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United States District Court for Massachusetts

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WARNING DEFECT: ORIGINS, POLICIES, AND DIRECTIONS

Robert E. Keeton*

On a spectrum from the polar extreme of generality to the opposite pole of specificity, "What should warnings say?" is near the extreme in its degree of generality. A question phrased this way invites a correspondingly generic response. Such a response is not very useful to the trial judge and lawyers who regularly must fashion clear explanations on the law of warning defect for layperson juries. As used here, this question is not intended as a signal inviting just any kind of response that might be acceptable under the mores of casual conversation. It is a more serious request for a very direct and substantive response. For clarification, consider these two further variations upon it:

What does the law say warnings should say?

What legal consequences follow if warnings do not say what the law says they should say?

These questions are illustrative of the issues raised in the legal consideration of warnings and their sufficiency. The aim of this Article is to provide legal professionals with guidance on how to frame these issues.

INTRODUCTION

What should product warnings say?

When you hear that question, and that question alone, what do you understand it to ask? Your answer probably depends on whether you are a lawyer, judge, law professor, law student, corporate executive, professional expert witness, potential claimant, or an impartially interested citizen, if such a person truly exists. A person asking the question might intend it as a simple policy question: "What *should*

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warnings say?" Even so, probably few, if any, persons in these categories would take the question that way.

Conversations are seldom governed by a ground rule that questions are to be taken literally, and are to be answered forthrightly. In the mores of our social conversations, it is usually understood that one person's question serves as a mere signal for another person to speak. The next speaker is more likely to deflect the conversation than to answer the question.

This Article takes the opening question seriously. A central objective of the Article is to explore ways of doing two important things: first, sharpening how judges and lawyers state the questions of fact a jury must answer in a particular case; and second, sharpening the questions of law that the trial judge must answer before being able to frame with precision the questions of fact that the jury must answer. Many of these questions of law are unanswered in the traditional sources of legal authority (principally constitutions, statutes, and precedents). This Article does not purport to resolve these unanswered questions or even to make recommendations about the answers to all of them. Rather, the Article proposes ways all legal professionals may go about defining the relevant questions.

In this process, questions that belong at various locations on the generality-specificity spectrum will be considered. It is important always to be clear about what kind of question we are considering (law or fact, general or specific), and to be clear about precisely what question or questions we are considering at each moment.

Part I of this Article centers primarily on one of the most useful methods of framing precisely all material factual questions: consultation between the trial judge and trial lawyers about interrogatories to the jury. Part II addresses more general issues of law, policy, and fact that illumine the precise choices that must be made before the precise factual questions can be defined. Part III brings together the different perspectives from Parts I and II in relation to a set of illustrative issues. Part IV carries the exploration one step further, integrating this Article's discussion into a provisional and incomplete jury charge that explains to jurors how the law defines the factual questions they must answer. It bears emphasis that the draft is incomplete because the law is unsettled. Like this provisional charge, the authoritative

sources of law do not contain a clear explanation of exactly what we mean by such words and phrases as "design," "warnings," "defect," "unreasonably dangerous," "cost," "benefit," "utility," "risk," "burden," "probability," and "magnitude of loss."

I. FRAMING THE QUESTIONS TO BE ANSWERED WITH PRECISION

When a question about law and legal proceedings is to be taken seriously, not just as a signal for another person to speak, and when the answer is to be forthright, the framing of the question dictates the relevance of any response. When such questions and responses occur during courtroom proceedings, the answer to the legal questions that the trial judge states in the form of an order or ruling defines the factual issues of the case. The judge also sets boundaries on the evidence that the parties may present in support of their respective factual contentions.

A skillfully framed question, about either law or fact, dramatically limits the range of plausible answers. Indeed, a skillful advocate can frame a question about law in a brief or in oral argument so that it may virtually compel the response that the advocate desires, because only one among all possible answers can be defended on a reasoned basis. As stated in an aphorism that is part of the lore of American trial lawyers, "Let me frame the question, and I will win the argument."

This Article, instead of discussing that kind of manipulative framing of questions, attempts to state, in the most neutral terms possible, each question of law that it considers. The objective is to focus on developing a good understanding of (1) the origins of the law of products liability regarding warning issues (from where it came), (2) the present status of products liability law (what can be stated as settled law and what questions are unsettled), and (3) to what destination observable trends may be pointing.

The most promising approach to this kind of clarification, at least as to issues of the present and the future, is a hands-on exercise in legal drafting. We should aim for drafting precise questions (each question to be answered YES or NO) that

might be put to a jury in a products liability case involving a difficult and debatable warning issue. As a particularized context for this drafting exercise, I will use a hypothetical case that is not entirely imaginary. Imagination has served only to give the parties different names and to simplify the fact situation to make it more manageable for discussion.

THE CASE OF THE EXPLODING MOTOR GENERATOR UNIT:
GREER V. POWER ENGINEERING CO.

The plaintiff Greer was a skilled technician employed by Consult, Inc., a consulting firm hired to test a motor generator unit during the unit's installation by Power Engineering Co. Power Engineering was doing the work under contract with a corporate entity that owned and expected to operate the power plant where the unit was being installed. Greer's employer, Consult, Inc., had a contract with the owner-entity to do the testing necessary before Power Engineering could receive the final payment under its installation contract.

The motor generator unit exploded while the plaintiff Greer was testing it just after Power Engineering installed it. The plaintiff suffered severe electrical burns.

The nature of the questions proposed for submission to the jury is revealed in three draft proposed verdict forms, presented below.¹ If one of these proposals becomes the verdict form used at trial, the court would explain it to the jury in the court's charge to the jury.

Beyond clarifying the meaning of ambiguous legal jargon, a trial judge must make choices regarding the content of jury instructions for several reasons: first, because products liability law differs between states; second, because differences may exist between state law and possibly preemptive federal law; and third, because in many respects we cannot now know exactly what the law is, regardless of its sources.

The first proposed verdict form is "designed" (without "defect," I hope) for a jurisdiction like Massachusetts that uses "breach of warranty" terminology for strict liability claims,²

1. A provisional and incomplete draft proposed charge to the jury is presented in Part IV of this Article.

2. See *Back v. Wickes Corp.*, 378 N.E.2d 964, 968-69 (Mass. 1978) (comparing Massachusetts' warranty liability to liability under section 402A of the *Restatement*

applies comparative negligence principles to negligence-based products liability claims,³ and applies a version of voluntary assumption-of-known-risk to the breach-of-warranty claims.⁴ The last of these characteristics is explained in *Correia v. Firestone Tire & Rubber Co.*,⁵ the case to which Massachusetts professionals refer when they speak of the "Correia defense."⁶

This draft verdict form also uses a type of question on damages that is appropriate only for a jurisdiction like Massachusetts that has a prejudgment interest statute allowing interest on damages for economic losses from the date the civil action was filed.⁷

The second proposed verdict form is for a more common kind of jurisdiction, one that uses negligence and strict liability terminology, applies comparative negligence principles to negligence claims, and allows no reduction of recovery on strict liability grounds because of plaintiff fault.⁸

The third proposed verdict form is for a jurisdiction that accepts the recommendation of the *Restatement (Third) of Torts: Products Liability* for a functional submission.⁹

All three proposed verdict forms leave some hard questions of law to be resolved by the trial judge in the instructions to the jury. Any hard legal questions left unanswered by the trial judge are left to the jury by default, except to the very limited extent that an appellate court might step in to override a jury verdict on a mixed question of law and fact. This is simply an inevitable consequence of the nature of a jury case, regardless of the intent of the trial judge and trial lawyers.

(*Second*)); see also W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §§ 95, 97 (5th ed. 1984) (discussing warranty theories and other approaches to products liability).

3. Cf. KEETON ET AL., *supra* note 2, § 102 (discussing the use of contributory negligence in products liability actions).

4. See *Correia v. Firestone Tire & Rubber Co.*, 446 N.E.2d 1033, 1040 (Mass. 1983) ("When a user unreasonably proceeds to use a product which he knows to be defective and dangerous, he violates [the duty to act reasonably with respect to that product] and relinquishes the protection of the law.")

5. 446 N.E.2d 1033 (Mass. 1983).

6. See *supra* Part IV.

7. See MASS. GEN. LAWS ch. 231, § 6B (1994) (allowing prejudgment interest at the rate of 12% per year).

8. See, e.g., *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 901 (Cal. 1962) (pioneering the use of strict liability in products liability); see also KEETON ET AL., *supra* note 2, §§ 96, 98, 102. See generally David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980) (discussing various strict liability systems).

9. See *infra* pp. 379-80.

Before discussing the verdict forms, I state for your consideration the following hypothesis: The third proposed verdict form and charge—the functional submission proposed by the *Restatement (Third)*—leaves more unanswered questions than does either the first or the second proposed verdict form and charge. Because judges will tend to leave some of these hard questions still unanswered in the verdict form and charge, the practical effect will be to leave more decisionmaking authority to the jury—including decisionmaking authority over the policy question about what the law on warnings *should* be.

That is the hypothesis I ask you to consider, as a means of coming to forthright answers to the questions I stated at the outset—including the policy question about what the law should be.

To clarify what the hypothesis does and does not state, I add that I am not suggesting that the drafters of the functional approach of the American Law Institute (ALI), and those persons in the Institute Council and Membership who supported this approach, meant to give juries more discretion over basic policy questions about the scope of strict liability. Indeed, from observing the ALI process as a member of the Institute and an adviser to the Reporters, I would infer that their purpose was to limit the scope of liability and, as a means to that end, to limit the scope of jury discretion. The hypothesis I ask you to examine concerns not the intended effect but rather the practical effect that this functional approach is likely to have as it is implemented by human beings who are genuinely committed to performing their respective functions in the administration of justice. This hypothesis concerns law in action.

As explained above, this draft verdict form for negligence and breach of warranty is a suggestion of one of the many possible choices that a trial judge and trial lawyers might consider for the phrasing of the factual questions that the trial judge would instruct the jury to answer in the hypothetical case stated above.

**PROPOSED VERDICT FORM FOR CLAIMS OF
NEGLIGENCE AND BREACH OF WARRANTY
DRAFT VERDICT FORM ONE**

1(a). Was Power Engineering Co. negligent in relation to the design of the motor generator unit that the plaintiff was testing when he was injured?

___ YES ___ NO

1(b). If YES, was Power Engineering Co.'s negligence in this respect a proximate cause of the injury?

___ YES ___ NO

2(a). Was Power Engineering Co. negligent in relation to the warnings provided with the motor generator unit the plaintiff was testing when he was injured?

___ YES ___ NO

2(b). If YES, was Power Engineering Co.'s negligence in this respect a proximate cause of the injury?

___ YES ___ NO

IF YOU ANSWERED YES TO ONE OR BOTH OF 1(b) AND 2(b), ANSWER QUESTION 3. OTHERWISE, SKIP QUESTION 3.

3. Do you find that plaintiff Greer was negligent and that his negligence was a proximate cause contributing to his injury?

___ YES ___ NO

If YES, then taking the negligence of Power Engineering Co. and Greer as 100%, what percentage of negligence do you attribute to each party? Answer in percentages that total 100%.

Percentage of negligence of defendant Power
Engineering Co. _____%

Percentage of negligence

of plaintiff Greer

_____ %

TOTAL

_____ % (100%)

4(a). Do you find a breach by Power Engineering Co. of the implied warranty of fitness for its intended purpose of the design of the motor generator unit plaintiff was testing when he was injured?

_____ YES _____ NO

4(b). Do you find a breach by Power Engineering Co. of the implied warranty of fitness for their intended purpose of the warnings provided with the motor generator unit plaintiff was testing when he was injured?

_____ YES _____ NO

IF YOU ANSWERED NO TO BOTH 4(a) AND 4(b), SKIP TO QUESTION 5. OTHERWISE, READ THE INSTRUCTIONS FOR 4(c), 4(d), 4(e), AND 4(f).

ANSWER 4(c) ONLY IF YOU ANSWERED YES TO 4(a).

4(c). Did plaintiff know of the defect in the motor generator's design, was he also aware of the danger arising from the defect, and did he nevertheless proceed unreasonably with his testing of the motor generator unit on the date of his injury?

_____ YES _____ NO

ANSWER 4(d) ONLY IF YOU ANSWERED YES TO 4(b).

4(d). Did plaintiff know of the defect in warnings, was he also aware of the danger arising from the defect, and did he nevertheless proceed unreasonably with his testing of the motor generator unit on the date of his injury?

_____ YES _____ NO

ANSWER 4(e) ONLY IF YOU ANSWERED NO TO 4(c).

4(e). Was Power Engineering Co.'s breach of warranty as to design a proximate cause of the injury?

___ YES ___ NO

ANSWER 4(f) ONLY IF YOU ANSWERED NO TO 4(d).

4(f). Was Power Engineering Co.'s breach of warranty as to warnings a proximate cause of the injury?

___ YES ___ NO

IF YOU ANSWERED YES TO ONE OR MORE OF 1(b), 2(b), 4(e), AND 4(f), ANSWER QUESTION 5. OTHERWISE, SKIP QUESTION 5.

DAMAGES

5. What amount of money would fairly and reasonably compensate plaintiff Greer in full for the harms or losses, if any, of each of the following types, that you find by a preponderance of the evidence were proximately caused by the negligence or breach of warranty of Power Engineering? Your answers to questions (a), (b), (c), and (d) are to be stated in terms of discounted value as of _____ [the date this civil action was filed].

This question concerns the amount required for fair and reasonable compensation in full. Do not reduce your findings because of a percentage of negligence, if any, you have found in answering Question 3.

ECONOMIC DAMAGES:

- (a) Loss of earning capacity, if any, up to the date of your verdict \$
- (b) Loss of earning capacity, if any, in the future \$
- (c) Reasonable and necessary expenses of treatment, if any, up to the date of your verdict \$

- (d) Reasonable and necessary expenses of treatment, if any, in the future \$

NONECONOMIC DAMAGES

- (e) Noneconomic damages, if any, for physical injury, pain and suffering, and emotional distress, whether in the past or in the future \$

Date _____

Foreperson _____

**PROPOSED VERDICT FORM FOR
CLAIMS OF NEGLIGENCE AND DEFECT
DRAFT VERDICT FORM TWO**

1(a). Was Power Engineering Co. negligent in relation to the design of the motor generator unit that the plaintiff was testing when he was injured?

___ YES ___ NO

1(b). If YES, was Power Engineering Co.'s negligence in this respect a proximate cause of the injury?

___ YES ___ NO

2(a). Was Power Engineering Co. negligent in relation to the warnings provided with the motor generator unit the plaintiff was testing when he was injured?

___ YES ___ NO

2(b). If YES, was Power Engineering Co.'s negligence in this respect a proximate cause of the injury?

___ YES ___ NO

IF YOU ANSWERED YES TO ONE OR BOTH OF 1(b) AND 2(b), ANSWER QUESTION 3. OTHERWISE, SKIP QUESTION 3.

3. Do you find that plaintiff was negligent and that his negligence was a proximate cause contributing to his injury?

___ YES ___ NO

If YES, then taking the negligence of Power Engineering Co. and Greer as 100%, what percentage of negligence do you attribute to each party? Answer in percentages that total 100%.

Percentage of negligence of defendant Power Engineering Co.	_____ %
Percentage of negligence of plaintiff Greer	_____ %
TOTAL	_____ % (100%)

4(a). Was there a defect in the design of the motor generator unit the plaintiff was testing when he was injured?

___ YES ___ NO

4(b). Was there a defect in warnings provided with the motor generator unit plaintiff was testing when he was injured?

___ YES ___ NO

IF YOU ANSWERED NO TO BOTH 4(a) AND 4(b), SKIP TO QUESTION 5. OTHERWISE, READ THE INSTRUCTIONS FOR 4(c) AND 4(d).

ANSWER 4(c) ONLY IF YOU ANSWERED YES TO 4(a).

4(c). Was the defect in design a proximate cause of the injury?

___ YES ___ NO

ANSWER 4(d) ONLY IF YOU ANSWERED YES TO 4(b).

4(d). Was the defect in warnings a proximate cause of the injury?

____YES ____NO

IF YOU ANSWERED YES TO ONE OR MORE OF 1(b), 2(b), 4(c), AND 4(d), ANSWER QUESTION 5. OTHERWISE, SKIP QUESTION 5.

5. What amount of money would fairly and reasonably compensate plaintiff in full for the harms or losses, if any, of each of the following types, that you find by a preponderance of the evidence were proximately caused by the negligence of Power Engineering Co. or defect of the motor generator unit? Your answers to questions (a), (b), (c), and (d) are to be stated in terms of discounted value as of _____ [the date this civil action was filed] [the date of your verdict].

This question concerns the amount required for fair and reasonable compensation in full. Do not reduce your findings because of a percentage of negligence, if any, you have found in answering Question 3.

ECONOMIC DAMAGES:

- (a) Loss of earning capacity, if any, up to the date of your verdict \$
- (b) Loss of earning capacity, if any, in the future \$
- (c) Reasonable and necessary expenses of treatment, if any, up to the date of your verdict \$
- (d) Reasonable and necessary expenses of treatment, if any, in the future \$

NONECONOMIC DAMAGES

- (e) Noneconomic damages, if any, for physical injury, pain and suffering, and emotional distress, whether in the past or in the future \$

Date _____

Foreperson _____

**PROPOSED VERDICT FORM FOR
A FUNCTIONAL SUBMISSION
DRAFT VERDICT FORM THREE**

1(a). Did the motor generator unit plaintiff was testing at the time of his injury have a defect of design?

___ YES ___ NO

1(b). If YES, was the defect of design a proximate cause of the injury?

___ YES ___ NO

2(a). Did the motor generator unit plaintiff was testing at the time of his injury have a defect in relation to warnings?

___ YES ___ NO

2(b). If YES, was the defect in warnings a proximate cause of the injury?

___ YES ___ NO

IF YOU ANSWERED YES TO ONE OR BOTH OF 1(b) AND 2(b), ANSWER QUESTION 3. OTHERWISE, SKIP QUESTION 3.

3. What amount of money would fairly and reasonably compensate plaintiff Greer in full for the harms or losses, if any, of each of the following types, that you find by a preponderance of the evidence were proximately caused by defect of the motor generator unit? Your answers to questions (a), (b), (c), and (d) are to be stated in terms of discounted value as of _____ [the date this Civil Action was filed] [the date of your verdict].

ECONOMIC DAMAGES:

- (a) Loss of earning capacity, if any, up to the date of your verdict \$
- (b) Loss of earning capacity, if any, in the future \$
- (c) Reasonable and necessary expenses of treatment, if any, up to the date of your verdict \$
- (d) Reasonable and necessary expenses of treatment, if any, in the future \$

NONECONOMIC DAMAGES

- (e) Noneconomic damages, if any, for physical injury, pain and suffering, and emotional distress, whether in the past or in the future \$

Date _____ Foreperson _____

II. LAW, POLICY, AND FACT

Each of the three alternative proposed verdict forms for the hypothetical case of *Greer v. Power Engineering Co.* purports to submit questions of fact to the jury. Which of the proposed verdict forms, or variation thereof, does the law support? In order to determine which comes closest to being supported by the law of any particular state, we will need to know the answers to some questions of law.

It is part of the tradition of professionals in law to talk about issues of law and issues of fact as if they were easily separable. In reality, however, as explained below, many of the questions we submit to a jury on a verdict form, or by way of a charge to the jury explaining questions they must answer to arrive at a "general verdict," concern mixed-legal-factual issues.

This hyphenated term, mixed-legal-factual issues, is not part of settled terminology in use among professionals in law, so I pause to explain the meaning of the phrase as I use it here. I do not use it to describe that relatively uncomplicated kind of test for legal accountability that applies when a case involves both genuine legal disputes and genuine factual disputes. Instead, I am referring to the kind of case that has some central issue, or worse still, more than one such issue, in which legal and factual elements are interwoven. From one perspective the interwoven issue looks like a legal issue to be decided as legal issues are decided. From another perspective it looks like a factual issue to be decided as factual issues are decided (and that ordinarily means by a jury, of course). Neither of these appearances is exactly correct, or incorrect.

Describing this kind of issue another way, one may say the legal and factual elements are so closely woven together that it is difficult, if not impossible, to separate them. Only a person who has the benefit of legal training would even try to think about the legal issue separately from thinking about the factual issue, or vice versa. This isolate-each-issue method of thinking is, however, an essential part of what we legal professionals are committed to attempting. This is true even for those among us who believe in eventually integrating our earlier separated thoughts.

One of the simpler examples of a mixed-legal-factual question is what we traditionally call an issue of cause—or as legal

professionals are wont to say, that less complex part of “proximate” or “legal” causation commonly referred to as “cause-in-fact.”¹⁰

Strictly stated, the only “in-fact” part of the question is what happened: what was the historical event? To answer the “cause-in-fact” inquiry, we compare what did happen (if we can make a reasonably reliable “finding” about that historical fact) with a hypothetical contrary-to-fact so-called “finding” about what would have happened “but-for” the conduct that the claimants say caused the historical event.¹¹ And, of course, we are talking about *a* cause—one of many causes—never about *the* cause in any but a legal sense. So, causation-in-fact in litigation is always a mixed-legal-factual issue.

A “proximate cause,” or “legal cause,” issue is a somewhat more complex mixture. Under the concept of “proximate cause,” public policy considerations may either limit or expand the scope of liability to less or more than all of the things the law says were caused-in-fact by the conduct of some actor (here, the marketer).¹² The “proximate cause” issue is even more complex. It is a mixed-legal-factual-policy issue.

In products liability law, the issue of causal connection is present not only with respect to conduct and harm but also with respect to some product characteristic and harm. The relevant characteristic is commonly called a “defect.” Great controversy exists about the precise meaning of defect, but it remains true that the concept, however it may be defined, concerns a characteristic of the product. Thus, we have a mixed-legal-policy-factual issue regarding the connection between a product characteristic (perhaps also called a “defect”) and a harm.

We have learned to live with causation issues of all kinds tolerably well in most kinds of cases involving only one or a few claimants and only one or a few defendants. The causation issue may become more troublesome in products liability litigation, however. One reason is the problem of so-called

10. See Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 550–51 (1962); Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 60–61 (1956); see also KEETON ET AL., *supra* note 2, § 41 (providing a general discussion on causation-in-fact). See generally H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 100–02 (1985) (discussing factual issues related to causation).

11. See KEETON ET AL., *supra* note 2, § 41, at 265.

12. See *id.* § 42 (listing factors and approaches that define the scope of proximate cause).

“categorical liability.” That is, when the alleged defect is not distinctive to a single product unit because of some error in the manufacturing process, in the post-manufacture handling, or during the chain of custody to the user, but instead is characteristic of large numbers of units that were marketed widely over the country or the world, the mix of legal elements (including policy choices) and factual elements involves intertwining in a much more complex way.

A second reason for the complex nature of products liability causation can be found in the problems associated with warnings for the different kinds of users in all the different contexts of use. Here, too, the legal elements (including policy choices) and factual elements are intertwined in a much more intricate and complicated way.

In short, the warning issue in products liability cases is an especially complex mixed-legal-policy-factual issue. As explained below, however, the ALI has chosen not to probe the depths of this area of complexity. One factor weighing in favor of the ALI’s choice is that the ALI product is a “Restatement;” because present statutes and precedents do not plumb the depths of this mixed-legal-policy-factual complex, there is not much law on this topic that can be restated. This result however, is not a solution because trial judges and trial lawyers, whose needs grow with every increase in the number and complexity of the cases they handle, receive little help from existing precedents and could benefit greatly from the help the ALI might provide.

My understanding of the tone of the ALI *Restatement (Third) of Torts: Products Liability* is that it encourages courts to exercise more control over cases to limit expansion of the scope of products liability.¹³ Neither the black letter provisions nor the comments, however, provide judges adequate guidance on how to accomplish that goal in their jury instructions. Although the judiciary still can override errant verdicts on appeal or order judgments as a matter of law before or after such verdicts, their actions must be performed on a reasoned basis and must be explained candidly and forthrightly. Thus, as matters now stand, courts and lawyers are left with little guidance on how to influence the scope of products liability.

13. Again, my understanding is from the perspective of a member-observer and reader of the draft ALI *Restatement (Third)* as it now exists.

These are issues that remain for consideration by legal professionals and interested citizens, regardless of the choices made in federal and state law about whether the general structure of the trial of a warnings case will follow one of the three models illustrated in the proposed jury verdict forms.

These three illustrative verdict forms by no means exhaust the range of possibilities. They do, however, illustrate three general and preliminary methods by which a trial judge may express whether the law that is to be applied is like that of Massachusetts (Form One), like that of many other states (Form Two), or like that proposed in the *Restatement (Third)* (Form Three). This choice, however, is only a beginning. Either through careful refinement of the questions in the verdict form, or through detailed jury instructions that explain the questions in the verdict form, the trial judge must either address and resolve every unsettled mixed-legal-factual-policy question about the scope of products liability relevant to the case, or leave some or all of these questions to unguided jury discretion. The latter choice, in practical effect, surrenders lawmaking functions to a jury. I do not believe that to be the intent of the ALI drafters, the ALI council, or the ALI membership, in approving the *Restatement (Third)*; however, their unmanifested intent is unexplained and unknown to juries. Thus, it will not control verdicts. The outcome of cases that are virtually alike in all material respects will be left to unexplained variant verdicts until some concerned legislature (federal or state) answers the questions, or, absent legislation, some concerned and emboldened trial or appellate court answers them in a way clear enough for a jury to understand and applies these answers to cases at trial. A continuing default by courts, as well as legislatures, is, I submit, a failure to deliver evenhanded treatment of like cases.

As a trial judge, I would have welcomed the help of the American Law Institute in the judiciary's ongoing efforts to develop wise and fair answers to these important questions. Courts must now do as well as they can without that help.

III. AN ILLUSTRATIVE SET OF ISSUES

The unanswered mixed-legal-policy-factual issues that surround questions of warning defect in products liability

litigation are too numerous and varied for treatment in this Article. The most it is possible to do here is to select some illustrative issues for closer examination.

For illustration, this Article comments briefly on a set of problems growing out of what I believe to be implicit but unexplained assumptions—a set of problems common to comparisons among costs, benefits, utility, risk, harm, probability of loss, burden, and the like. Consider, for example, three comparisons that might influence one's views on how a trial judge should instruct a jury on whether the manufacturer of a product line is subject to liability for all or part of a loss that the product line helped to cause. What should the trial judge say about what the law in some jurisdiction now is, or is to be, if the law is not yet clearly settled? A more difficult question is presented when one asks what a trial judge should say to a jury on this subject, if the law is now unsettled with no predictable future course.

I gratefully acknowledge that in formulating these three comparisons and the explanation below, I have borrowed freely from Professor Owen's remarks at the March 1996 Colloquy on Products Liability at the University of Michigan, and from his sharp focus on framing a standard that explains clearly what it is that causes us to say a product is unreasonably dangerous.¹⁴

The Article discusses three comparisons immediately below:

1. COST-BENEFIT

Is the COST greater than the BENEFIT?

2. RISK-UTILITY

Is the RISK greater than the UTILITY?

3. $B < PL$ ¹⁵

Is the BURDEN less than the
PROBABILITY OF THE INJURY?

The term "RISK" is ordinarily used to mean something quite different from "COST." "UTILITY" is ordinarily used, in a

14. See David G. Owen, Remarks at the Colloquy on Products Liability: Comprehensive Discussions on the *Restatement (Third) of Torts: Products Liability* 201-06 (Mar. 23, 1996) (transcript on file with the *University of Michigan Journal of Law Reform*).

15. This third comparison derives from Judge Learned Hand's opinion in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (finding negligence to exist if $B < PL$, B being the burden or cost of avoiding accidental loss, P being the increase in probability of loss, and L being the probable magnitude of loss).

nontechnical sense, to mean something at least a bit different from "BENEFIT." Thus, the first two comparisons differ.

Also, "RISK" is often used to mean "probability of losses" times "mean magnitude of losses"—or "PL" in Learned Hand's metaphor.¹⁶ Hand, however, compared PL with BURDEN (B). I submit that a careful reading of his *Carroll Towing* opinion,¹⁷ with sensitivity to the context in which it was written, supports the interpretation that he was using the term "BURDEN" in the sense of cost of avoiding (or perhaps reducing) losses. That comparison is a very different metaphor from the "COST-BENEFIT" metaphor in the sense stated below.

Taking, as a point of beginning, some figures that were used in this Symposium,¹⁸ assume a product line that the manufacturer sells in the marketplace for a total of \$8 billion (gross). Assume that manufacturing and marketing costs are \$4 billion. Assume that the calculus of risk for this product, lacking a specified kind of safety feature, is that RISK = \$3 billion.

If we treat RISK as part of the COST of the product line (a way of thinking consistent with the objective of making the product line "pay its way"), the total COST is \$7 billion. If we also take the \$8 billion that buyers were willing to pay in the market as a surrogate for BENEFIT (that is, this is the worth of all the tangible and intangible elements of BENEFIT as evaluated by all buyers as a group) then the product line has more BENEFIT than COST. Stated in tabular form, here is the calculus:

\$4 billion for manufacturing cost
+ \$3 billion for RISK

—————
\$7 billion total COST
+ \$1 billion PROFIT

—————
\$8 billion TOTAL (also the amount of gross sales, or BENEFIT)

If the law says this product line is not defective and that the manufacturer is not legally responsible for any part of the

16. See *id.*

17. See *id.*

18. See Owen, *supra* note 14, at 200–02 (referring to charts used in his discussion of cost-benefit analysis).

RISK, then RISK is not placed on the scales at all and the manufacturer has a \$4 billion profit. The victims bear all of the \$3 billion RISK. They "subsidize" the manufacturer to the extent of \$3 billion, unless buyers and competitors become well enough informed to take part of the "subsidy" away from the manufacturer and appropriate it to themselves, still leaving the victims uncompensated "subsidizers." Stated in tabular form, here is the calculus:

\$4 billion manufacturing and market cost
 + \$0 responsibility for RISK

\$4 billion total COST
 + \$4 billion PROFIT

\$8 billion TOTAL (also the amount of gross sales, or BENEFIT)

Is it sensible to use "gross sales" as a surrogate measure of BENEFIT? Although the notion that thousands or millions of buyers would ever be truly "informed" is a contrary-to-fact fiction, arguments are being advanced that the law of some states presumes them to be informed, and that buying is presumed consent to "assume" the RISK both for themselves and for the victims of their use of the product.¹⁹ I do not believe this is a correct reading of the scattering of judicial opinions that have anything at all to say on this subject.²⁰ Nor do I believe tort reform statutes have made this a prevailing rule, even if one or more statutes may be read to say this for a particular state or states—a point I assume *arguendo* in order to move on to the more important issues at stake in thinking about the extent to which the law does or should support the idea that a "product pays its way." Thus, I do not believe it would be correct for me, as a trial judge, to instruct a jury that the law includes a statement that buyers generally, or the buyers of a particular product, are presumed to be "informed" about "subsidizing" product risks or that the injured person

19. See Mark A. Geistfeld, Remarks at the Colloquy on Products Liability: Comprehensive Discussions on the *Restatement (Third) of Torts: Products Liability* 20–25 (Mar. 23, 1996) (transcript on file with the *University of Michigan Journal of Law Reform*).

20. See *infra* pp. 392–98.

whose case is on trial, or "consumers" and injured persons generally, are presumed to have "consented to" or "assumed" the "risk" of suffering an injury such as happened to the injured person now at trial. Nevertheless, I recognize that gross sales of a product line may be useful as a very *rough* estimate of an evaluation of benefit, and one that is *ready* without all the effort and resources that would be required to determine what other calculus might provide a better estimate. Thus, we may use gross sales as a rough-and-ready estimate of BENEFIT.

Now assume that a safety feature is proposed for addition to the product. Assume that the evaluation of the decisionmaker, whoever that may be, is that this safety feature would cut RISK from \$3 billion to \$1 billion. Also assume that adding the safety feature would add \$1 billion to manufacturing costs.

If the manufacturer is still not responsible for any part of RISK, it has a disincentive to add the safety feature. The manufacturing cost of adding that feature would reduce its profit by \$1 billion, from \$4 billion to \$3 billion. The reduced RISK would have no bearing on the manufacturer's profit.

If, on the other hand, the manufacturer is responsible for all of the RISK in both cases, then to make the comparison we must add, on the COST side, \$1 billion more manufacturing cost, and we change the RISK figure on the COST side from \$3 billion to \$1 billion. Thus, the manufacturer's PROFIT will increase from \$1 billion to \$2 billion with the addition of the safety feature (the net of saving \$2 billion of RISK by adding \$1 billion manufacturing costs). With the RISK burden, the manufacturer has an economic incentive to produce and sell the safer product. Stated in tabular form, here is the calculus:

\$4 billion manufacturing and market costs (old method)	
\$1 billion added manufacturing and market costs with safety feature	
+ \$1 billion RISK with safety feature	
\$6 billion total COST	
+ \$2 billion PROFIT	
\$8 billion TOTAL (also the amount of gross sales, or BENEFIT)	

This way of envisioning the comparison always places RISK on the COST side, along with the costs of manufacturing. The saving of lives (stated as a recalculated RISK) shows up as a reduced COST rather than an added BENEFIT. If, instead of looking at the comparison this way, we treat saving lives as part of the BENEFIT, the buyers' willingness to pay \$8 billion could no longer be used as a surrogate for the evaluation of BENEFIT.

This is barely an introduction, but I hope it is enough to illustrate this suggested approach to comparisons. Of course, one who accepts this approach will discover many other implications for the details of the comparisons. For example, a safety feature may make the product less attractive to some buyers. Thus, the BENEFIT as measured by what buyers will pay in the marketplace might be reduced. If in the example given, we add the assumption that BENEFIT is reduced by \$1.5 billion to \$6.5 billion, the incentives would be shifted.

Trying to bring together in one equation (or formula, or weighing) the COST-BENEFIT comparison and Learned Hand's comparison is mixing metaphors. Bringing these different perspectives to bear is sensible, but trying to integrate them into one metaphor is probably not an objective worth pursuing.

If, instead of accepting the objective of "making the product line pay its way," one accepts the *Restatement (Third)* theme of a lesser scope of liability than that required to "make the product pay its way," then, looking at the matter from the COST-BENEFIT perspective suggested above might lead one to the following formulation:

A product line is "defective in design" if (a) is greater than (b), when:

(a) is the sum of

- (1) zero (because no added manufacturing cost is incurred), and
- (2) RISK when the safety feature is not added (that is, the reasonably predictable cost of compensating for the injuries foreseeable resulting from the product line without the safety feature); and

(b) is the sum of

- (1) *the added cost of manufacturing and marketing* that product line with the safety feature identified in a feasible alternative design, and

- (2) RISK when the safety feature is added (that is, the reasonably predictable cost of compensating for the injuries foreseeably resulting from the product line of the alternative design that has the safety feature).

The definition of defect presented above is very close in substance to that Professor Owen has recommended.²¹ His proposal, as I understand it, is that instead of asking jurors to think about the total cost-benefit (or the total PL or total RISK) of the original product line and the total cost-benefit (or the total PL or total RISK) for the altered product line, we ask the jurors to focus only on the additions or reductions of cost and the additions or reductions of usefulness resulting from the alteration. Neither evidence nor argument about the overall cost-benefit (or overall PL or overall RISK) would be needed at trial.²² This excellent proposal led me to devise the formulation presented immediately below. This revised formulation includes two alternative forms of introduction, the second of which also assigns the burden of proof. Both formulations consider that the private decisionmaker is not to be faulted for a decision not to add the proposed safety feature if that decision would have been reasonable when made, even if in hindsight the judge and jury think the better decision would have been to add the safety feature. The first formulation instructs the jury as follows:

A product is defective in design if no reasonable person would have believed, after reasonable investigation, that: the sum of the added cost (in dollars) of making the product with the proposed alteration and the reduction in usefulness of the product resulting from the alteration (in dollars) would be as much as or greater than the reduction of harms and losses (in dollars) resulting from the alteration.

With alternative introductory phrasing, placing the burden of proof, an instruction might say:

You will find that a product is defective in design if, but only if, you find by a preponderance of the evidence that no

21. See Owen, *supra* note 14, at 200-01.

22. See *id.* at 205.

reasonable person would have believed, after reasonable investigation, that: the sum of the added cost (in dollars) of making the product with the proposed alteration and the reduction in usefulness of the product resulting from the alteration (in dollars) would be as much as or greater than the reduction of harms and losses (in dollars) resulting from the alteration.

Any calculus of the two separate sets of figures for this comparison depends on whether we assume the full tort measure of damages for each victim in quantifying RISK (or LOSS as part of PL) in dollars or instead use some other measure (for example, that fashioned by Congress for DPT vaccine cases).²³ As a policy matter, although I have a strong preference for making a product "pay its way," I would also propose that serious consideration be given to defining "pay its way" as providing payment to victims under a refashioned measure of damages. This refashioned damages approach would compensate for all economic losses at the full rate of the tort measure but not for all noneconomic harms.²⁴

In any event, the point I am suggesting is that as long as one treats RISK consistently, RISK can be calculated for use on the COST side of the COST-BENEFIT comparison while assuming that either the tort measure of damages or some other measure of compensation will apply to victims' claims that are determined to be legally meritorious.

According to my reading of the great majority of judicial decisions in jurisdictions where no "law reform" statute has spoken to these comparisons, those decisions support continuing the goal of products "paying their own way" in products liability law,²⁵ in the same sense as I believe section 402A and its comments support that goal.²⁶ Determining what constitutes "paying their own way" will not result in treating the entire RISK (or PL) as a part of the product's COST. Although other contributing causes, including the victims' own causal conduct, may share the burden of that COST, I do not find any cases

23. See 42 U.S.C. § 300aa-22 (1991).

24. This is not to suggest that I favor caps, however. That is the most unfair way to fashion limitations on the measure of recovery, because it is harshest to the very victims who are most seriously injured and, for that reason, most in need of reasonable compensation.

25. See *infra* notes 34-52 and accompanying text.

26. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

that justify treating *none* of the RISK (or PL) as part of the product's COST. This is the case even when the product is one whose true COST (including the cost of paying for an appropriate share of RISK or PL) is less than its BENEFIT (as measured by what buyers as a group are willing to pay).

Any COST-BENEFIT analysis will expose fundamental policy issues about the scope of products liability in design and warning cases. The *Restatement (Third)*, however, gives trial judges and trial lawyers very little, if any, guidance about how verdict forms and jury instructions should define such key concepts and terms as "defect," "unreasonably dangerous," and "reasonably adequate warning." Existing statutes and precedents to which a trial judge and trial lawyers might turn also disappoint the judges and lawyers who search them for guidance in drafting clear and understandable jury instructions. In one significant respect, however, they can be helpful.

Precedents frequently cite section 402A with approval,²⁷ and in explaining their approval frequently recite comments to section 402A regarding the history of development of strict liability, first in products for human consumption, next in products for intimate bodily use, and later more generally.²⁸ Included in these comments are allusions to the policy grounds that cut across the evolving legal theories. For example, the idea that public policy dictates placing the burden of compensating victims on the COST side of the COST-BENEFIT comparison is first found in comment c: "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and *be treated as a cost of production* against which liability insurance can be obtained"²⁹

This excerpt from comment c speaks of "products intended for consumption."³⁰ As explained in comment b, products designed for human consumption first gave rise to a form of

27. See, e.g., *Brokenshire v. Rivas & Rivas, Ltd.*, 922 P.2d 696, 698 n.2 (Or. 1996) (stating that Oregon adopted section 402A with only minor changes); *Ulmer v. Ford Motor Co.*, 452 P.2d 729, 734-35 (Wash. 1969) (adopting language of section 402A for strict liability of manufacturers).

28. See RESTATEMENT (SECOND) OF TORTS § 402A cmts. a-g (1965); see also *Brokenshire*, 922 P.2d at 698 n.2 (noting the legislature's express intent that its statute enacting section 402A be construed in accordance with comments a-m); *Young v. Key Pharms., Inc.*, 922 P.2d 59, 62-63 (Wash. 1996) (noting that comment k has been adopted into Washington law).

29. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965) (emphasis added).

30. *Id.* cmt. c.

strict liability. Any notion, however, that the above public policy rationale applies only to products for human consumption is quickly dispelled as one proceeds to comment d, which observes that the evolving law of the twentieth century had extended the rule of strict liability to other products, before the ALI adopted section 402A:

The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer.³¹

It bears emphasis that the "expectation" test stated in comment d is not a "consumer expectation" test, about which controversy currently rages.³² Rather, the phrase in comment d, "it is expected to reach the ultimate user or consumer,"³³ could be reasonably interpreted to mean that it is expected, *from the point of view of a reasonable person in the position of the seller*, to reach the ultimate user or consumer.

The comments to section 402A, like the section itself, reflect public policy reasoning from the contemporaneous discourse of the late 1950s and early 1960s. The current edition of *Prosser and Keeton on Torts* makes this point in the following statement:

The policy reasons that courts and writers were giving around 1960 to justify the imposition of strict liability on manufacturers and other merchant sellers for physical harm to persons and tangible things went far beyond any liability based on conventional contractual notions. . . .

. . . The costs of damaging events due to defectively dangerous products can best be borne by the enterprisers who make and sell these products. Those who are merchants and especially those engaged in the manufacturing

31. *Id.* cmt. d.

32. See, e.g., Angela C. Rushton, Comment, *Design Defects Under the Restatement (Third) of Torts: A Reassessment of Strict Liability and the Goals of a Functional Approach*, 45 EMORY L.J. 389, 397-98 (1996) (discussing the controversy surrounding the consumer expectations test).

33. RESTATEMENT (SECOND) OF TORTS § 402A cmt. d (1965).

enterprise have the capacity to distribute the losses of the few among the many who purchase the products. It is not a "deep pocket" theory but rather a "risk-bearing economic" theory. *The assumption is that the manufacturer can shift the costs of accidents to purchasers for use by charging higher prices for the costs of products. This can be regarded as a fairness and justice reason of policy. The costs of accidents attributable to defective products are internalized and passed on in a rough sort of way, although some may be unable to survive a disastrous experience with a particular product.*³⁴

Forcing products to pay their way to benefit the public interest was a widely held point of view in the 1960s. This view is explained more fully in *Venturing to Do Justice: Reforming Private Law*,³⁵ published in 1969. Among the book's key points are the following:

(1) The arrival of a new era of strict products liability was no longer in doubt after 1963.³⁶ In a deeper sense, however, it is more accurate to call this period an era of "products liabilities, in the plural, for the new cases disclose[d] not one but an array of somewhat inconsistent theories, with no dominant choice yet clear."³⁷

(2) The California and New York courts of last resort framed the key issue somewhat differently. These courts even used different means to express the same facts. A New York judge, describing a California case, personified a defective machine by declaring the question to be whether the "Shopsmith" (the power tool in question) "threw a piece of wood at a user."³⁸

If that suggests machines revolting against their masters, perhaps less disturbing is the description by the California court, deciding the case. As they put it, personifying the wood rather than the machine, a piece of wood the user

34. KEETON ET AL., *supra* note 2, § 98, at 692-93 (emphasis added) (footnote omitted).

35. ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* (1969).

36. *See id.* at 101.

37. *Id.* at 101-02. For a discussion of the "new cases," see *supra* notes 28-34 and accompanying text.

38. *Goldberg v. Kollsman Instrument Corp.*, 191 N.E.2d 81, 83 (N.Y. 1963).

wished to make into a chalice “suddenly flew out of the machine and struck him on the forehead, inflicting serious injuries.”³⁹

The two courts’ approaches to the relevant legal issue differed as well. The California court stated:

To establish the manufacturer’s liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.⁴⁰

Chief Judge Desmond, writing for the majority of the New York Court of Appeals, applied a different formulation: “The question now to be answered is: does a manufacturer’s implied warranty of fitness of his product for its contemplated use run in favor of all its intended users, despite lack of privity of contract?”⁴¹

(3) Precedents of the 1960s were curiously disparate with respect to who would be strictly liable to an injured person.

As to choosing which among the various persons in the chain of manufacture and marketing shall be subject to strict liability for injury a product causes, there is a curious and interesting comparison between the views of the New York court in *Goldberg* and the views developed in a sequence of Texas cases involving impure foods. One Texas case held the manufacturer of the impure food subject to strict liability. Another case held the retailer liable. And in a third case, [*Bowman Biscuit Co. v. Hines*, 251 S.W.2d 153 (Tex. 1952),] a closely divided court held a wholesaler *not* subject to strict liability.

Does this mean that in Texas the man in the middle is safe and those on each flank are exposed, but in New York the man in the middle is liable and those on each flank are safe? Perhaps the precedents in these two states can be

39. KEETON, *supra* note 35, at 102 (quoting *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 898 (Cal. 1962) (Traynor, J., concurring)).

40. *Id.* (quoting *Greenman*, 377 P.2d at 901).

41. *Id.* at 102–03 (quoting *Goldberg*, 191 N.E.2d at 81).

reconciled on the ground that when the middleman is the assembler, as in *Goldberg*, he has potential control over the defect, whereas if he is merely a merchandising channel, as in *Bowman*, others in the chain of marketing may be better targets for responsibility. But should we distinguish the New York and Texas cases and attempt to sustain both rules, or should one or both rules be changed?⁴²

(4) The eventual impact of strict liability depends only in part on whom courts hold to be subject to liability to an injured person.

Who eventually bears the cost of payment made to victims under strict products liability? This question may be answered temporarily by contracts among the various entities involved in bringing the product to the consumer. Claims for indemnity or contribution are subject to contractual modification, and such contracts are likely to be made in a high percentage of cases, at least after the doctrine of strict products liability becomes well known. Indeed, such contracts will be likely to determine the secondary impact regardless of the victim's or the court's choice of one or another entity as an immediate target of strict liability, unless there is a supplemental rule declaring it against public policy to modify by contract the incidence of this liability.

Whichever entity pays the victim will ordinarily wish to pass the cost forward toward the consumer or backward toward some supplier. The first supplier against whom any effort is plausible will resist with greater vigor since the only direction in which [the first supplier] can pass the cost is forward. Thus, the pressure is stronger in general for passing costs forward. *If the economic market is fully responsive to this pressure, the full burden eventually rests on the consumers of the product, because it is reflected in the price they must pay.*⁴³

(5) The policy argument that products should pay their way was a theme discussed in many tort classrooms of the

42. *Id.* at 105-06 (footnotes omitted).

43. *Id.* at 106-07 (emphasis added).

1950s and 1960s.⁴⁴ It was also a powerful influence in the courtrooms of the 1950s and 1960s, where the law of strict products liability was developing. Of course, this was not the only policy argument brought to bear, and it alone could not explain the lawmaking decisions of legislatures and courts, without taking into account other policy arguments that were used at that time.

(6) Another policy argument prevalent in the classrooms and courtrooms of the 1950s and 1960s is that the choice regarding who initially pays for victims' losses may have practical significance due to the risk of financial irresponsibility.⁴⁵ It is no comfort to a victim to have a theoretically valid claim against a financially irresponsible defendant. "Nor is this comfort for the economic planner who intends the eventual impact of strict products liability to be reflected *in the price of the product*."⁴⁶

(7) Policy arguments of the 1950s and 1960s also accounted for a variety of unjust enrichment theories, one conceived of more broadly than in the sense defined by the established precedents that allowed legal or equitable remedies.⁴⁷ The policy argument on this subject extended to "activities" or "enterprises," as well as "products." The key element of this argument is that an outcome analogous to "unjust enrichment" would occur unless the costs of products and activities, "*including the costs of paying for accidental losses [they] cause[, [are] borne by those who benefit from the [products and activities] and, insofar as practicable, in proportion to the benefits they realize*."⁴⁸

Of course, no single policy argument is ever sufficient to explain a body of legal rules. Even where a single policy is advanced there may be other considerations lurking behind the rule. For example, appellate opinions citing section 402A with approval, and trial court charges that cite and quote from

44. See *supra* note 34 and accompanying text.

45. See KEETON, *supra* note 35, at 107.

46. *Id.* (emphasis added); see also *id.* at 110-11 (discussing cases involving impurities in foods).

47. See *id.* at 159-61.

48. *Id.* at 159 (emphasis added); see also *id.* at 161 (making products and activities pay their way provides "an economic incentive and a selector separating socially useful activities [or products], which can pay their way in society even with this added cost, from the socially undesirable activities [or products] that cause more harm than they are worth").

section 402A's comments, have in many instances identified the idea of causing products to pay their way,⁴⁹ as a public policy reason for strict liability, though these opinions seldom added, as did section 402A, comment c, that the marketer could buy liability insurance to cover the cost of compensating victims.⁵⁰

In conclusion, trial courts often borrow language from appellate opinions and from *Restatements*,⁵¹ even though appellate opinions and *Restatements* have rarely been drafted with an explicit purpose of expressing ideas in a form suitable for use in instructing a jury.⁵² The modification of section 402A, proposed by the *Restatement (Third)*, if used by trial judges in instructions that juries understand and apply, will tend to cut back on the scope of products liability. This reality increases the significance of developing verdict forms and jury instructions that adequately address the factual and legal issues in particular cases, and do so in a form that the juries can apply.

IV. AN ILLUSTRATIVE CHARGE TO THE JURY

From time to time the illustrative charge presented below presents alternative drafts of a particular segment of the charge. The greater percentage of the illustrative charge is, however, appropriate regardless of how the unanswered questions of law discussed earlier in this Article are answered. The text of an entire charge is presented to illustrate the context into which the alternative formulations are set.

MEMBERS OF THE JURY:

You have heard the evidence and the arguments in this case. It is now my duty to instruct you on the law that you must

49. See, e.g., *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1237 (9th Cir. 1989) (discussing and supporting adoption of section 402A to shift the financial burden of defective products to manufacturers); *Symons v. Mueller Co.*, 493 F.2d 972, 974 (10th Cir. 1974) (discussing the trial court's jury instruction detailing the public policy rationales for strict products liability).

50. See *supra* text accompanying note 29.

51. See, e.g., *Witt v. Norfe, Inc.*, 725 F.2d 1277, 1279 (11th Cir. 1984) (discussing the trial court's misuse of an appellate court's definition of "defect" in a jury instruction); *Harber v. Altec Indus.*, 812 F. Supp. 954, 957 (W.D. Mo. 1993) (quoting *RESTATEMENT (SECOND) OF TORTS* § 402A cmt. c (1965)).

52. Cf. *Witt*, 725 F.2d at 1279 (noting that the trial court's incorrect use of the term "defect" misled the jury).

follow and apply. When I have finished, you will begin your discussion with each other—what we call your deliberations.

To help you understand and remember these instructions on the law, I will divide them into three main parts: First, opening general instructions intended to guide you throughout your deliberations; second, more specific instructions about the claims and defenses, about questions you will be asked to answer (as stated in the verdict form), and about the law you must apply in considering these questions; and, third, some additional general instructions about procedures during your deliberations.

PART I OPENING GENERAL INSTRUCTIONS

All of my instructions are about the law you must apply. I do not intend for you to understand these instructions as my comment on the facts or on the evidence in this case. It is your function to determine the facts. Although the law allows a trial judge in this court to comment on evidence, I deliberately do not do so and instead leave the factfinding entirely in your hands.

Fortunately, you do not need to resolve every factual dispute raised by the evidence. In order to know which factual disputes are important, you need to know what rules of law to apply. I have explained some of these rules to you in the course of the trial, and I will explain others to you now.

You must follow all of the rules as I explain them to you. Do not follow any single sentence or statement by itself, because it might have an exception or qualification that I have stated elsewhere in these instructions. Therefore, you must consider all these instructions together, as a unit.

The lawyers were allowed to comment during the trial both on the evidence and on the rules of law. But if what they have said about the evidence differs from your memory, let your collective memory control. And if what they have said about the law seems to you to have a different meaning in any way from my instructions on the law, you must be guided only by my instructions.

Even if you disagree with one or more of the rules of law I tell you about, or don't understand the reason for some of the

rules, you are bound to follow them. This rule—that you must follow the law as stated to you by the trial judge—is a fundamental part of our system of government. Our system is governed by the law rather than by the individual views of the judge and jury who have the responsibility for deciding this case. If I make any mistake in instructing you about the law, fair and evenhanded application of the law to this and other cases is nevertheless assured because any mistake I make on the law can be corrected on appeal.

In contrast, your decision on disputed facts is final. That is, your findings on material disputed facts are not subject to appeal. You are the final judges of the facts.

In your factfinding, of course, you are not to be swayed by bias, prejudice, sympathy, or antagonism. It is your function to find the facts fairly and impartially, on the basis of the evidence.

The evidence in the case consists of the sworn testimony of the witnesses (including testimony by deposition), all exhibits received in evidence, and all facts that may have been admitted or stipulated.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys for opposing parties stipulate or agree as to the existence of a fact, however, there is no need for evidence for any party on that point. You must accept the stipulation as evidence, and take that fact as proved.

Anything you may have seen or heard outside the courtroom is not evidence, and you must disregard it entirely.

You must consider the evidence and find the facts as you decide the evidence has proved them.

Also, from the facts proved, you may draw reasonable inferences about additional facts. An inference is a deduction or conclusion. An inference is an additional finding that your experience, reason, and common sense lead you to draw from facts that you find are proved by evidence.

I will give you just two illustrations, unrelated to any of the evidence in this case, to make the meaning of inference clear. When you hear a knock on your door, you may draw an inference that some person is there, knocking. If you also know, however, that a stormy wind is blowing and you have trees close to your house, then, based on your experience and common sense, you may have trouble deciding whether to infer that someone is at the door, or to infer that the wind has blown

a tree limb against the house, or just deciding that you do not have a sufficient basis to decide what inference to draw. It is for you, as judges of the facts, to decide whether the evidence before you is or is not sufficient for you to draw an inference.

Before I give you the second illustration of what we mean by the term "inference," I will explain two more phrases often used in discussions about evidence received in a trial. The two phrases are "direct evidence" and "circumstantial evidence."

Testimony of a witness showing firsthand observation of a fact by that witness is direct evidence. For example, the testimony of an eyewitness describing what he or she saw is direct evidence. If the witness is permitted to go beyond stating what he or she saw and is permitted to state a conclusion, or inference, or opinion, that part of the answer is not direct evidence. Instead, it is one kind of circumstantial evidence.

Circumstantial evidence is proof of some facts—including events and circumstances—on the basis of which the jury may infer the existence or nonexistence of an additional fact or facts. As I told you a few moments ago, in explaining the meaning of "inference," you may use your common sense and common experience in deciding whether proof of one set of facts is sufficient, as circumstantial evidence, to prove another fact in dispute.

I gave you one illustration of circumstantial evidence a few minutes ago, as I was explaining the meaning of "inference." Now I will give you a second illustration of what we mean by inference, what we mean by circumstantial evidence, and what is the distinction between direct and circumstantial evidence. At a given time, one person was standing on a sidewalk observing rain falling. That person's later testimony, "I saw it raining," is direct evidence that it was raining at that given time. In contrast, a second person was inside a building at that given time. This second person later gives testimony, "I was in the lobby of a building, and I saw people coming in with wet coats and umbrellas." This testimony is circumstantial evidence that it was raining outside at that time; it supports an inference that it was raining outside.

Direct and circumstantial evidence have equal standing in law. That is, with respect to what weight shall be given to evidence before you, the law makes no distinction between direct and circumstantial evidence. Also, no greater degree of certainty is required of circumstantial evidence than of direct

evidence. You are to consider all the evidence in the case and give each item of evidence the weight you believe it deserves.

At times during the trial you heard lawyers object to questions asked by another lawyer and to answers by witnesses. It is a proper function of lawyers to object. In objecting, a lawyer is requesting that a trial judge make a decision on a question of law. Do not draw from such objections, or from my rulings on the objections, any inferences about facts. The objections and my rulings related only to legal questions that I had to determine. They should not influence your thinking about the facts.

When I sustained an objection to a question, the witness was not allowed to answer it after my ruling. Do not attempt to guess what answer might have been given had I allowed the question to be answered. And if you heard an answer to the question before my ruling, you are to disregard it.

I will state the same point now more broadly. In your deliberations, do not consider or talk about any question to which I sustained an objection or any answer or other statement that I excluded, or struck, or in some other way told you not to consider.

Also, if I received evidence but told you it was received for a limited purpose, or if in the present instructions I tell you that some of the evidence is to be considered only for a limited purpose, you are bound by that limitation.

An important part of your job as jurors will be deciding whether you believe what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person seem honest? Did he or she have some reason not to tell the truth? Did he or she have something to gain or lose in the outcome of this case? Did the witness seem to have a good memory? Did the witness have the opportunity, and was the witness able to observe accurately the things he or she testified about? Did he or she understand the questions and answer them directly? Did the witness's testimony differ from the testimony of other witnesses or from testimony that the same witness gave earlier? Was the witness's testimony on cross-examination different from the testimony given on direct examination? These are some, but of course not all, of the kinds of things that will help you decide how much weight to give to what each witness said.

You may also consider any demonstrated bias, prejudice or hostility of a witness in deciding what weight to give to the testimony of the witness.

The mere number of witnesses or length of the testimony or number of exhibits has no bearing on what weight you give to evidence, or on whether you find that the burden of proof has been met. Weight does not mean the amount of the evidence. Weight means your judgment about the credibility and importance of the evidence.

You may consider inconsistencies or differences as you weigh evidence, but you do not have to discredit testimony merely because there are inconsistencies or differences in the testimony of a witness, or between the testimony of different witnesses. Two or more persons witnessing an incident or a transaction may see or hear it differently. Innocent misrecollection, like failure of recollection, is a common experience. In weighing the effect of any inconsistency or difference, consider whether it concerns a matter of importance or an unimportant detail, and whether it results from innocent error or intentional falsehood.

You are not required to accept testimony, even if it is uncontradicted. You may decide, because of the witness's bearing and demeanor, or because of inherent improbability, or for other reasons sufficient to you, that testimony is not worthy of belief.

You may accept all of a witness's testimony or you may reject all of it, or you may accept parts and reject other parts.

You will recall that during the trial, a witness was sometimes asked to give testimony about whether that witness or some other witness, before trial, made a statement about some fact. By a statement about some fact I mean a statement that expressly or impliedly asserts that some event occurred or some fact existed. The before-trial statements to which I refer include statements made in documents.

A before-trial statement about a fact may be brought to your attention to help you decide whether you believe and credit the testimony at trial of the witness who made the statement before trial. If you find that a witness, before trial, knowingly gave a false statement concerning any material matter, you may take that into account in deciding whether to distrust the testimony at trial. You may credit the testimony of that witness at trial, or give it no credit, or only such credit as you

think it deserves. Also, if a witness said something different about any material matter earlier, even though truthfully, and you decide that the two statements are in conflict, then you may consider whether there is reason for you to doubt or discredit the testimony given.

With respect to a statement made before trial about a matter, except as I tell you otherwise in these instructions or have told you in instructions during trial, you cannot treat that statement as evidence in this case for any other purpose than to determine how it bears, if at all, on the credibility of the witness.

Now I will explain an exception to this rule that applies in this case.

If a party (that is, a plaintiff or a defendant), or a representative authorized to speak for a party, admitted some fact through an earlier statement, act or omission, then you may consider the earlier statement, act or omission both for the purpose of judging the credibility of that person as a witness and as evidence of the truth of the fact so admitted.

Here is another exception: Regardless of whether the witness is a party, if the earlier statement was given under oath in a deposition, you may consider the earlier statement both for the purpose of judging the credibility of the person as a witness and as evidence of the truth of the facts it asserts.

During the trial of this case, certain testimony has been read to you from depositions or presented to you audiovisually. A deposition contains sworn, recorded answers to questions asked of the witness before trial by one or more of the attorneys for the parties. Deposition testimony is entitled to the same consideration, and is to be judged as to credibility and weighed in the same way as testimony from the witness stand.

During the trial you heard the testimony of witnesses who answered some questions put to them as persons having specialized skill or knowledge. Such a witness is often referred to as an "expert witness." The mere fact that a witness is allowed to testify as an "expert" (or, more precisely speaking, as one having specialized knowledge or experience) does not indicate that you must believe that testimony. The credibility of each witness is for you to determine.

The law allows a person having specialized knowledge or experience to state an opinion in court about matters in that person's particular field. The fact that such a witness has expressed an opinion does not mean, however, that you must

accept that opinion. It is for you to decide whether the opinions expressed were mere speculations or guesses, which you should disregard, or were based on sound reasons, judgment, and facts.

If you find that part or all of the opinion testimony was based on stated or unstated assumptions, and you further find that those assumptions are contrary to what you find from the evidence before you, then you will disregard any part of the opinion testimony that was based on assumptions contrary to your fact findings.

Also, your decision whether to rely upon opinion testimony will depend on your judgment about whether the witness's training and experience is sufficient for him or her to give the opinion that you heard.

It is up to you, bearing all these considerations in mind, to decide whether you believe and choose to rely on the testimony of a witness having specialized knowledge or experience. You may accept all of it, part of it, or none of it, as you find appropriate.

On each issue submitted to you in this case, one party or the other has the burden of proof to establish that party's claim or defense by a preponderance of the evidence.

To establish by a preponderance of the evidence means to prove that something is more likely than not. In other words, a preponderance of the evidence in the case means such evidence that, when considered and compared with that opposed to it, has more convincing force, and produces in your minds the belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them. The burden of proof has not been carried if, after you have considered all the evidence, you find that you must speculate, guess, or imagine that one or more of the necessary facts is true.

Although, on each issue, the burden is on one party to prove that party's contention on that issue by a preponderance of the evidence in the case, this rule does not, of course, require proof to an absolute certainty. Proof to an absolute certainty is

seldom possible in any case. Nor is proof beyond reasonable doubt or by clear and convincing evidence required; a burden of proof by these more stringent standards applies in criminal cases and in other special circumstances. In civil cases generally, and in particular as to all the issues in this case, the standard for defining the burden of proof is the preponderance of the evidence standard.

In applying the preponderance of the evidence standard, you will find that a party has succeeded in meeting the burden of proof on an issue of fact if, after considering of all the evidence in the case, and on the basis of evidence, you find that what is sought to be proved on that issue is more likely true than not true.

PART II

Comment: The next segment of the Charge, immediately below, is presented in alternatives. The first alternative concerns two theories—negligence and breach of warranty. It fits with Verdict Form One.

[This is an action in which the plaintiff seeks to recover on two theories, negligence and breach of warranty. As to the negligence theory, you will be required to consider the conduct of the defendant and also the conduct of the plaintiff. As to the breach of warranty theory you will be required to consider the characteristics of the defendant's product, a question about plaintiff's conduct, and questions about causation.]

Comment: The second alternative, immediately below, fits with Verdict Form Two.

[This is an action in which the plaintiff seeks to recover on two theories, negligence and strict liability. As to the negligence theory, you will be required to consider the conduct of the defendant and also the conduct of the plaintiff. As to the strict liability theory you will need to consider the characteristics of the defendant's product and questions about causation.]

Comment: The third alternative, immediately below, fits with Verdict Form Three.

[This is an action in which the plaintiff seeks to recover on the theory of products liability.]

In the remainder of these instructions, I will define more precisely the nature of the questions you must consider.

Comment: Two alternatives are presented for the next segment of the charge. The first alternative is for use with Verdict Form One; the second, with Verdict Form Two. No segment of this kind is needed with Verdict Form Three.

First Alternative (Use With Verdict Form One)

[Under [Massachusetts] law, the plaintiff can recover by proving the elements of either one of the two alternative theories he advances. In other words, plaintiff has alleged that the defendant was negligent, and plaintiff has alleged a breach of warranty by the defendant. If the plaintiff proves the elements of either of these two theories, he is entitled to recover.]

Second Alternative (Use with Verdict Form Two)

[Under [named State] law, the plaintiff can recover by proving the elements of either one of the two alternative theories he advances. In other words, plaintiff has alleged that the defendant was negligent, and plaintiff has alleged [that there were defects in defendant's product]. If the plaintiff proves the elements of either of these two theories, he is entitled to recover.]

In this case, I am submitting [five] [four] questions to you (with some subparts). You have copies of these questions in your hands so you may follow your copy as I read a particular question and explain it.

[READ QUESTION 1.]

Verdict Form One:

1(a). Was Power Engineering Co. negligent in relation to the design of the motor generator unit that the plaintiff was testing when he was injured?

___ YES ___ NO

1(b). If YES, was Power Engineering Co.'s negligence in this respect a proximate cause of the injury?

___ YES ___ NO

Verdict Form Two

1(a). Was Power Engineering Co. negligent in relation to the design of the motor generator unit that the plaintiff was testing when he was injured?

___ YES ___ NO

1(b). If YES, was Power Engineering Co.'s negligence in this respect a proximate cause of the injury?

___ YES ___ NO

Comment: Use the next segment in Verdict Forms One and Two but not Three.

[In order to find for the plaintiff against the defendant on a negligence claim, you must find both (1) that the defendant was negligent and (2) that the defendant's negligence was a proximate cause of the accident.]

[In order to find negligence, you must find facts indicating a duty on the part of the defendant to exercise reasonable care for the plaintiff and a failure to fulfill that duty to exercise reasonable care.]

[In explaining the law about the defendant's duties, I will be referring to the rules of law that apply to all of those who design a product, manufacture the product, assemble the product, distribute the product, or sell the product. Persons or entities such as corporations who are designers, manufacturers, assemblers, or sellers are all treated in law as part of a "marketing chain."]

[In some circumstances and subject to rules that I will explain to you later, insofar as they bear on this case, each person or entity in the marketing chain may be held legally responsible for reasonably foreseeable injuries to others. For example, in some circumstances, an entity that manufactured a product but did not design it can still be liable for a design defect in the product. Similarly, in some circumstances, an entity that sold a product that it neither designed nor manufactured can be liable for a design defect in the product. As I will explain more fully later in these instructions, reasonable foreseeability of the circumstances of marketing and use of the

product is one of the factors you may consider in deciding whether there was breach of a duty of reasonable care.]

[Under [name of State] law, contracts among the different entities in the marketing chain may control the legal responsibilities between those entities. Their contracts among themselves, however, do not determine the legal responsibility of any of them to other persons who are not among the contracting parties. I will give you more explanation of this point later in these instructions.]

[For convenience throughout the remainder of this charge I will use the one word “marketer” to refer to any entity in the marketing chain whether that entity is the designer, the manufacturer, the assembler, or the seller of the product.]

[Now I will explain what we mean by “negligence.” Negligence is a breach of the duty to exercise reasonable care. A claim of negligence is based on a defendant’s duty of reasonable care. In general, a defendant has a duty, both when doing a particular thing and when engaging in a course of conduct, to use reasonable care to protect against reasonably foreseeable injuries to other persons and their property.]

[It is a breach of the duty of reasonable care to fail to exercise that degree of care, vigilance, and forethought that an ordinarily prudent person would have exercised in the same or similar circumstances.]

[Question 1 concerns plaintiff’s claim of negligent design of the motor generator unit at issue in this case. The focus in a claim of design negligence is on whether the product is designed with reasonable care to eliminate reasonably avoidable dangers.]

[A marketer (including each participant in the marketing chain) must exercise reasonable care to anticipate the environment in which its product will be used, and it must design against the reasonably foreseeable risks attending the product’s use in that setting. This foreseeable environment includes such things as misuse of a product, instinctual reaction, momentary inadvertence, and forgetfulness, if you find that an ordinarily prudent person in the position of the marketer would foresee such things and protect against them.]

[It is not necessary that any precise accident be foreseen. It is necessary, however, that the risk of harm by an accident of the general nature of the one that occurred be reasonably foreseeable.]

[You will consider the defendant's conduct from the point of view of a reasonable person—that is, an ordinarily prudent person—in the position of the defendant as one of the marketers of the motor generator unit at the time of the act or omission of the defendant alleged to be negligent. You will take account of what a reasonable marketer in the position of the defendant would have known at the time of each alleged act or omission, about the foreseeable hazards of a machine it designs, produces, or markets. In judging the defendant's conduct at any particular time that the defendant acted or, having a duty to act, failed to act, you will consider what a reasonable marketer would have known at that time, taking account of the difference, if any, in the state of development of knowledge of hazards at different times, and taking into account the actual knowledge of potential hazards that the defendant had at different times. You will also take account of the defendant's experience and expert knowledge in the field.]

[A corporation can act only through its officers and employees. In a case such as this one, the law holds a corporation responsible for the acts of its officers and employees in the scope of their employment. Thus, for example, in considering whether the defendant knew or should have known of a risk, you will find that the defendant knew or should have known if you find that any of its officers or employees, acting in the scope of employment, knew or should have known.]

[A marketer of a product is allowed some range for the exercise of judgment regarding the design of its product. The mere fact that an alternate design is available does not require its adoption. As long as the product is designed with reasonable safety, and the judgment regarding design is in accordance with the reasonable care that would have been exercised by a reasonably prudent designer under similar circumstances, the marketer's judgment about design is permissible.]

[A marketer is not an insurer against injury that results from the use of its products.]

[The duty that the law of negligence imposes on a marketer is not that of perfection; rather it is that of reasonable care. The failure of a marketer to adopt a better safeguard does not make the marketer legally liable unless in not adopting a better safeguard the marketer has failed to exercise reasonable care.]

[A marketer of a product is not obliged to make the product absolutely injury-proof. The duty, as I have said, is one of reasonable care to protect against foreseeable harm.]

[In evaluating the adequacy of a product's design, you should consider the gravity of any danger you find to be posed by the

design, the likelihood that such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences, if any, that such a changed design might pose to the product and to its reasonably foreseeable users.]

[Comment: The next instructive paragraph is a commonly used instruction identifying "factors" to be considered. It does not state or define precisely what it is that the jury must conclude in order to find "negligence" with respect to design. Absent objection on this precise ground, or a precisely framed request, the earlier instructions defining "negligence" are commonly treated as sufficient explanation of what it is the jury must find, after considering "factors," to make the ultimate finding of "negligence."]

Comment: The next segment fits with Verdict Forms One and Two, but not Three.

[Evidence of compliance or noncompliance with industry or government practices and standards may be considered by you as evidence bearing on negligence. Neither compliance nor noncompliance with industry or government practices and standards is alone decisive of the claim of negligence, because independently of industry or government standards and practices, a marketer has a duty of reasonable care.]

[Thus, if the evidence supports a finding that reasonable care requires something more than was required by industry or government standards and practice, you may find negligence even in the face of evidence of compliance with those industry or government standards and practices.]

[On the other hand and in addition, noncompliance with industry or government standards and practices is not alone decisive. It is only some evidence of negligence.]

[Just as evidence of compliance or noncompliance with industry or government practices or standards is not decisive but may be considered by you as part of the total circumstances bearing on negligence, so, too, you may consider as evidence that is not decisive but is among all the circumstances you take into account, evidence of contractual arrangements among entities in the marketing chain about which entity among them will be contractually responsible to the others to take actions to protect against one or more foreseeable risks of injuries to others. In the present case you are not asked to determine the obligations of the contracting parties among themselves. The

evidence that you have heard about those contractual arrangements, however, is evidence that you may consider, along with other evidence before you, in deciding the questions submitted to you.]

[In closing these instructions on negligence, I emphasize that you must bear in mind that in answering questions about negligence you are to apply the standard of reasonable care as I have defined it for you. You are to reach your finding in light of all the facts and circumstances in evidence before you. If you find by a preponderance of the evidence that the defendant was negligent as to design, you will answer Question 1(a) YES. Otherwise, answer it NO. Also, if you find by a preponderance of the evidence that defendant was negligent as to warnings, answer Question 2(a) YES. Otherwise, answer it NO.]

[Now I will explain “proximate cause.” If you will look at Question 1(b), for example, you will see that if you find the defendant negligent as to design, then you must consider whether that negligence was a proximate cause of plaintiff’s injury. If you find that it was not, you will answer that Question NO.

Proximate cause is a technical legal term, the meaning of which I will now explain. You cannot extract the proper meaning from the phrase “proximate cause” itself; so you will need to pay close attention to this explanation.]

[Keep these ideas in mind: First, if the injury would have happened anyway for other reasons regardless of defendant’s alleged act or omission then that act or omission is not a proximate cause. This first idea is more often expressed as a “but-for” rule rather than a “would-have-happened-anyway” rule. These are two different ways of expressing the same idea. Lawyers and judges seem to prefer the double negative form—that is, the way of speaking that says: to find proximate cause you must find that the injury would not have occurred but for the alleged act or omission. Another way of expressing the point is to say, if this injury would have happened anyway—regardless of defendant’s negligence—then defendant’s negligence was not a proximate cause.]

[The second idea you need to keep in mind as you consider a question about proximate cause is this: the injury must have been foreseeable in a general sense—not precisely the way it happened. That is, an injury of that general type or kind must be reasonably foreseeable. This idea is also expressed by the phrase “natural and probable consequence.”]

[Now, combining these two ideas together in one definition of "proximate cause," I instruct you as follows:]

[You will find that an injury or damage was proximately caused by an act, or a failure to act, if you find, from a preponderance of the evidence in the case, that the injury or damage would not have occurred but for the act or omission and that the injury or damage was a natural and probable consequence of that act or omission. Note that an accident may have more than one proximate cause.]

Comment: The next segment fits with Verdict Form One. In some of the jurisdictions where Verdict Form Two might be used, precedent does not support this addition.

[Now, I will give you still more explanation of "proximate cause" as applied to the present case. In order to find that the defendant's negligence, if you find any, is a proximate cause of plaintiff's injury for which he can recover damages, you must find that the defendant's negligence was a substantial factor in bringing about the injury.]

Comment: The next segment fits with Verdict Forms One and Two, but not Three.

[It is the obligation of the plaintiff to prove by a preponderance of the evidence the causal relationship between any negligent act or omission of the defendant and plaintiff's injury. You are not allowed to speculate on the question of causal relationship.]

[READ QUESTION 2 OF VERDICT FORMS ONE AND TWO.]

Verdict Form One

2(a). Was Power Engineering Co. negligent in relation to the warnings provided with the motor generator unit the plaintiff was testing when he was injured?

___ YES ___ NO

2(b). If YES, was Power Engineering Co.'s negligence in this respect a proximate cause of the injury?

___ YES ___ NO

IF YOU ANSWERED YES TO ONE OR BOTH OF 1(b) AND 2(b), ANSWER QUESTION 3. OTHERWISE, SKIP QUESTION 3.

Verdict Form Two

2(a). Was Power Engineering Co. negligent in relation to the warnings provided with the motor generator unit the plaintiff was testing when he was injured?

___ YES ___ NO

2(b). If YES, was Power Engineering Co.'s negligence in this respect a proximate cause of the injury?

___ YES ___ NO

Comment: The next segment fits with Verdict Form One and Two, but not Three.

[One who markets a product owes a duty of reasonable care to foreseeable users with respect to providing any instructions for use of the product and any warnings of hazards that would be provided by an ordinarily prudent person in the position of the marketer. In some circumstances, instructions and warnings may be needed to guide users and to alert them to the severity, gravity, magnitude and extent of any danger involved in the use of the product. The marketer has a duty of reasonable care to foresee dangers that will not be apparent to users and to provide reasonably adequate and effective warnings about those dangers. If warnings or instructions are needed, they must be explicit enough to be reasonable for the purpose of alerting the user to the risks and dangers of the product.]

[A marketer of a product that the marketer knows, or with reasonable care should know, is unreasonably dangerous in its nature if not accompanied by instructions and warnings and who foresees, or with reasonable care should foresee, that it will be used by some person, known or unknown, who will be ignorant of the danger, owes a duty to such a person to use reasonable care to prevent injury to that person.]

[Just as a marketer owes a duty to use due care in making its products, a marketer also owes the companion duty to warn of the latent limitations of even a perfectly made article. Even well made products can be dangerous when the user is ignorant of their latent limitations and, thus, the marketer has a duty to warn if he has reason to believe that the user will not recognize this danger. By "latent limitations" we mean

limitations that would not be apparent to an ordinarily prudent person in the position of a foreseeable user.]

[The plaintiff has the burden of showing that the defendant had reason to foresee that users of the product needed to be warned of its dangers.]

[In assessing the sufficiency of a warning under the circumstances of this case, you may take into account all evidence of warnings and instructions about use, and all other evidence bearing on whether it is reasonable to infer that any additional warning that reasonably could have been provided by the defendant would have so further alerted the plaintiff as to avoid the accident.]

[A marketer's duty to warn stems from its opportunity to have superior knowledge of the characteristics of its product. Thus, for example, the duty exists when the marketer should reasonably foresee danger of injury to a less knowledgeable user unless adequate warning of the danger is given.]

[Also, a marketer must take into account the environment in which the product may foreseeably be used in determining its safety and any duty to warn and instruct potential users of the product. Thus, the duty exists if a reasonably prudent person in the position of the marketer would foresee inadvertence or forgetfulness against which a reasonable warning would be effective.]

[A particular form of warning is not required unless the defendant has some reason to suppose that such a form of warning is needed.]

[In considering whether a particular form of warning is needed, you may consider whether any danger to which this warning would call attention was a danger that would be obvious to a user and, thus, whether such a warning would not be needed or useful. A marketer does not have a duty to warn of dangers that would be obvious to a user of the product.]

[If the exercise of reasonable care requires a warning as to a hazard, the forcefulness of the warning must be reasonably adapted to the foreseeable danger. In evaluating the adequacy of a warning, you should consider the gravity of any danger you find would not be obvious to a user, the likelihood that such danger would occur, the feasibility of including in a warning a caution against a particular danger along with cautions of other particular dangers of equal or greater gravity and likelihood of occurring, the financial cost, if any, and the

adverse consequences, if any, to the usefulness of the product to foreseeable users.]

[You will note that Question 2 uses the terms negligence and proximate cause. All the instructions I gave you about the meaning of these terms when I was explaining Question 1 apply to Question 2 also, and I will not repeat them now.]

Comment: The form of Question 3 presented immediately below appears in Forms One and Two only, not Three, and the segments of the charge that follow fit with Forms One and Two, but not Three.

[READ QUESTION 3 OF VERDICT FORMS ONE AND TWO.]

Verdict Form One and Two

3. Do you find that plaintiff Greer was negligent and that his negligence was a proximate cause contributing to his injury?

_____YES _____NO

If YES, then taking the negligence of Power Engineering Co. and Greer as 100%, what percentage of negligence do you attribute to each party? Answer in percentages that total 100%.

Percentage of negligence of defendant Power Engineering Co. _____%

Percentage of negligence of plaintiff Greer _____%

TOTAL _____% (100%)

[If you find that the defendant was negligent, and that the defendant's negligence caused the plaintiff's harm, you must also consider whether the plaintiff was contributorily negligent. In this regard, I instruct you that the plaintiff was required by law to conduct himself in a prudent and careful manner. You must consider whether he was prudent and careful in using the product and in the way in which he used it on the day of his injury. If you find that the plaintiff's conduct did not measure up to what an ordinarily prudent person would have done, and that his negligence was a contributing cause of his injury, you will answer Question 3 YES. If you do not so find, you will answer Question 3 NO.]

[You may consider evidence of inadvertence or inattentiveness to risks as evidence of negligence. If you find that a

person was inadvertent or inattentive to risks, you may also find that the inadvertence or inattention to risks was negligence if you find that it occurred when there were no such circumstances as would have distracted or diverted the attention of a person who was exercising ordinary care. Thus, evidence of *inadvertence* or inattentiveness to risks is relevant to whether a person was negligent, but such evidence is not alone decisive. The standard you are to apply in determining whether plaintiff was negligent is the standard of ordinary care—the care that would be exercised by an ordinarily prudent person in the same or similar circumstances.]

[You may consider all the evidence you have heard in determining whether you find that plaintiff failed to exercise reasonable care for his own safety.]

[As to the burden of proof on Question 3, I instruct you that]

Comment: The next segment applies only in a State with such a statute.

[the plaintiff has the benefit of a statutory presumption that he was exercising due care and that, as a result of this rebuttable presumption,]

Comment: The next segment continues an instruction to be used with Verdict Form One and Two, but not Three.

[the defendant has the burden of proving that the plaintiff failed to exercise that degree of care that a reasonably prudent person ordinarily exercises under like circumstances. Thus, the defendant has to bear the burden of proof on Question 3. That is to say, the defendant must prove, by a preponderance of the evidence, that the plaintiff was negligent. “Preponderance of the evidence” has exactly the same meaning here as elsewhere in these instructions. In Questions 1 and 2, on the other hand, the plaintiff has the burden of proof by a preponderance of the evidence.]

[If you answer the first part of Question 3 YES, then you must answer the second part of Question 3.]

Comment: The next segment applies only if the law of the State so declares.

[If in answering the second part of Question 3 you find that the negligence of the plaintiff was greater than the negligence of the defendant (that is, that plaintiff’s negligence was more than 50%), the court will enter judgment on the negligence claims against the plaintiff and for the defendant. If, on the other hand, you find plaintiff responsible for 50% or less, then the percentage that you have found will be applied as a

percentage of the damages to be deducted in determining the judgment to be entered. This is a calculation that the clerk will make at the direction of the court. You are not asked to make this calculation of reduced damages in answering any of the questions placed before you.]

Comment: The next question and the instructions that follow fit with Verdict Form One only. For Verdict Form Two, the question and the instructions should eliminate the phrase "implied warranty of fitness" and substitute the phrase "duty of a marketer to deliver a product that is free of defects of design or, defects regarding warning." Also, "breach of warranty" should be deleted and "defect" substituted.

[READ QUESTION 4.]

Verdict Form One

4(a). Do you find a breach by Power Engineering Co. of the implied warranty of fitness for its intended purpose of the design of the motor generator unit plaintiff was testing when he was injured?

___ YES ___ NO

4(b). Do you find a breach by Power Engineering Co. of the implied warranty of fitness for their intended purpose of the warnings provided with the motor generator unit plaintiff was testing when he was injured?

___ YES ___ NO

IF YOU ANSWERED NO TO BOTH 4(a) AND 4(b), SKIP TO QUESTION 5. OTHERWISE, READ THE INSTRUCTIONS FOR 4(c), 4(d), 4(e), AND 4(f).

ANSWER 4(c) ONLY IF YOU ANSWERED YES TO 4(a).

4(c). Did plaintiff know of the defect in the motor generator's design, was he also aware of the danger arising from the defect, and did he nevertheless proceed unreasonably with his testing of the motor generator unit on the date of his injury?

___ YES ___ NO

ANSWER 4(d) ONLY IF YOU ANSWERED YES TO 4(b).

4(d). Did plaintiff know of the defect in warnings, was he also aware of the danger arising from the defect, and did he nevertheless proceed unreasonably with his testing of the motor generator unit on the date of his injury?

___ YES ___ NO

ANSWER 4(e) ONLY IF YOU ANSWERED NO TO 4(c).

4(e). Was Power Engineering Co.'s breach of warranty as to design a proximate cause of the injury?

___ YES ___ NO

ANSWER 4(f) ONLY IF YOU ANSWERED NO TO 4(d).

4(f). Was Power Engineering Co.'s breach of warranty as to warnings a proximate cause of the injury?

___ YES ___ NO

[In this case the plaintiff makes a claim that he is entitled to the benefit of the implied warranty of fitness. The marketer of a product makes a warranty that the product will be fit for the ordinary purposes for which such products are used. This warranty is implied in law, whether or not it is expressed.]

[A marketer has a duty to market products that are fit for the ordinary purposes for which such products are used and thus free of defects. Whether a product is "fit" and free of defects depends in part on the reasonable expectations of users of the product.]

[The liability of a defendant for breach of warranty does not depend, however, on any proof of negligence or lack of care on the part of the defendant. To show a breach of warranty, plaintiff need only prove that the product was, when sold, defective in a way that made it unreasonably dangerous to the user and thus did not conform to the warranty.]

[To make these points clear I will add some more explanation now. The answer to Question 4(a) has to be YES if you answered YES to either Question 1(a) or Question 2(a), or YES to both Question 1(a) and Question 2(a). The reason for this is that, in cases such as this, proof of negligence (in design, instructions, or warning) that causes an injury also proves a

breach of warranty. It is also true, however, that a breach of warranty may be proved without proof of negligence.]

[Now I turn to some additional points. The mere fact that an accident occurred in this case is not by itself evidence that the product was defective. The defendant was not obliged to design the safest possible product. Warranty liability is not absolute liability and the marketer of a product is not obliged to make its product entirely accident-proof.]

[The test for whether a product is defective is not perfection but rather that it not be unreasonably dangerous. A product is not defective if it is safe for any foreseeable usage and handling, including being safe for all foreseeable misuses and foreseeable unintended uses.]

[Under the law of implied warranty, a product is defective even if it is properly manufactured according to design, if the design is itself unreasonably dangerous.]

Comment: Should "unreasonably dangerous" be more precisely defined by a "COST-BENEFIT," "RISK-UTILITY," or "BURDEN < PL" comparison, or in some other way? If so, the suggested formulation stated in Part III of this Article, or some alternative the trial judge concludes is compatible with the state tort law that is applicable, may be inserted here.

[A product is also defective if, when marketed, it fails to provide reasonably adequate instructions for use. It is also defective if the marketer fails to provide reasonably adequate warnings of reasonably foreseeable dangers created by the product.]

[Under law, the adequacy of a warning is measured by the warning that would be given at the time of marketing by an ordinarily prudent marketer. An ordinarily prudent marketer is one who, at the time of the marketing, is fully aware of the risks presented by the product. A defendant marketer of the product is held to that standard regardless of the knowledge of risks that the defendant actually had or reasonably should have had when the marketing took place. The marketer is presumed to have been fully informed at the time of the marketing of all risks. The state of the art is irrelevant, as is the culpability of the defendant. A product that, from the user's perspective, is unreasonably dangerous due to lack of adequate warnings, is defective and not fit for the ordinary purposes for which such products are used, regardless of the absence of fault of the marketer of the product.]

[As to claims for breach of warranty, contributory negligence (as I defined it in explaining Question 3) is not a defense under applicable law. Therefore, I have not asked you about contributory negligence of the plaintiff in relation to Question 4.]

Comment: The next segment applies only in Massachusetts. This is the Correia defense referred to in Part III of this article.

[As part (c) of Question 4 indicates, however, there is one particular kind of conduct of a plaintiff that defeats a claim for breach of warranty. I will now instruct you on this point. If the product had a defect that made it unreasonably dangerous, and the plaintiff knew of the defect and was aware of its danger, and he nevertheless proceeded unreasonably to make use of the product and was injured by it, his breach of warranty claim fails.]

[You will note that part (c) of Question 4 uses the phrases “know of the defect(s) in design and warnings” and “aware of the danger arising from the defect(s).” These two phrases refer to the state of mind of “knowing” and being “aware.”]

[You may consider all the evidence before you, including circumstantial evidence of what a reasonable person in his position would have known and been aware of. The question put to you, however, is not whether he should have known and been aware, or whether a reasonable person in his position would have known and been aware. The question put to you is whether he did know and was aware.]

[You will note that part (c) of Question 4 also asks “did he nevertheless proceed unreasonably” to use the product. “Unreasonably” is used here in the usual sense, requiring you to consider whether he acted differently from the way an ordinarily prudent person would have acted in his circumstances. Thus, in this respect the standard is not what his state of mind was but instead whether his conduct in proceeding to use the product was unreasonable conduct as judged by you, using the standard of ordinary care and taking into account all the circumstances in evidence.]

[The defendant has the burden of proof on part (c) of Question 4. Thus if you find by a preponderance of the evidence, first, that the plaintiff did know of the defect(s) of the product, second, that plaintiff was aware of the danger arising from the defect(s), and, third, that plaintiff did act unreasonably in proceeding to use the product, you will answer YES to part (c). Otherwise, you will answer NO to part (c).]

[Now I turn to parts (d) and (e) of Question 4. You will not answer either part (d) or part (e) of Question 4 unless you answer NO to part (c).]

[Also, you will not answer part (d) if you answer NO to part (a), and you will not answer part (e) if you answer NO to part (b). In order to recover for breach of the implied warranty of fitness, the plaintiff has the burden to prove that the product was defective and unreasonably dangerous, and that the defect proximately caused injury to the plaintiff.]

[The instructions I have previously given to you on proximate cause apply to that term as it is used in parts (d) and (e) of Question 4.]

[The burden of proof on parts (d) and (e) of Question 4, as well as on parts (a) and (b) of Question 4, is on the plaintiff. If you find that plaintiff has met that burden of proof you will answer YES. Otherwise, you will answer NO.]

Comment: The next Questions are Questions 1 and 2 from Form 3.

Verdict Form Three

1(a). Did the motor generator unit plaintiff was testing at the time of his injury have a defect of design?

____ YES ____ NO

1(b). If YES, was the defect of design a proximate cause of the injury?

____ YES ____ NO

Comment: The instructions on defect and proximate cause may be quite similar to those presented above for use with Verdict Forms One and Two, but the trial judge will be faced with a hard choice involving unanswered questions of law, depending on how the Restatement Third is interpreted. I do not propose answers here to all those unanswered questions, and for that reason do not present alternative drafting of these segments of the charge for a "functional submission" of the kind the Restatement Third recommends.

DAMAGES

Comment: The next segment of the charge concerns Damages. Question 5 of Form One is inserted here as a reminder of its text. With Question 5 of Form Two, the reference to warranty should be dropped, and the references to negligence as well should be dropped in the question on damages and accompanying instructions if Form Three is used. Question 3 of Verdict Form Three omits references to negligence and warranty, and substitutes "products liability" for "strict liability" and breach of warranty. Otherwise, it is similar to Question 5 immediately below, and the appropriate accompanying instructions are also similar.

Verdict Form One

5. What amount of money would fairly and reasonably compensate plaintiff Greer in full for the harms or losses, if any, of each of the following types, that you find by a preponderance of the evidence were proximately caused by the negligence or breach of warranty of Power Engineering Co.? Your answers to questions (a), (b), (c), and (d) are to be stated in terms of discounted value as of _____ [the date this civil action was filed].

This question concerns the amount required for fair and reasonable compensation in full. Do not reduce your findings because of a percentage of negligence, if any, you have found in answering Question 3.

ECONOMIC DAMAGES:

- | | |
|--|----|
| (a) Loss of earning capacity, if any, up to the date of your verdict | \$ |
| (b) Loss of earning capacity, if any, in the future | \$ |
| (c) Reasonable and necessary expenses of treatment, if any, up to the date of your verdict | \$ |

- (d) Reasonable and necessary expenses of treatment, if any, in the future \$

NONECONOMIC DAMAGES

- (e) Noneconomic damages, if any, for physical injury, pain and suffering, and emotional distress, whether in the past or in the future \$

The mere fact that I instruct you on damages does not mean that you must find damages. Also, the mere fact that I instruct you on a particular type of damages does not mean that you must find damages of that type. I am required to give you a complete set of instructions as to the law.

Damages must be reasonable, fair, and just. If you find that the plaintiff is entitled to a verdict, you may award only such damages as will reasonably compensate for the types of injuries that are defined in these instructions, and only for the elements of damages of any type that you find, from a preponderance of the evidence, were proximately caused by the defendant's negligence, if any, or breach of warranty, if any.

The object of compensation allowed by law is to award the equivalent in money to the plaintiff for the past, present and future harm or loss he has sustained. This amount will be the only amount the plaintiff will ever be able to recover from the defendant, now or in the future.

I will now instruct you on the types of harms or losses for which you may award damages if you find that they have been proved by a preponderance of the evidence to have been proximately caused by the defendant's negligence or breach of warranty.

In answering each separate question, you must award only the amount needed to compensate the plaintiff fairly and reasonably for the specific harm or loss. That is, you must not award duplicative or overlapping amounts. Your total verdict is the sum of your separate findings.

If you find that the plaintiff has not proved by a preponderance of the evidence any damages of the type asked about in a particular part of a question, you will write NONE in that blank.

Loss of earning capacity, referred to in Questions 5(a) and 5(b), is not the same as loss of wages. Loss of earning capacity is the loss or reduction of one's ability to secure and fulfill gainful employment. Evidence of lost wages for a given period of time can be considered as evidence of the scope and extent of lost earning capacity during that period of time. But other evidence may also be considered. If you find that negligence or breach of warranty by the defendant was a proximate cause of plaintiff's suffering a loss or reduction of his earning capacity—that is, of his ability to secure certain kinds of employment—you may and should award him compensation for that loss through whatever period of time you find by a preponderance of the evidence it has extended or will extend.

You may consider as evidence on the subject of reduced earning capacity what the plaintiff earned in some earlier period of time, but you may not include in your answer to parts 5(a) and 5(b) any amount to compensate him for actual lost wages or earnings. As I have explained, evidence of wage loss or earnings loss is evidence you may consider but it is not the measure of damages for the periods of time asked about in parts 5(a) and 5(b).

If you award any amount for reduced earning capacity in the future, beyond the date of your verdict, in answering part 5(b), you should take into account not only the plaintiff's life expectancy but also the length of time you think he would have been employable in light of his condition and circumstances as you find them to have been before the accident.

Any amount you award for future losses, in answer to part 5(b), should be reduced to reflect the discounted value of that future loss as of the date

Comment: The phrases in brackets below fit the statutory law of Massachusetts.

[this civil action was filed.]

One reason for discounting is that an award of damages for loss to be incurred in the future necessarily requires that payment be made ahead of time for a loss that will not actually be sustained until some future date. A second reason is that any judgment for money damages entered in this case will bear postjudgment interest from the date of the judgment until it is paid.

Note that you are to discount the value as of [the date this civil action was filed.] The reason for using that date is that the clerk of this court will calculate the pre-judgment interest

at a statutory rate or rates [from the date the action was filed up to the date the judgment is entered,] and will add that amount to your findings in calculating the amount of the judgment to be entered.

Under these circumstances, if you find for the plaintiff on the element of future loss of earning capacity, the plaintiff will to some extent be reimbursed in advance of loss, and so will have the use of money that but for the accident and these proceedings he would not have received until a later date.

Thus, in order to make a reasonable adjustment for the value of the use of money representing a lump sum payment for anticipated future loss, the law requires that you determine the discounted worth of the anticipated future loss. This determination of discounted worth of a future loss can be difficult because it may depend on inflation and on interest and discount rates in ways that can be quite complex.

Comment: The following segment of the charge is appropriate only if the parties so stipulate, or the applicable law allows the trial judge to give this much guidance to the jury rather than allowing them to hear conflicting expert testimony and use it to make their finding.

[Experience tells us, however, that as an average through many years, generally the interest one may earn by safe and prudent investment of a lump sum of money exceeds inflation by some percentage. It is for you to determine what percentage you should use. For illustration only, if one applies a 2% rate to an anticipated \$100 loss one year after the date to which the award is to be discounted (the "discount date"), the worth on the discount date is 2% less than \$100—that is, \$98. Similarly, the worth on the discount date of a \$100 loss two years after the discount date would be 2% less than \$98—that is, a few cents over \$96.]

The instructions I have given you about discounting to value as of the date this civil action was filed apply also to parts 5(c) and 5(d).

As to part 5(e), these instructions about discounting do not apply because your finding cannot be based on calculation in any event. Your finding is to be what you determine to be fair and reasonable. The clerk will add interest on this finding also, at the statutory rate from the date on which this action was filed, in determining the amount of the judgment to be entered.

Another type of damages is "noneconomic" damages, about which Question 5(e) inquires. The phrase "noneconomic

damages” means damages other than those related to economic losses, which we have referred to as loss of earning capacity and expenses of treatment. Included in “noneconomic damages” are damages for past and future pain and suffering, including any embarrassment or humiliation, or loss of enjoyment of life. The plaintiff is entitled to be compensated for all past and future mental and physical pain and suffering, humiliation, or embarrassment, or loss of enjoyment of life that you find was proximately caused by the defendant’s negligence or by breach of warranty.

Included in elements of noneconomic damages is compensation for noneconomic consequences of any physical injuries proved by a preponderance of the evidence to have been proximately caused by the defendant’s negligence or breach of warranty. This type of damages includes compensation for any loss of bodily function proved by a preponderance of the evidence. If you find that the defendant’s negligence or breach of warranty proximately caused the plaintiff to suffer physical injuries or any loss of bodily function for some period of time, you may, and should, compensate him for the full duration of any such physical injury and any such loss of function proximately caused by the defendant’s negligence or breach of warranty. If you find some element of noneconomic harm to be permanent, then you may and should allow damages for that element of harm for its permanent duration, taking into account the plaintiff’s life expectancy.

The following instructions apply to all parts of Question 5.

When considering what the plaintiff must show in order to be awarded full, fair and reasonable damages, for a type of loss, bear in mind that recovery will not be barred because there may be a lack of certainty in the plaintiff’s proof of aspects of loss that by their nature are not susceptible to precise calculation. Under applicable law, much can and must be left to the judgment and estimate of the jury, as long as it is a reasoned determination based on evidence. The jury’s finding, however, is not to be made by speculation but instead must be a reasonable finding based on reasonable inferences from evidence. It is sufficient if the extent of the harm or loss is shown by circumstantial evidence and is determined by just and reasonable inference.

You should also keep in mind that you may only award damages attributable to injuries proximately caused by defendant’s negligence or breach of warranty contributing to the

accident of [date]. The plaintiff has the burden of proving that claimed losses and harms, including noneconomic damages, were proximately caused by the defendant's negligence or breach of warranty.

Another matter you are to bear in mind is a rule of law that is described either as a duty to mitigate, or as a rule of avoidable consequences. This rule of law says that a person who has been injured as a result of someone else's negligence or breach of warranty has a duty to use reasonable means to mitigate or minimize his losses. In other words, a plaintiff who causes his losses to be unnecessarily great by failing to act reasonably cannot recover for the avoidable part of the losses.

If you find that, since the accident, the plaintiff has acted unreasonably in a way that has needlessly increased his losses or disability, you must exclude that needless increase from any award of damages.

You should not concern yourselves with taxes in calculating damages. No part of your award, or of the interest on your award until the present time, is subject to any federal or state taxes. Once an award is paid, however, if part of that sum is invested by the plaintiff, then the interest or other investment return the plaintiff receives in the future from that investment may be subject to federal and state taxes, depending upon the form of investment.

PART III PROCEDURES DURING DELIBERATIONS

When you go to the jury room to begin considering the evidence in this case, I suggest that you first select one of the members of the jury to act as your foreperson. The foreperson will assure that every juror is present during all of your deliberations and that all jurors, the foreperson included, will have equal and full opportunity to participate in the deliberations. Once you are in the jury room, if you need to communicate with me, the foreperson will send a written message to me. Do not tell me, however, how you stand, either numerically or otherwise, on any issue before you, until after you have reached a verdict.

On matters touching simply on the arrangements for your meals, schedule, accommodations and convenience, you are free

to communicate with the marshal orally rather than in writing. You are not to communicate with anyone but me about the case, however, and then only in writing.

I have read to you what is called the verdict form. A verdict form is simply the written notice of the decision that you reach. You will have the original and copies of this form in the jury room and, when you have reached your verdict, your foreperson will fill in, date, and sign the original to state the verdict upon which you agree. Then you will return with your verdict to the courtroom. Your verdict must be unanimous. That is, you must be unanimous as to the answer to each of the questions you answer.

It is my usual practice, absent special circumstances, to allow a jury at a time the jury chooses between 4 p.m. and 6 p.m. to recess and begin deliberations again the morning of the next regular court day (that is, not including Saturday, Sunday, and holidays), or else, if the jurors prefer, to have food brought in and continue deliberations into the evening, but not later than 9:30 or 10 p.m. You may ask the marshal to report your preference to me. If you wish to continue deliberations into the evening, the marshal will need advance notice of at least two hours as to when you will wish to have food brought in.

It is not yet time for you to start deliberating. I will ask you to go to the jury room and remain at ease for a few minutes. I still have some more brief instructions to give you before it will be time for you to deliberate.

Comment: After objections and requests have been heard, and rulings have been made, if any objections or requests are sustained, appropriate additional instructions or modifications of instructions are made before proceeding with the closing instructions, below.

Members of the jury, it is now time for the case to be submitted to you. The first thing you should do is select one of the members of the jury to act as your foreperson. Then, you may commence your deliberations. All of you must be together at all times when you are deliberating. Whenever you need a recess for any purpose, your foreperson may declare a recess. Do not discuss the case during a recess in your deliberations. All of your discussion of the case should occur only when you are in the jury room, all together, and your foreperson has indicated that deliberations may proceed. This should be your

procedure so that everyone in the jury will have equal opportunity to participate and to hear all that other members of the jury say.

You may go to the jury room and then may commence your deliberations as soon as you have selected your foreperson.

CONCLUSION

The *University of Michigan Journal of Law Reform* deserves our applause and appreciation for convening the conference of March 1996 and developing this Symposium. The ultimate benefits of their initiative will depend on continued efforts of all who read these papers to advance understanding of the issues considered, including the special problems associated with the extraordinary complex of mixed-legal-policy-factual issues that products liability cases present.