry custom, safety or performance standards, and practical technological feasibility

UPLA Sec. 107

This provision is an evidentiary rule for products liability actions. Evidence of post-manufacture changes in the design of a product or warnings

---

58. See Smith v. E.R. Squibb & Sons, 405 Mich. 79, 102, 273 N.W.2d 476, 486 (1979) (Levin, J., dissenting); Cova v. Harley Davidson Motor Company, 26 Mich.App. 602, 612, 182 N.W.2d 800, 806 (1970).

accompanying it, or changes in industry custom, standards or technical capabilities, is inadmissible. Evidence of compliance or non-compliance with industry custom or standards in the manufacture of the particular injury-causing product is admissible but not dispositive. S.2631 Sec. 14 corresponds to the portion of UPLA Sec. 107 that excludes evidence of post-manufacture changes.

Michigan Law

The Michigan products liability statute includes rules of evidence equivalent to those above.[59]

Comment

Adoption of UPLA Sec. 107 basically would duplicate the Michigan statute.

3. Relevance of governmental standards

UPLA Sec. 108

Compliance or non-compliance with government standards is dispositive of the question of defectiveness under this provision, unless the

---

59. Mich. Comp. Laws §600.2946. Nor did this statute alter Michigan law. "[I]t is simply a codification of what the law already was." Products Liability Task Force Annual Report, 58 Mich. B.J. 524, 525 (1979). See, e.g., Elasser v. American Motors Corporation, 81 Mich.App. 379, 386, 265 N.W.2d 339, 342 (1978) ("[A] manufacturer may show compliance with industry standards to indicate reasonableness, but the industry standard itself is always open to the question of reasonableness"); Phillips v. J.L. Hudson Company, 79 Mich.App. 425, 263 N.W.2d 3 (1977) (evidence of subsequent remedial measures not admissible to prove product defect).

claimant proves that "a reasonably prudent product seller could and would have taken additional precautions." S.2631 contains no provision on the significance of government standards.

Michigan Law

Evidence of compliance or non-compliance with government standards is admissible, but accorded no more weight than evidence with respect to industry standards and customs.[60]

Comment

Opponents of UPLA Sec. 108 contend that giving dispositive weight to government standards encourages lobbying for weak standards and reduces the incentive to improve products once government standards are set. Concern is also expressed that government resources are limited, compared to industry resources, and this provision would shift the burden of overseeing product safety from the private to the public sector.[61]

Proponents argue that weak government standards can always be challenged in court at the time of promulgation; once the standards are adopted, the manufacturers should be allowed to rely upon those standards. Once the government agency starts to issue standards, it has taken on the responsibility of overseeing safety. That responsibility is not returned to the private sector by saying that government standards are not ordinarily

---

60. Compare Mich. Comp. Laws §600.2946(2) with §600.2946(1).

61. See Hazard to Consumers, supra note 14, at 688.

dispositive. If the manufacturer falls below the government standard, he has violated the law. It is only fair that when he meets that standard, he should be held free from liability. Moreover, it is argued, this position will not remove the incentive of manufacturers to go beyond those government standards. It is not the tort law but marketing and other factors that lead manufacturers to exceed government standards.

4. Plaintiff's conduct

UPLA Sec. 112

A product user is not under an obligation to inspect a product for defects, but comparative responsibility will apply to an injury caused by a defect which would have been apparent without inspection to a reasonably prudent person. Comparative responsibility will also apply when a product has been misused or altered, unless the alteration was in accord with the manufacturer's instructions, or the misuse or alteration was reasonably foreseeable. S.2631 Sec. 10 corresponds to the portion of UPLA Sec. 112 on misuse and alteration.

Michigan Law

Evidence of misuse or alteration is admissible under Mich. Comp. Laws §600.2947. Manufacturers are under a duty to design and fabricate

products which will not cause injury when subject to reasonably foreseeable misuse.[62] No liability will attach, however, when plaintiff has with full knowledge used a dangerously defective product.[63]

Comment

The UPLA no-duty-to-inspect and defect-apparent-to-a-reasonably-prudent-person provisions draw a distinction that could readily evaporate as applied. In support of the proposition that the user is entitled to assume that the product is reasonably safe for ordinary use and therefore has no duty to inspect, the drafters cite the case of Kassouf v. Lee Bros. (plaintiff "without inspection ate a chocolate bar containing worms and maggots").[64] Two paragraphs later, they support the apparent-defect rule by a hypothetical in which "a claimant with good eyesight eats a candy bar with bright green worms crawling on it." The cases are distinguishable, but one wonders whether cases of defects so obvious they can be perceived by a mere glance are likely to soon merge into cases where the so-called "apparent defects" require an observation that could just as readily be described as an "inspection."

---

62. See, e.g., Graham v. Ryerson, 96 Mich.App. 480, 491, 292 N.W.2d 704, 709 (1980) ("Manufacturers are duty bound to design products that are safe for their intended or reasonably anticipated use, which may include reasonably anticipated misuse.")

63. See, e.g., Baker v. Rosemurgy, 4 Mich.App. 192, 144 N.W.2d 660 (1966) (no liability to plaintiff injured in hunting accident by gun he knew had defective safety when he bought it).

64. 209 Cal.App.2d 568 (1962) discussed in UPLA, supra note 3, at 62,737 (Analysis Sec. 112).

Indeed, the provision on apparent defect -- even if limited to defects apparent at a glance -- has been criticized as inconsistent with the underlying premise of the "no-duty-to-inspect" provision. Thus, it is argued:

> Why did the plaintiff eat the candy bar? Do we really believe that he saw the green worms and proceeded to eat the candy? The obvious answer is that the plaintiff did not notice the worms. But, why? Well, he did not expect a candy bar to have worms. That is hardly an unreasonable position to defend. Then why should his recovery be diminished? The only answer is that he did not look before he ate. But, that means that he has a duty to inspect for defects -- a proposition which is denied by the above section. . . .[65]

Apart from the apparent defect provision, the basic provisions of UPLA §112 -- i.e., the provisions on no-duty-to-inspect, misuse, and alteration -- do not substantially differ from Michigan law. The interface in Michigan between plaintiff's conduct and apportionment of damages is discussed below in the section on comparative responsibility.

5. Limitations on actions

UPLA Sec. 110

This section proposes a useful safe life test to determine the duration of a manufacturer's potential liability for a product defect. Whether the useful safe life of a product has expired is determined by:

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

(b) the effect of deterioration due to natural causes;

---

65. UPLA Critique, supra note 19, at 249.

(c) the normal practices attendant to the product's use;

(d) representations made by the seller regarding product maintenance and expected useful life; and

(e) modification or alteration by the user.

After ten years, a presumption arises that a product has outlived its useful safe life. This presumption may be rebutted by clear and convincing evidence, a higher degree of proof than the preponderance standard generally employed. The ten year presumption is inapplicable to cases involving (1) misrepresentation by the manufacturer, (2) an express warrant that the useful life is more than 10 years, (3) injuries caused by prolonged exposure to a defective product, (4) injury-causing defects that were not discoverable by an ordinarily reasonable prudent person until more than 10 years after delivery, or (5) harm caused within 10 years that did not manifest itself until after that time. The statute of limitations for product liability actions is set at two years from the time claimant discovered, or should have discovered, the harm or cause thereof.

S.2631 Sec. 12 contains two alternative time limitation provisions. A decision has not yet been made by the sponsors which will be included in the final version of the bill. The first provision contains a two year statute of limitations, similar to the UPLA, with a twenty-five year statute of repose for design and warning cases involving only capital

goods. The second provision includes a period of safe utilization test and a ten year presumption similar to the UPLA, but applicable only to design and warning cases. Both S.2631 sections follow the UPLA provisos on misrepresentation, prolonged exposure and delayed manifestations.

Michigan Law

The Michigan statute of limitations for product liability actions is three years. After a product has been in use for ten years, the plaintiff must prove a prima facie case without the benefit of any presumption of defectiveness.[66]

Comment

A chief source of insecurity for insurance companies and manufacturers is the "long tail" of liability -- the potential of suits brought for product-related injuries many years after the product has left the control of the manufacturer.[67] This concern exists despite data showing that 97 percent of all product-related claims occur within six years, 83.5 percent of all claims involving capital goods within ten years.[68]

---

66. Mich. Comp. Laws §600.5805(a).

67. See Insurance Service Office, Closed Claim Survey 105-08 (1977). See also UPLA Critique, supra note 19, at 244 ("[W]hy [is it] that the statutory provisions are directed against potentially valid claims when they should be directed toward the rating practices of insurers. If the fear of the insurers is not not well founded, then it would behoove the government to question rating practices that are built on nothing more than hypothecation rather than on facts.")

68. See 2A L. Frumer and M. Friedman, Products Liability §16D.03[4] (1982); Note, Several Risk Allocation Schemes Under the Model Uniform Product Liability Act: An Analysis of the Statute of Repose, Comparative Fault Principles and the Conflicting Social Policies Arising From Workplace Product Injuries, 48 Geo. Wash. L.Rev. 588, 599 (1980).

Michigan law already deprives plaintiffs of the benefit of any presumption of defectiveness for claims involving products more than ten years of age. The UPLA would further increase the burden of proof required to prove defectiveness to the clear and convincing level. Arguably, no statutory buttressing is necessary. The longer a product functions safely, the more difficult it is for plaintiffs to prevail on the question of defectiveness. Time already favors the defendant in these circumstances.

The UPLA also establishes a useful life concept, which operates apart from the ten year presumption. It is debatable, however, whether that concept does more than repeat factors already considered in determining whether a product failure was due to normal wear and tear or manufacturing defect. Arguably, by setting forth these factors as part of a special test, the UPLA proposal may implicitly impose new burdens upon manufacturers -- the necessity to accumulate data to fulfill a duty to warn the consumer of the duration of a product's useful safe life, and the potential that by servicing its products a manufacturer is warranting an extension of their useful safe lives.[69]

From an insurance perspective, perhaps the most alarming "long tail" problems involve diseases with long latency periods caused by exposure to such substances as asbestos and DES. These cases are not barred by the UPLA limitations. They are protected from being time-barred by specific provisos in the UPLA limitations provisions.

---

69. See Reform and UPLA, supra note 31, at 71-72; UPLA Critique, supra note 19, at 246.

An absolute six year statute of repose is currently under consideration in the Michigan House of Representatives.[70] Although in 1978 the State Bar Products Liability Report was "unanimous in its opinion that [such] proposals are probably unconstitutional,"[71] a statute of repose for builders and architects has since been held constitutional.[72] The State Bar Report also took the position, apart from the constitutional question, that the statute of limitations provisions currently in force were reasonable and should be retained.[73]

C. Damages

1. Comparative responsibility

UPLA Sec. 111

The UPLA has deliberately employed the term comparative responsibility, sidestepping the problem courts and commentators have had mixing the conventional concepts of comparative negligence with strict products liability and implied warranty. Section 111 makes comparative responsibility a factor to be considered. S.2631 Sec. 9 follows the UPLA.

---

70. See note 17 supra.

71. See Bar Report, supra note 7, at 413.

72. O'Brien v. Hazelet & Erdal, 410 Mich. 1, 299 N.W.2d 336 (1980).

73. In 1978, the State Bar Task Force concluded that the three years from date of injury limitations period "is reasonable and that no change should be made in this area." Bar Report, supra note 7, at 413. Two years later, in evaluating the impact of the Bar Report on the formulation of Public Act 495, the Task Force felt that "(1) Perhaps the most important, the statute of limitations in product cases remains three years from date of injury or death." Products Liability Task Force, Annual Report, 58 Mich. B.J. 524 (1979).

Michigan Law

Public Act 495 replaced contributory negligence with comparative negligence in products liability suits.[74] The choice of the term comparative negligence by the legislature apparently was deliberate,[75] and the Michigan courts have defined several broad categories of cases in which plaintiff's conduct will not be considered in apportioning recovery. Prior to the adoption of comparative negligence, Michigan courts disallowed the defense of contributory negligence in breach of warranty actions[76] and workplace accidents involving defectively designed safety features.[77] The court has since held that contributory negligence will not diminish a plaintiff's recovery in either instance,[78] despite the passage of the comparative negligence statute.

---

74. Mich. Comp. Laws §600.2949.

75. The State Bar Task Force noted that the original term used in the bill, comparative fault, was changed in the final version to comparative negligence. It also suggested that the bill codified rather than changed existing law, and that to apply contributory negligence, even on a comparative basis, "in an action based upon breach of warranty would be a radical departure from existing law." Products Liability Task Force, Annual Report, 58 Mich. B.J. 525 (1979).

76. See Kujawski v. Cohen, 56 Mich.App. 533, 224 N.W.2d 908 (1974).

77. See Funk v. General Motors Corp., 392 Mich. 91, 220 N.W.2d 641 (1974); Tulkku v. McKworth Rees Division of Avis Industries, Inc., 406 Mich. 615, 281 N.W.2d 641 (1979).

78. See Ferdig v. Melitta, Inc., 115 Mich.App. 340, 320 N.W.2d 369 (1982) (breach of warranty); Timmerman v. Universal Corrugated Box Machinery Corp., 93 Mich.App. 680, 287 N.W.2d 316 (1979) (workplace injuries).

Comment

Excluding consideration of contributory negligence in workplace injuries has been justified on the basis of public policy, "being the fostering of worker protection and encouragement of employers and manufacturers to provide adequate safety equipment."[79] The Michigan courts have accepted this policy as continuing to prevail notwithstanding the adoption of Public Act 495.

The same type of overriding policy is not as readily available to support the refusal to apply comparative negligence in implied warranty cases. Contributory negligence traditionally acted as a total bar to recovery. Faced with an all-or-nothing situation, courts refused to consider plaintiff's conduct, "where the injury was the result of breach of warranty, whether express or implied...."[80] In Ferdig v. Melitta, Inc., the jury found the plaintiff 85 percent negligent and Melitta 15 percent negligent. Nevertheless, the court held that plaintiff's recovery should not be diminished since her cause of action was for breach of warranty. Since Ferdig involved an express warranty, the result may be defensible. Ignoring plaintiff's conduct in implied warranty actions,[81] however, would virtually negate the comparative negligence provision of P.A. 495, since almost any

---

79. 93 Mich.App. at 686, 287 N.W.2d at 318.

80. 115 Mich.App. at 349, 320 N.W.2d at 373 (emphasis added).

81. Cases in other states which subscribe to an implied warranty theory have divided on whether contributory negligence should be considered as a defense. See Comment, Public Act 495--A Beginning Step in Products Liability Reform in Michigan, 1979 Det. C.L. Rev. 677, 678, n. 11 (1979).

products case can be framed as an implied warranty action. Unless the statute is amended to clarify the circumstances in which damages will be apportioned, comparative negligence in products liability suits in Michigan arguably could nearly always be circumvented.[82]

2. Contribution and indemnity--multiple plaintiffs

UPLA Sec. 113

This section provides a right of contribution apportioned on the basis of comparative responsibility among tortfeasors who are jointly and severally liable. Contribution is available to a party entering a settlement only (1) if the liability of the party against whom contribution is sought has been extinguished by the settlement, and (2) to the extent that the settlement was reasonable. Release of a party defendant relieves that party from liability for contribution, but the total recovery of the claimant is reduced by released party's apportioned share. S.2631 contains no provision on rights of contribution among multiple tortfeasors.

Michigan Law

Michigan Public Act 318 enacted in 1974 established rights of contribution essentially the same as those above.[83] That Act, in section

---

82. But see Vincent v. Allen Bradley Company, 95 Mich.App. 426, 429-30, 291 N.W.2d 66, 68 (1980) ("Although contributory negligence is not a defense, misuse of the product is.")

83. Mich. Comp. Laws §600.2925a-2925d.

M.C.L. §600.2925b, provides that relative degrees of fault shall not be considered in determining pro-rata shares of tortfeasors. However, §600.2949 of the Michigan Products Liability Act, has been read by the federal courts to require apportionment of damages according to degree of fault in products liability actions.[84] Although a right of contribution is established, defendants remain jointly and severally liable.[85]

Comment

Both cases which reasoned that the §600.2925b pro-rata share provision was modified by the §600.2949 comparative negligence statute were Federal District Court cases.[86] In light of Ferdig v. Melitta, Inc., in which the Michigan Court of Appeals held that contributory negligence was not liable to apportionment in a breach of warranty action, it is unclear how the Michigan courts will apportion damages in a case in which one defendant has been found liable on a warranty theory and one on a negligence theory. Adoption of UPLA §113 would make clear that comparative fault applied to contribution in all products liability actions. Otherwise, assuming the validity of the federal decisions interpreting §600.2949, UPLA §113 does not add anything to current Michigan law as to contribution among multiple tortfeasors.

---

84. See Conkright v. Ballantyne of Omaha, Inc., 496 F.Supp. 147, 150 (W.D. Mich. 1980); Jorae v. Clinton Corp. Service, 465 F.Supp. 952, 959 (E.D. Mich. 1979).

85. See Cutter v. Massey-Ferguson, Inc., 114 Mich.App. 28, 37, 318 N.W.2d 554, 557 (1982).

86. 115 Mich.App. 340, 320 N.W.2d 369 (1982).

3. Contribution and indemnity--worker's compensation

UPLA Sec. 114

This section provides that, in the case of a workplace injury, a claim brought by or on behalf of an injured person entitled to worker's compensation benefits be reduced by the amount of those benefits. Section 111(B)(2), on comparative responsibility, notes that where the employer is also at fault, damages shall be reduced either by the workmen's compensation, or the percentage of responsibility apportioned to the employer, whichever is greater. An employer's (or insurance carrier's) right of subrogation against the manufacturer is eliminated, unless the manufacturer expressly agreed to indemnity. S.2631 follows the UPLA in the treatment of this subject.

[87]

Michigan Law

Under Michigan law, manufacturers have no right of indemnification or contribution from negligent employers.[88] Either the manufacturer is negligent, in which case it bears the entire burden, or the manufacturer is not negligent,[89] in which case it has a complete defense to liability. Manufacturers also have no right to have a judgment reduced by worker's compensation benefits. However, if an employee brings a successful action

---

87. See generally Bar Report, supra note 7, at 418-19.

88. See Husted v. Consumers Power Company, 326 Mich. 41, 135 N.W.2d 370 (1965).

89. See Swindlehurst v. Resistance Welder Corporation, 110 Mich.App. 693, 698, 313 N.W.2d 191, 194 (1981).

against a third party, the employee must repay worker's compensation benefits out of the judgment.[90] The employer or insurance carrier may recover these benefits even if the employer was itself negligent.

Comment

As noted in the Task Force Report, the law in jurisdictions like Michigan fails to put any pressure upon the employer who fails to provide safety in the workplace.[91] A successful third-party suit results in a windfall for the negligent employer, with the third-party defendant paying a judgment disproportionate to its degree of fault.

The UPLA proposal, however, may not be an ideal solution. If the damages allocable to the employer's share of the responsibility are less than the employee's worker's compensation benefits, the judgment is still reduced by the latter, and the manufacturer gets a windfall. If those damages are greater than the compensation benefits, the judgment is reduced by the former, and the employee arguably gets less than a full recovery, though that is a product of the inadequacy of the worker's compensation limit.

Even the UPLA drafters concede that their approach is a "next best solution."[92] A number of other approaches have been suggested.

---

90. Mich. Comp. Laws §418.827(5).

91. See Final Report, supra note 2, at VII-89.

92. UPLA, supra note 3, at 62,740 (Sec. 114 Analysis).

(1) The Task Force recommended as the best solution that worker's compensation be the sole source recovery in workplace injuries[93] (although it felt that the UPLA was an inappropriate place to work out the details).[94] Opponents argue that such an approach deprives workers of a common law right of action, and therefore is unfair unless the quid pro quo of benefits are improved.[95]

(2) The California Citizens' Commission on Tort Reform recommended that where an employer's comparative responsibility for an injury exceeds the worker's compensation benefits schedule, the employer should be liable for a payment up to twice its normal obligation.[96] Opponents argue that this undermines the basic premise of workmen's compensation as it relates to employer liability.

(3) The Michigan State Bar Task Force suggested another approach: The third party defendant should be able to add the employer as a party defendant, and the employer, if found negligent, should not be entitled to a return of worker's compensation benefits if it contributed to plaintiff's injury. The Task Force notes that this solution ensures economic penalties on all parties directly responsible.[97] The employer's

---

93. See Final Report, supra note 2, at VII-103-112.

94. See UPLA, supra note 3, at 62,740 (Sec. 114 Analysis).

95. See Final Report, supra note 2, at VII-104-105.

96. See California Report, supra note 6, at 126.

97. See Bar Report, supra note 7, at 420.

liability is limited to the worker's compensation payments and the manufacturer's liability encompasses the jury award (apparently less the workmen's compensation benefits). Opponents argue that this may require the manufacturer to pay more than his fair share; if worker's compensation benefits are inadequate, that burden should be borne by the beneficiary of that no-fault system, the employee, not the manufacturer.

4. Non-pecuniary damages

UPLA Sec. 118

This section provides that the court will review damage awards of the trier of fact for excessiveness. An optional subsection (C) relates to non-pecuniary damages (commonly referred to as "pain and suffering"). These damages are limited to $25,000, unless claimant has suffered serious and permanent or prolonged disfigurement, impairment of bodily function, pain and discomfort, or mental illness. S.2631 contains no provision concerning non-pecuniary damages.

Michigan Law

The trial judge has limited discretion to grant a new trial or remittitur if a verdict has been influenced by passion or prejudice, or is clearly or grossly excessive.[98] This would include non-pecuniary damages.

98. Mich. Ct. R. 527 (1981).

Comment

The optional provision on limiting non-pecuniary damages raises a number of problems. First, singling out one type of claim for such a limitation may raise equal protection difficulties.[99] Second, it is unlikely that in many cases outside of the exceptions to the $25,000 ceiling, non-pecuniary damages in excess of that amount would be awarded.[100] The major problem may lie in determining appropriate pain and suffering damages where the $25,000 limit does not apply. The California Report recommended that a commission be established "to develop sample standards of reasonable pain and suffering awards fitted to typical factual situations."[101]

5. Collateral source rule

UPLA Sec. 119

This section modifies the collateral source rule to the extent that claimants recovery will be reduced by any payments received from a public source. S.2631 contains no provision concerning the collateral source rule.

Michigan Law

The collateral source rule is applicable in Michigan as to payments from public sources.[102]

---

99. See Reform and UPLA, supra note 31, at 73, Bar Report, supra note 7, at 414.

100. See Reform and UPLA, supra note 31, at 73-74.

101. See California Report, supra note 6, at 151.

102. 9 M.L.P. Damages §74 (1976).

Comment

In City of Detroit v. Bridgeport Brass Co.,[103] a municipality was deemed to have acquired subrogation rights against a tortfeasor by payment to an injured employee of a duty disability pension. If changes are to be made as to payments from public sources, it may be more appropriate that the public source recoup its payments rather than that the tortfeasor's liability be reduced by those payments. Moreover, changes in the collateral source rule confined to the area of product liability would again raise the issue as to the propriety and constitutionality of unequal treatment of other areas of tort liability.

6. Punitive damages

UPLA Sec. 120

Punitive damages may be awarded if the claimant proves by clear and convincing evidence that the harm suffered was the result of reckless disregard on the part of the defendant. S.2631 Sec. 13 follows the UPLA.

Michigan Law

Punitive damages for purposes of punishment are not acceptable in Michigan, though compensation is allowed for injury to plaintiff's feelings attributable to defendant's egregious conduct.[104]

---

103. 28 Mich.App. 54, 184 N.W.2d 278 (1970).

104. See Bar Report, supra note 7, at 415.

Comment

Punitive damages do not appear to be a problem in the area of products liability. The Michigan Bar Task Force was unable to find a single products liability case in which punitive damages were allowed.[105] The impact of punitive damages has been so slight that the Insurance Services Office has not taken them into account in making rate adjustments.[106]

D. Improving Litigative Efficiency

1. Notice of pending claims

UPLA Sec. 109

An attorney preparing to file a claim must notify all potential defendants within six months of entering an attorney-client relationship of the impending claim. A claimant who delays retaining counsel in order to unreasonably delay notice, an attorney who delays giving such notice, or a potential defendant that withholds pertinent information required by the plaintiff may be assessed costs and attorneys' fees resulting to the inconvenienced party. S.2631 contains no equivalent provision.

Michigan Law

Michigan has no such law.

---

105. Id. at 416.

106. See Final Report, supra note 2, at VII-77.

Comment

The purposes of the pre-filing notice deadline is to improve product safety by alerting manufacturers to detect problems as early as possible. The potential benefits, however, are speculative. It is not clear how often suits are not filed within six months of consideration by counsel, or what manufacturer would do with such limited information.

2. Frivolous claims, defenses

UPLA Sec. 115

After final judgment has been entered, any party may seek reimbursement of costs or attorneys' fees resulting from the assertion by the opposing party of a frivolous claim or defense. S.2631 contains no equivalent provision.

Michigan Law

A frivolous claims and defenses provision was included in Public Act 495.[107]

Comment

Adoption of UPLA Sec. 115 would duplicate the Michigan statute already in force.

---

107. Mich. Comp. Laws §600.2949(2).

3. Arbitration

UPLA Sec. 116

If the court determines that the probable amount in dispute is less than $50,000, either party may institute a pre-trial arbitration proceeding. Either party dissatisfied with the resulting award may demand a trial, but will be assessed the costs of the arbitration if the judgment received at trial is not greater than the arbitration award. S.2631 contains no provision on arbitration.

Michigan Law

Michigan has a voluntary, binding arbitration law for medical malpractice.[108]

Comment

Most states which have experimented with arbitration for certain classes of claims have employed either compulsory and non-binding arbitration, or voluntary and binding arbitration. The voluntary and non-binding combination employed in the UPLA has been criticized as the least likely to reduce the number of claims faced by the courts.[109] In addition, the $50,000 ceiling is higher than the typical arbitration scheme which permits a trial de novo. With more at stake, the rates of

---

108. Mich. Comp. Laws §§600.5040-5565.

109. Special Project, Model Uniform Product Liability Act: An Analysis of Arbitration Claims Under Section 116, 46 J. Air L. & Com. 359, 387 (1981).

trials de novo are likely to be higher than the five to fifteen percent experienced elsewhere.[110]

One commentator has suggested that taxing the victim who exercises his right to jury trial, simply because he has received a judgment less than the arbitration award, is "an inexcusable bar to the courthouse door."[111] In fact, however, the penalties are so small that, with more than $50,000 at stake, the disincentive to appeal is unlikely to deter a disgruntled party.[112]

4. Experts

UPLA Sec. 117

This provision follows Fed. R. Evid. 706. S.2631 contains no equivalent provision.

Michigan Law

Mich. R. Evid. 706 is identical to the Federal rule.

Comment

Adoption of UPLA Sec. 117 would duplicate the Michigan rule.

---

110. Id. at 388.

111. 2A L. Frumer and M. Friedman, Product Liability §16D.03[7] (1982).

112. Special Project, supra note 109, at 388.

III. ISSUES FOR LEGISLATIVE CONSIDERATION

The UPLA raises a broad range of issues, including many that were considered in the enactment of P.A. 495. Assuming that positions taken in P.A. 495 will be retained, the legislature might find it worthwhile to consider the following issues:

1. Should the legislature resolve the currently unsettled issue as to whether the product liability cause of action or the U.C.C. covers consequential economic losses (in particular, loss of profits)?

2. Should the strict liability element of implied warranty be replaced by a negligence standard as to design defects and/or warnings?

3. Should a special action, such as suggested in S.2631, be authorized for cases in which the particular manufacturer of the product cannot be identified?

4. Should the legislature amend the evidentiary provisions of the P.A. 495 to make compliance or non-compliance with government standards generally dispositive on the question of defectiveness, in accord with UPLA §108?

5. Should the legislature specify precisely where comparative negligence should be applied, in light of the decisions suggesting a narrow construction of M.C.L. §600.2949? Should it adopt a broader concept of "comparative responsibility" as provided in UPLA §111?

6. Should P.A. 318 of 1974 be amended to ratify the reading of the federal courts that P.A. 495 modifies P.A. 318 by requiring that apportionment among joint tortfeasors in products liability cases be according to fault.

7. Should P.A. 495 be amended to offset manufacturer liability by worker's compensation payments, at least where the employer has been negligent?

8. Should the collateral source rule be modified as suggested in UPLA §119?

9. Should P.A. 495 be modified to include some type of arbitration provision, perhaps similar to that in the medical malpractice field?

APPENDIX A

FEDERAL INTERAGENCY TASK FORCE ON
PRODUCT LIABILITY

MODEL UNIFORM PRODUCT LIABILITY ACT
44 Fed. Reg. 62716 (10/31/79)

Uniform Product Liability Act

Code

Preamble

This Act sets forth uniform standards for state product liability tort law. It does not cover all issues that may be litigated in product liability cases; rather, it focuses on those where the need for uniform rules is the greatest. The principal purposes of the Act are to provide a fair balance of the interests of both product users and sellers and to eliminate existing confusion and uncertainty about their respective legal rights and obligations. The fulfillment of these goals should help, first, to assure that persons injured by unreasonably unsafe products will be adequately compensated for their injuries and, second, to make product liability insurance more widely available and affordable, with greater stability in rates and premiums.

Sec. 100. Short Title

This Act shall be known and may be cited as the "Uniform Product Liability Act."

Sec. 101. Findings

(A) Sharply rising product liability insurance premiums have created serious problems in commerce resulting in:

(1) Increased prices of consumer and industrial products;

(2) Disincentives for innovation and for the development of high-risk but potentially beneficial products;

(3) An increase in the number of product sellers attempting to do business without product liability insurance coverage, thus jeopardizing both their continued existence and the availability of compensation to injured persons; and

(4) Legislative initiatives enacted in a crisis atmosphere that may, as a result, unreasonably curtail the rights of product liability claimants.

(B) One cause of these problems is that product liability law is fraught with uncertainty and sometimes reflects an imbalanced consideration of the interests it affects. The rules vary from jurisdiction to jurisdiction and are subject to rapid and substantial change. These facts militate against predictability of litigation outcome.

(C) Insurers have cited this uncertainty and imbalance as justifications for setting rates and premiums that, in fact, may not reflect actual product risk or liability losses.

(D) Product liability insurance rates are set on the basis of countrywide, rather than individual state, experience. Insurers utilize countrywide experience because a product manufactured in one state can readily cause injury in any one of the other states, the District of Columbia, or the Commonwealth of Puerto Rico. One ramification of this practice is that there is little an individual state can do to solve the problems caused by product liability..

(E) Uncertainty in product liability law and litigation outcome has added to litigation costs and may put an additional strain on the judicial system.

(F) Recently enacted state product liability legislation has widened existing disparities in the law.

Sec. 102. Definitions

(A) *Product Seller.* "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products.

The term "product seller" does not include:

(1) A seller of real property, unless that person is engaged in the mass production and sale of standardized dwellings or is otherwise a product seller;

(2) A provider of professional services who utilizes or sells products within the legally authorized scope of its professional practice. A non-professional provider of services is not included unless the sale or use of a product is the principal part of the transaction, and the essence of the relationship between the seller and purchaser is not the furnishing of judgment, skill, or services;

(3) A commercial seller of used products who resells a product after use by a consumer or other product user, provided the used product is in essentially the same condition as when it was acquired for resale; and

(4) A finance lessor who is not otherwise a product seller. A "finance lessor" is one who acts in a financial capacity, who is not a manufacturer, wholesaler, distributor, or retailer, and who leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.

(B) *Manufacturer.* "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product before its sale.

(C) *Product.* "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term.

The "relevant product" under this Act is that product, or its component part or parts, which gave rise to the product liability claim.

(D) *Product Liability Claim.* "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage, or labeling of the relevant product. It includes, but is not limited to, any action previously based on: strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or under any other substantive legal theory.

(E) *Claimant.* "Claimant" means a person or entity asserting a product liability claim, including a wrongful death action, and, if the claim is asserted through or on behalf of an estate, the term includes claimant's decedent. "Claimant" includes any person or entity that suffers harm.

(F) *Harm.* "Harm" includes: (1) damage to property; (2) personal physical injuries, illness and death; (3) mental anguish or emotional harm attendant to such personal physical injuries, illness or death; and (4) mental anguish or emotional harm caused by the claimant's being placed in direct personal physical danger and manifested by a substantial objective symptom. The term "harm" does not include direct or consequential economic loss.

(G) *Reasonably Anticipated Conduct.* "Reasonably anticipated conduct" means the conduct which would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances.

(H) *Preponderance of the Evidence.* "A preponderance of the evidence" is that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur.

(I) *Clear and Convincing Evidence.* "Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. This level of proof is greater than mere "preponderance of the evidence," but less than proof beyond a reasonable doubt.

(J) *Reckless Disregard.* "Reckless disregard" means a conscious indifference to the safety of persons or entities that might be harmed by a product.

(K) *Express Warranty.* "Express warranty" means any positive statement, affirmation of fact, promise, description, sample, or model relating to the product.

Sec. 103. Scope of This Act

(A) This Act is in lieu of and preempts all existing law governing matters within its coverage, including the "Uniform Commercial Code" and similar laws; however, nothing in this Act shall prevent the recovery, under the "Uniform Commercial Code" or similar laws, of direct or consequential economic losses.

(B) A claim may be asserted under this Act even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller.

(C) Whenever this Act does not provide a rule of decision, reference may be made to other sources of law, provided that such reference conforms to the intent and spirit of this Act as set forth in the following criteria used as guidelines for its development:

(1) To ensure that persons injured by unreasonably unsafe products receive reasonable compensation for their injuries;

(2) To ensure the availability of affordable product liability insurance with adequate coverage to product sellers that engage in reasonably safe manufacturing practices;

(3) To place the incentive for loss prevention on the party or parties who are best able to accomplish that goal;

(4) To expedite the reparations process from the time of injury to the time the claim is paid;

(5) To minimize the sum of accident costs, prevention costs, and transaction costs; and

(6) To use language that is comparatively clear and concise.

Sec. 104. Basic Standards of Responsibility for Manufacturers

A product manufacturer is subject to liability to a claimant who proves by a preponderance of the evidence that the claimant's harm was proximately caused because the product was defective.

A product may be proven to be defective if, and only if:

(1) It was unreasonably unsafe in construction (Subsection A);

(2) It was unreasonably unsafe in design (Subsection B);

(3) It was unreasonably unsafe because adequate warnings or instructions were not provided (Subsection C); or

(4) It was unreasonably unsafe because it did not conform to the product seller's express warranty (Subsection D).

Before submitting the case to the trier of fact, the court shall determine that the claimant has introduced sufficient evidence to allow a reasonable person to find, by a preponderance of the evidence, that one or more of the above conditions existed and was a proximate cause of the claimant's harm.

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

(B) *The Product Was Unreasonably Unsafe in Design.*

(1) In order to determine that the product was unreasonably unsafe in design, the trier of fact must find that, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms outweighed the burden on the manufacturer to design a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product.

(2) Examples of evidence that is especially probative in making this evaluation include:

(a) Any warnings and instructions provided with the product;

(b) The technological and practical feasibility of a product designed and manufactured so as to have prevented claimant's harm while substantially serving the likely user's expected needs;

(c) The effect of any proposed alternative design on the usefulness of the product;

(d) The comparative costs of producing, distributing, selling, using, and maintaining the product as designed and as alternatively designed; and

(e) The new or additional harms that might have resulted if the product had been so alternatively designed.

(C) *The Product Was Unreasonably Unsafe Because Adequate Warnings or Instructions Were Not Provided.*

(1) In order to determine that the product was unreasonably unsafe because adequate warnings or instructions were not provided about a danger connected with the product or its proper use, the trier of fact must find that, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms

and the seriousness of those harms rendered the manufacturer's instructions inadequate and that the manufacturer should and could have provided the instructions or warnings which claimant alleges would have been adequate.

(2) Examples of evidence that is especially probative in making this evaluation include:

(a) The manufacturer's ability, at the time of manufacture, to be aware of the product's danger and the nature of the potential harm;

(b) The manufacturer's ability to anticipate that the likely product user would be aware of the product's danger and the nature of the potential harm;

(c) The technological and practical feasibility of providing adequate warnings and instructions;

(d) The clarity and conspicuousness of the warnings or instructions that were provided; and

(e) The adequacy of the warnings or instructions that were provided.

(3) In any claim under this Subsection, the claimant must prove by a preponderance of the evidence that if adequate warnings or instructions had been provided, they would have been effective because a reasonably prudent product user would have either declined to use the product or would have used the product in a manner so as to have avoided the harm.

(4) A manufacturer shall not be liable for its failure to warn or instruct about dangers that are obvious; for "product misuse" as defined in Subsection 112(C)(1); or for alterations or modifications of the product which do not constitute "reasonably anticipated conduct" under Subsection 102(G).

(5) A manufacturer is under an obligation to provide adequate warnings or instructions to the actual product user unless the manufacturer provided such warnings to a person who may be reasonably expected to assure that action is taken to avoid the harm, or that the risk of the harm is explained to the actual product user.

For products that may be legally used only by or under the supervision of a class of experts, warnings or instructions may be provided to the using or supervisory expert.

For products that are tangible goods sold or handled only in bulk or other workplace products, warnings or instructions may be provided to the employer of the employee-claimant if there is no practical and feasible means of transmitting them to the employee-claimant.

(6) *Post-Manufacture Duty to Warn.* In addition to the claim provided in Subsection (C)(1), a claim may arise under this Subsection where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under an obligation to act with regard to the danger as a reasonably prudent manufacturer in the same or similar circumstances. This obligation is satisfied if the manufacturer makes reasonable efforts to inform product users or a person who may be reasonably expected to assure that action is taken to avoid the harm, or that the risk of harm is explained to the actual product user.

(D) *The Product Was Unreasonably Unsafe Because It Did Not Conform to an Express Warranty.* In order to determine that the product was unreasonably unsafe because it did not conform to an express warranty, the trier of fact must find that the claimant, or one acting on the claimant's behalf, relied on an express warranty made by the manufacturer or its agent about a material fact or facts concerning the product and this express warranty proved to be untrue.

A "material fact" is any specific characteristic or quality of the product. It does not include a general opinion about, or praise of, the product.

The product seller may be subject to liability under Subsection (D) although it did not engage in negligent or fraudulent conduct in making the express warranty.

Sec. 105. Basic Standards of Responsibility for Product Sellers Other Than Manufacturers

(A) A product seller, other than a manufacturer, is subject to liability to a claimant who proves by a preponderance of the evidence that claimant's harm was proximately caused by such product seller's failure to use reasonable care with respect to the product.

Before submitting the case to the trier of fact, the court shall determine that the claimant has introduced sufficient evidence to allow a reasonable person to find by a preponderance of the evidence that such product seller has failed to exercise reasonable care and that this failure was a proximate cause of the claimant's harm.

In determining whether a product seller, other than a manufacturer, is subject to liability under Subsection (A), the trier of fact shall consider the effect of such product seller's own conduct with respect to the design, construction, inspection, or condition of the product, and any failure of such product seller to transmit adequate warnings or instructions about the dangers and proper use of the product.

Unless Subsection (B) or (C) is applicable, product sellers shall not be subject to liability in circumstances in which they did not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition.

(B) A product seller, other than a manufacturer, who makes an express warranty about a material fact or facts concerning a product is subject to the standards of liability set forth in Subsection 104(D).

(C) A product seller, other than a manufacturer, is also subject to the liability of manufacturer under Section 104 if:

(1) The manufacturer is not subject to service of process under the laws of the claimant's domicile; or

(2) The manufacturer has been judicially declared insolvent in that the manufacturer is unable to pay its debts as they become due in the ordinary course of business; or

(3) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against the product manufacturer.

(D) Except as provided in Subsections (A), (B), and (C), a product seller, other than a manufacturer, shall not otherwise be subject to liability under this Act.

Sec. 106. Unavoidably Dangerous Aspects of Products

(A) An unavoidably dangerous aspect of a product is that aspect incapable, in light of the state of scientific and technological knowledge at the time of manufacture, of being made safe without seriously impairing the product's usefulness.

(B) A product seller shall not be subject to liability for harm caused by an unavoidably dangerous aspect of a product unless:

(1) The product seller knew or had reason to know of the aspect and with that knowledge acted unreasonably in selling the product at all;

(2) The aspect was a defect in construction under Subsection 104(A);

(3) The product seller knew or had reason to know of the aspect and failed to meet a duty to instruct or warn under Subsection 104(C), or to transmit warnings or instructions under Subsection 105(A); or

(4) The product seller expressly warranted that the product was free of the unavoidably dangerous aspect under Subsection 104(D) or 105(B).

Sec. 107. Relevance of Industry Custom, Safety or Performance Standards, and Practical Technological Feasibility

(A) Evidence of changes in (1) a product's design, (2) warnings or instructions concerning the product, (3) technological feasibility, (4) "state of the art", or (5) the custom of the product seller's industry or business, occurring after the product was manufactured, is not admissible for the purpose of proving that the product was defective in design under Subsection 104(B) or that a warning or instruction should have accompanied the product at the time of manufacture under Subsection 104(C).

If the court finds that the probative value of such evidence substantially outweighs its prejudicial effect and that there is no other proof available, this evidence may be admitted for other relevant purposes if confined to those purposes in a specific court instruction. Examples of "other relevant purposes" include proving ownership or control, or impeachment.

(B) For the purposes of Section 107, "custom" refers to the practices followed by an ordinary product seller in the product seller's industry or business.

(C) Evidence of custom in the product seller's industry or business or of the product seller's compliance or non-compliance with a non-governmental safety or performance standard, existing at the time of manufacture, may be considered by the trier of fact in determining whether a product was defective in design under Subsection 104(B), or whether there was a failure to warn or instruct under Subsection 104(C) or to transmit warnings or instructions under Subsection 105(A).

(D) For the purposes of Section 107, "practical technological feasibility" means the technological, mechanical, and scientific knowledge relating to product safety that was reasonably feasible for use, in light of economic practicality, at the time of manufacture.

(E) If the product seller proves, by a preponderance of the evidence, that it was not within practical technological feasibility for it to make the product safer with respect to design and warnings or instructions at the time of manufacture so as to have prevented claimant's harm, the product seller shall not be subject to liability for harm caused by the product unless the trier of fact determines that:

(1) The product seller knew or had reason to know of the danger and, with that knowledge, acted unreasonably in selling the product at all;

(2) The product was defective in construction under Subsection 104(A),

(3) The product seller failed to meet the post-manufacture duty to warn or instruct under Subsection 104(C)(6); or

(4) The product seller was subject to liability for express warranty under Subsection 104(D) or 105(B).

Sec. 108. Relevance of Legislative or Administrative Regulatory Standards and Mandatory Government Contract Specifications

(A) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with legislative regulatory standards or administrative regulatory safety standards relating to design or performance, the product shall be deemed not defective under Subsection 104(B), or, if the standard addressed warnings or instructions, under Subsection 104(C) or 105(A), unless the claimant proves by a preponderance of the evidence that a reasonably prudent product seller could and would have taken additional precautions.

(B) When the injury-causing aspect of the product was not, at the time of manufacture, in compliance with legislative regulatory standards or administrative regulatory safety standards relating to design or performance, the product shall be deemed defective under Subsection 104(B), or, if the standard addressed warnings or instructions, under Subsection 104(C) or 105(A), unless the product seller proves by a preponderance of the evidence that its failure to comply was a reasonably prudent course of conduct under the circumstances.

(C) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with a mandatory government contract specification relating to design, this shall be an absolute defense and the product shall be deemed not defective under Subsection 104(B), or, if the specification related to warnings or instructions, under Subsection 104(C) or 105(A).

(D) When the injury-causing aspect of the product was not, at the time of manufacture, in compliance with a mandatory government contract specification relating to design, the product shall be deemed defective under Subsection 104(B), or, if the specification related to warnings or instructions, under Subsection 104(C) or 105(A).

Sec. 109. Notice of Possible Claim Required

(A) An attorney who anticipates filing a claim shall notify all product sellers against whom the claim is likely to be made. The notice of claim shall:

(1) Identify the product as specifically as possible;

(2) State the time, place, circumstances, and events giving rise to the claim;

(3) Give an estimate of compensation or other relief to be sought.

(B) The attorney shall give notice of claim within six (6) months of the date of entering into an attorney-client relationship with the claimant in regard to the claim. For the purposes of Section 109, such a relationship arises when the attorney, or any member or associate of the attorney's firm, agrees to serve the claimant's interests in regard to the anticipated claim.

(C) If the claimant's attorney requests the information at the time the notice of claim is given, the product seller receiving the notice of claim shall promptly furnish the claimant's attorney with the names and addresses of each person whom the product seller knows to be in the chain of manufacture and

distribution of the product, and who is likely to be subject to liability under Sections 104 or 105. Any product seller who fails to furnish such information may be subject to liability as provided in Subsection (E).

(D) A claimant who delays entering into an attorney-client relationship so as to delay unreasonably the notice of claim required by Subsection (A) may be subject to liability as provided in Subsection (E).

(E) Any party to the product liability claim or any attorney representing such a party who suffers a monetary loss associated with the litigation of the claim caused by the failure of a claimant or a claimant's attorney, or of a product seller or its attorney, to comply with the requirements of this Section may recover pecuniary damages, costs, and reasonable attorneys' fees from that party. Failure to comply with the requirements of Section 109 does not affect the validity of any claim or defense under this Act.

Sec. 110. Length of Time Product Sellers are Subject to Liability

(A) *Useful Safe Life.*

(1) Except as provided in Subsection (A)(2), a product seller shall not be subject to liability to a claimant for harm under this Act if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired.

"Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of Section 110, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

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

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

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

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

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

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

(2) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life to the extent that the product seller has expressly warranted the product for a longer period.

(B) *Statute of Repose.*

(1) *Generally.* In claims that involve harm caused more than ten (10) years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence.

(2) *Limitations on Statute of Repose.*

(a) If a product seller expressly warrants that its product can be utilized safely for a period longer than ten (10) years, the period of repose, after which the presumption created in Subsection (B)(1) arises, shall be extended according to that warranty or promise.

(b) The ten- (10-) year period of repose established in Subsection (B)(1) does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.

(c) Nothing contained in Subsection (B) shall affect the right of any person found liable under this Act to seek and obtain contribution or indemnity from any other person who is responsible for harm under this Act.

(d) The ten- (10-) year period of repose established in Subsection (B)(1) shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery, or if the harm, caused within ten (10) years after the time of delivery, did not manifest itself until after that time.

(C) *Statute of Limitation.* No claim under this Act may be brought more than two (2) years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and the cause thereof.

Sec. 111. Comparative Responsibility and Apportionment of Damages

(A) *Comparative Responsibility.* All claims under this Act shall be governed by the principles of comparative responsibility. In any claim under this Act, the comparative responsibility of, or attributed to, the claimant shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.

(B) *Apportionment of Damages.*

(1) In all claims involving comparative responsibility, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, the court shall make findings, indicating:

(a) The amount of damages each claimant would be entitled to recover if the comparative responsibility of each party were disregarded; and

(b) The percentage of the total responsibility of all parties to each claim that is to be allocated to each claimant; defendant; third-party defendant; person or entity who misused, modified, or altered a product under Subsection 112 (C) or (D), [or who voluntarily and unreasonably used or stored a product with a known defective condition under Subsection 112(B)]; and person released from liability under Subsection 113(E). Under this Subsection, the court may determine that two or more persons are to be treated as a single party.

(2) When the claimant's employer's or co-employee's fault is considered, damages shall be reduced in accordance with Subsection 114(A), if applicable, or by the percentage of responsibility apportioned to such employer or co-employee, if that amount is greater. When a person released from liability under Subsection 113(E) would otherwise be liable under this Act, damages shall be reduced by the percentage of responsibility apportioned to such person.

(3) In determining the percentages of responsibility, the trier of fact shall consider, on a comparative basis, both the nature of the conduct of each person or entity responsible and the extent of the proximate causal relation between the conduct and the damages claimed.

(4) The court shall determine the award of damages to each claimant in accordance with the findings and enter judgment against each party liable. For purposes of contribution under Section 113, the court shall also determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of responsibility.

(5) Damages are to be apportioned severally, and not jointly, when a party is responsible for a distinct harm, or when there is some other reasonable basis for apportioning that party's responsibility for the harm. Otherwise, judgment shall be entered against each party liable on the basis of the rules of joint and several liability.

(6) When one or more parties made a substantial contribution to an indivisible harm, or for other reasons under the common law of the state is a joint tortfeasor, upon motion made not later than one (1) year after judgment is entered, the court shall determine whether all or part of a joint tortfeasor's share of the obligation is uncollectible from that joint tortfeasor.

If the court's finding is in the affirmative, the court shall reallocate any uncollectible amount among a claimant found to be responsible and other parties who are joint tortfeasors with the party whose share is uncollectible. The reallocation shall be made according to the respective percentages of responsibility of each party.

Sec. 112. Conduct Affecting Comparative Responsibility

(A) *Failure to Discover a Defective Condition.*

(1) *Claimant's Failure to Inspect.* A claimant is not required to have inspected the product for a defective condition. Failure to have done so does not render the claimant responsible for the harm caused or reduce the claimant's damages.

(2) *Claimant's Failure to Observe an Apparent Defective Condition.* When the product seller proves by a preponderance of the evidence that the claimant, while using the product, was injured by a defective condition that would have been apparent, without inspection, to an ordinary reasonably prudent person, the claimant's damages shall be subject to reduction. The procedural principles governing reduction of damages are set forth in Section 111.

(3) *A Non-Claimant's Failure to Inspect for Defects or to Observe an Apparent Defective Condition.* A non-claimant's failure to inspect for a defective condition or to observe an apparent defective condition that would have been obvious, without inspection, to an ordinary reasonably prudent person, shall not reduce claimant's damages.

(B) *Use of a Product With a Known Defective Condition.*

(1) *By a Claimant.* When the product seller proves, by a preponderance of the evidence, that the claimant knew about the product's defective condition, and voluntarily used the product or voluntarily assumed the risk of harm from the product, the claimant's damages shall be subject to reduction to the extent that the claimant did not act as an ordinary reasonably prudent person under the circumstances. Under this Subsection, the trier of fact may determine that the claimant should bear sole responsibility for harm caused by a defective product. The procedural principles governing reduction of damages are set forth in Section 111.

*Optional Section

[(2) *By a Non-Claimant Product User.* If the product seller proves by a preponderance of the evidence that a product user, other than the claimant, knew about a product's defective condition, but voluntarily and unreasonably used or stored the product and thereby caused claimant's harm, the claimant's damages shall be subject to apportionment. The procedural principles governing apportionment of damages are set forth in Section 111.]

(C) *Misuse of a Product.*

(1) "Misuse" occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances.

(2) When the product seller proves, by a preponderance of the evidence, that product misuse by a claimant, or by a party other than the claimant or the product seller, has caused the claimant's harm, the claimant's damages shall be subject to reduction or apportionment to the extent that the misuse was a cause of the harm. Under this Subsection, the trier of fact may determine that the harm arose solely because of product misuse. The procedural principles governing reduction or apportionment of damages are set forth in Section 111.

(3) Under this Subsection, subject to state and federal law regarding immunity in tort, the trier of fact may determine that a party or parties who misused the product and thereby caused claimant's harm should bear partial or sole responsibility for harm caused by the product and are subject to liability to the claimant.

(D) *Alteration or Modification of a Product.*

(1) "Alteration or modification" occurs when a person or entity other than the product seller changes the design, construction, or formula of the product, or changes or removes warnings or instructions that accompanied or were displayed on the product. "Alteration or modification" of a product includes the failure to observe routine care and maintenance, but does not include ordinary wear and tear.

(2) When the product seller proves, by a preponderance of the evidence, that an alteration or modification of the product by the claimant, or by a party other than the claimant or the product seller, has caused the claimant's harm, the claimant's damages shall be subject to reduction or apportionment to the extent that the alteration or modification was a cause of the harm. Under this Subsection, the trier of fact may determine that the harm arose solely because of the product alteration or modification.

This Subsection shall not be applicable if:

(a) The alteration or modification was in accord with the product seller's instructions or specifications;

(b) The alteration or modification was made with the express or implied consent of the product seller; or

(c) The alteration or modification was reasonably anticipated conduct under Subsection 102(G), and the product was defective under Subsection 104(C) because of the product seller's failure to provide adequate warnings or instructions with respect to the alteration or modification.

The procedural principles governing reduction or apportionment of damages are set forth in Section 111.

(3) Under this Subsection, subject to state and federal law regarding immunity in tort, the trier of fact may determine that a party or parties who altered or modified the product and thereby caused claimant's harm should bear partial or sole responsibility for harm caused by the product and are subject to liability to the claimant.

Sec. 113. Multiple Defendants: Contribution and Implied Indemnity

(A) A right of contribution exists under this Act between or among two or more persons who are jointly and severally liable, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant, as determined in accordance with the provisions of Section 111. For the purposes of this Act, contribution and implied indemnity are merged.

(B) If the proportionate responsibility of the parties to a claim for contribution has been established previously by the court, as provided in Section 111, a party paying more than its equitable share of the obligation may, upon motion, recover judgment for contribution.

(C) If the proportionate responsibility of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(D) Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished by the settlement, and (2) to the extent that the amount paid in settlement was reasonable.

(E) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing claimant against the other parties is reduced by the amount of the released party's equitable share of the obligation, determined in accordance with the provisions of Section 111.

(F) If a judgment has been rendered, the action for contribution must be commenced within one year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution must have (1) discharged by payment the common liability within the period of the statute of limitation or repose applicable to the claimant's right of action against him and commenced the action for contribution within one year after payment, or (2) agreed while action was pending to discharge the common liability and, within one year after the agreement, have paid the liability and brought an action for contribution.

Sec. 114. Relationship Between Product Liability and Worker Compensation

(A) In the case of any product liability claim brought by or on behalf of an injured person entitled to compensation under a state Worker Compensation statute, damages shall be reduced by the amount paid as Worker Compensation benefits for the same injury plus the present value of all future Worker Compensation benefits payable for the same injury under the Worker Compensation statute.

(B) Unless the product seller has expressly agreed to indemnify or hold an employer harmless for harm caused to the employer's employee by a product, the employer shall have no right of subrogation, contribution, or indemnity against the product seller when the harm to the employee constitutes a product liability claim under this Act. Also, the employer's Worker Compensation insurance carrier shall have no right of subrogation against the product seller.

(C) When final judgment in an action brought under this Act has been entered prior to the determination of Worker Compensation benefits, the product seller may bring a subsequent action for reduction of the judgment by the amount of the Worker Compensation benefits, or for recoupment from the employee if the product seller has paid a judgement which includes the amount of such benefits.

Sec. 115. Sanctions Against the Bringing of Frivolous Claims and Defenses

(A) After final judgment has been entered under this Act, any party may, by motion, seek reimbursement for reasonable attorneys' fees and other costs that would not have been expended but for the fact that the opposing party pursued a claim or defense that was frivolous. A claim or defense is considered frivolous if the court determines that it was without any reasonable legal or factual basis.

(B) If the court decides in favor of a party seeking redress under this Section, it shall do so on the basis of clear and convincing evidence. In all motions under this Section, the court shall make written findings of fact.

(C) The motion provided for in Subsection (A) may be filed and the claim assessed against a party or a party's attorney or both, depending on which person or persons were responsible for the assertion of the frivolous claim or defense.

(D) Claims for damages under this Section shall be limited to expenses incurred by parties to the action or persons under a legal or contractual duty to bear the expenses of the action.

Sec. 116. Arbitration

(A) *Applicability.*

(1) Any party may by a motion institute a pre-trial arbitration proceeding in any claim brought under this Act, if the court determines that:

(a) It is reasonably probable that the amount in dispute is less than $50,000, exclusive of interest and costs; and

(b) Any non-monetary claims are insubstantial.

(2) Arbitration may not be used if both the claimant and one or more defendants state that they do not want an arbitration proceeding.

(B) *Rules Governing.*

(1) *Substantive Rules.* The substantive rules of an arbitration proceeding under this Section are those contained in this Act as well as those in applicable state law.

(2) *Procedural Rules.* These are the procedural rules of an arbitration proceeding under this Section. If this Section does not provide a rule of procedure, reference may be made to the "Uniform Arbitration Act" or other sources of law. Any reference to other sources of law must conform to the intent and spirit of this Section.

***Optional Subsection**

[(3) *Additional Rules and Administration.*

(i) The ———— (legislature to specify appropriate state agency or administrative body) is empowered to promulgate additional procedural rules for this Section.

(ii) The ———— (legislature to specify American Arbitration Association or similar organization) shall carry out the day-to-day administration of arbitration under this Section.]

(C) *Arbitrators.*

(1) Unless the parties agree otherwise, the arbitration shall be conducted by three persons: an active member of the state bar or a retired judge of a court of record in the state; an individual who possesses expertise in the subject matter area that is in dispute; and a layperson.

(2) Arbitrators shall be selected in accordance with applicable state law in a manner which will assure fairness and lack of bias.

(D) *Arbitrators' Powers.*

(1) Each arbitrator to whom a claim is referred has the power, within the territorial jurisdiction of the court, to conduct arbitration hearings and make awards consistent with the provisions of this Act.

(2) State laws applicable to subpoenas for attendance of witnesses and the production of documentary evidence apply in proceedings conducted under this Section. Arbitrators shall have the power to administer oaths and affirmations.

(E) *Commencement.* Arbitration hearings shall commence not later than thirty (30) days after the claim is referred to arbitration unless, for good cause shown, the court shall extend the period. Hearings shall be concluded promptly. The court may order the time and place of the arbitration.

(F) *Evidence.*

(1) The Federal Rules of Evidence [or designated state evidence code] may be used as a guide to the admissibility of evidence in an arbitration hearing.

(2) Strict adherence to the rules of evidence, apart from relevant state rules of privilege, is not required.

(G) *Transcript of Proceeding.* A party may have a transcript or recording made of the arbitration hearing at its own expense. A party who has had a transcript or recording made shall furnish a copy of the transcript or recording at cost to any other party upon request.

(H) *Arbitration Decision and Judgment.* The arbitration decision and award, if any, shall be filed with the court promptly after the hearing is concluded. Unless a party demands a trial pursuant to Subsection (I), the decision and award shall be entered as the judgment of the court. The judgment entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be subject to appeal.

(I) *Trial Following Arbitration.*

(1) Within twenty (20) days after the filing of an arbitration decision with the court, any party may demand a trial of fact or a hearing on an issue of law in that court.

(2) Upon such a demand, the action shall be placed on the calendar of the court. Except for the provisions of Subsection (3), any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(3) At trial, the court shall admit evidence that there has been an arbitration proceeding, the decision of the arbitration panel, and the nature and amount of the award, if any. The trier of fact shall give such evidence whatever weight it deems appropriate.

(4) A party who has demanded a trial but fails to obtain a judgment in the trial court which is more favorable than the arbitration award, exclusive of interest and costs, shall be assessed the cost of the arbitration proceeding, including the amount of the arbitration fees, and—

(i) If this party is a claimant and the arbitration award is in its favor, the party shall pay the court an amount equivalent to interest on the arbitration award from the time it was filed; or

(ii) If this party is a product seller, it shall pay interest to the claimant on the arbitration award from the time it was filed.

Sec. 117. Expert Testimony

(A) *Appointment of Experts.* The court may, on its own motion or on the motion of any party, enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witness agreed upon by the parties, and may appoint witnesses of its own selection. The court may consult with knowledgeable individuals or with professional, academic, consumer, or business organizations and institutions to assist with the selection process. An expert witness shall not be appointed by the court unless the expert consents to serve. An expert witness appointed by the court shall be informed of his or her duties in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have an opportunity to participate. An expert witness so appointed shall advise the parties of any findings; shall be available for deposition by any party; and may be called to testify by the court or any party. The court-appointed expert witness shall be subject to cross-examination by each party, including the party calling that expert as a witness.

(B) *Compensation.*

(1) Expert witnesses appointed by the court are entitled to reasonable compensation for their services in an amount to be determined by the court. The court, in its discretion, may tax the costs of such expert on one party or apportion them among parties in the same manner as other costs.

(2) In exercising this discretion, the court may consider:

(a) Which party, if any, requested the court appointment of the expert;

(b) Which party had judgment entered in its favor; and

(c) Whether the amount of damages recovered in the action bore a reasonable relationship to the amount sought by the claimant or conceded to be appropriate by the product seller or other defendant.

(C) *Disclosure of Appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court has appointed the expert witness.

(D) *Parties' Selection of Own Experts.* Nothing in this Section shall limit the parties in calling expert witnesses of their own selection.

(E) *Pre-Trial Evaluation of Experts.* The court in its discretion may conduct a hearing to determine the qualifications of all proposed expert witnesses. The court may order a hearing on its own motion or on the motion of any party.

(1) *Need for Pre-Trial Evaluation.* In determining whether to grant such a motion, the court shall consider:

(a) The complexity of the issues in the case; and

(b) Whether the hearing would deter the presentation of witnesses who are not qualified as experts on the specific issues.

(2) *Factors in Evaluation.* If the court decides to hold such a hearing, it shall consider;

(a) The background and skills of the proposed witness;

(b) The formal and self-education the proposed witness has undertaken relevant to the case or to similar cases; and

(c) The potential bias of the proposed witness.

(3) *Findings of Fact.* In making a determination as to whether a proposed expert witness is qualified, the court shall state its findings of fact to the parties.

(4) *Determination.* Based upon its findings of fact regarding the qualifications of any proposed expert witness, the court, in its discretion, may limit the scope of the witness' testimony, or may refuse to permit such witness to testify as an expert.

Sec. 118. Non-Pecuniary Damages

(A) For the purposes of this Section, "non-pecuniary damages" are those which have no market value and do not represent a monetary loss to claimant.

(B) When sufficient evidence has been introduced, the amount of non-pecuniary damages shall be determined by the trier of fact. However, the court shall have and shall exercise the power to review such damage awards for excessiveness.

***Optional Subsection**

[(c) Non-pecuniary damages under this Act shall not exceed $25,000, or twice the amount of the pecuniary damages, whichever is less, unless the claimant proves by a preponderance of the evidence that the product caused claimant to suffer serious and permanent or prolonged (1) disfigurement, (2) impaired of bodily function, (3) pain and discomfort, or (4) mental illness.]

***Optional Subsection**

[(D) Every third year following the effective date of this Act as stated in Section 122, the ———— Committee(s) of [each House of] the Legislature of this State shall review the monetary limitations contained in Subsection (C) to determine whether such limitations should be changed in view of the economic conditions existing at that time. Upon a finding that such change is warranted, said Committee(s) shall introduce legislation to amend the monetary limitations contained in Subsection (C).]

Sec. 119. The Collateral Source Rule

In any claim brought under this Act, the claimant's recovery, or that of any party who may be subrogated to the claimant's rights under this Act, shall be reduced by any compensation from a public source which the claimant has received or will receive for the same damages. For the purposes of this Section, "public source" means a fund more than half of which is derived from general tax revenues.

Sec. 120. Punitive Damages

(A) Punitive damages may be awarded to the claimant if the claimant proves by clear and convincing evidence that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers, or others who might be harmed by the product.

(B) If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of those damages. In making this determination, the court shall consider:

(1) The likelihood at the relevant time that serious harm would arise from the product seller's misconduct;

(2) The degree of the product seller's awareness of that likelihood;

(3) The profitability of the misconduct to the product seller;

(4) The duration of the misconduct and any concealment of it by the product seller;

(5) The attitude and conduct of the product seller upon discovery of the misconduct and whether the conduct has been terminated;

(6) The financial condition of the product seller;

(7) The total effect of other punishment imposed or likely to be imposed upon the product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of criminal penalties to which the product seller has been or may be subjected; and

(8) Whether the harm suffered by the claimant was also the result of the claimant's own reckless disregard for personal safety.

Sec. 121. Severance Clause

If any part of this Act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its effect to that part of this Act declared to be invalid.

Sec. 122. Effective Date

This Act shall be effective with regard to all product liability claims filed on or after ————————, 19——.

* Alternative Section

[This Act shall be effective with regard to all claims accruing on or after ————————, 19——. It shall be prospective in operation, and shall only apply to a product-related harm occurring on or after this date. When the facts giving rise to a claim are discovered or should have been discovered after this date, this Act shall govern the claimant's action. When the facts giving rise to a product-related harm are discovered or should have been discovered prior to the effective date of this Act, the law of this State which was applicable at the time of such discovery shall govern the claimant's action.]

APPENDIX B

PUBLIC ACT 495 of 1978

[No. 495]

AN ACT to amend section 5805 of Act No. 236 of the Public Acts of 1961, entitled as amended "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil and criminal actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act," being section 600.5805 of the Compiled Laws of 1970; and to add sections 2945, 2946, 2947, 2948 and 2949.

The People of the State of Michigan enact:

Sections amended and added; revised judicature act of 1961.

Section 1. Section 5805 of Act No. 236 of the Public Acts of 1961, being section 600.5805 of the Compiled Laws of 1970, is amended and sections 2945, 2946, 2947, 2948 and 2949 are added to read as follows:

600.2945 "Products liability action" defined. [M.S.A. 27A.2945]

Sec. 2945. As used in sections 2946 to 2949 and section 5805, "products liability action" means an action based on any legal or equitable theory of liability brought for or on account of death or injury to person or property caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product.

600.2946 Products liability action; admissible evidence. [M.S.A. 27A.2946]

Sec. 2946. (1) It shall be admissible as evidence in a products liability action that the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling was done pursuant to the generally recognized and prevailing nongovernmental standards in existence at the time the product was sold or delivered by the defendant to the initial purchaser or user.

(2) It shall be admissible in evidence in a products liability action that the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling was done pursuant to the federal and state law, rules, or regulations in effect at the time the product was sold or delivered by the defendant to the initial purchaser or user.

(3) Evidence of a change in the philosophy, theory, knowledge, technique, or procedures of or with regard to the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling made, learned, placed in use or discontinued after the event of death or injury to person or property shall not be admissible in a product liability action to prove liability.

600.2947 Death or injury; alteration, modification, application, or use of product as evidence. [M.S.A. 27A.2947]

Sec. 2947. It shall be admissible as evidence in a products liability action that the cause of the death or injury to person or property was an alteration or modification of the product, or its application or use, made by a person other than and without specific directions from the defendant.

600.2948 Death or injury; warnings as evidence. [M.S.A. 27A.2948]

Sec. 2948. It shall be admissible as evidence in a products liability action that before the event of death or injury to person or property pamphlets, booklets, labels or other written warnings were provided which gave notice to foreseeable users of the material risk of injury, death, or damage connected with the foreseeable use of the product or provided instructions as to the foreseeable uses, applications, or limitations of the product which the defendant knew or should have known.

600.2949 Contributory negligence; diminishment of damages; frivolous claim or defense. [M.S.A. 27A.2949]

Sec. 2949. (1) In all products liability actions brought to recover damages resulting from death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or the plaintiff's legal representatives, but damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

(2) If the court determines that the claim or defense is frivolous, the court may award costs and reasonable attorney's fees to the prevailing party in a products liability action.

600.5805 Injuries to persons or property. [M.S.A. 27A.5805]

Sec. 5805. (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

(2) The period of limitations is 2 years for an action charging assault, battery, or false imprisonment.

(3) The period of limitations is 2 years for an action charging malicious prosecution.

(4) The period of limitations is 2 years for an action charging malpractice.

(5) The period of limitations is 2 years for an action against a sheriff charging misconduct or neglect of office by the sheriff or the sheriff's deputies.

(6) The period of limitations is 2 years after the expiration of the year for which a constable was elected for actions based on the constable's negligence or misconduct as constable.

(7) The period of limitations is 1 year for an action charging libel or slander.

(8) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

(9) The period of limitations is 3 years for a products liability action. However, in the case of a product which has been in use for not less than 10 years, the plaintiff, in proving a prima facie case, shall be required to do so without benefit of any presumption.

Conditional effective date.

Section 2. This amendatory act shall not take effect unless House Bill No. 6541 of the regular session of the 1977-78 legislature is enacted into law.

This act is ordered to take immediate effect.

Approved December 11, 1978.