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Anatomy of a Defect: Exploring the Outer Limits of a Manufacturer's Liability for Criminally Tampered Products

INTRODUCTION

The national incidence of crime has been steadily rising during the last several decades,¹ and societal reaction to this increasing criminal activity is spurring a new wave of tort claims unique to the established principles of civil liability.² Historically, individuals who suffered harm from criminal activity were relegated to seeking recovery from either state sponsored compensation programs³ or the actual malefactor,⁴ both of which often proved insufficient to compensate the injury.⁵ Increasingly, however, criminally injured plaintiffs have been launching innovative judicial attacks upon yet another front in the form of civil suits against third parties who have in some way contributed to the

1. See Bazzyler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727, 727-34 (1979), for a comprehensive compilation of source material documenting the rising crime rate in the United States. See generally, J. WILSON, THINKING ABOUT CRIME (1977).

2. See Comment, *Negligence Liability for the Criminal Acts of Another*, 15 J. MAR. L. REV. 459, 459-60 (1982) [hereinafter referred to as Comment, *Criminal Acts*]; Comment, *California's Approach to Third-Party Liability for Criminal Violence*, 13 LOY. L.A.L. REV. 535, 535-37 (1980) [hereinafter referred to as Comment, *California Approach*]; Bazzyler, *supra* note 1, at 727-29. See generally, Carrington, *The Crime Victims Legal Advocacy Institute: A Victims' Legal Rights Organization is Formed in Virginia*, 6 VA. B.A.J. 4 (1980); Carrington, *Victims' Rights Litigation: A Wave of the Future?* Trial, June 1978, at 40. Third party suits against the government present a notable example of the increasing spread of liability. See Comment, *Criminal Acts, supra*, at 463, n.31; Comment, *Victims' Suits Against Government Entities and Officials for Reckless Release*, 29 AM. U.L. REV. 595, 595-97 (1980).

3. California presently has several means of compensating victims of crime, including restitution and state aid. See generally, CAL. GOV'T CODE §§13959-13969.1 (California's program of compensation for victims of crime); Comment, *California Approach, supra* note 2, at 535; Lamborn, *Remedies for Victims of Crime*, 43 S. CAL. L. REV. 22 (1970); Schafer, *Victims Compensation and Responsibility*, 43 S. CAL. L. REV. 55 (1970).

4. Criminals are generally precluded from making victim restitution either because they are indigent or their earning capacity is reduced by incarceration. See Comment, *California Approach, supra* note 2, at 544; McAdam, *Emerging Issue: An Analysis of Victim Compensation in America*, 8 URB. LAW. 346, 347-48 (1976); Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crimes*, 10 ST. LOUIS U.L.J. 238, 243 (1975). Generally speaking, most violent crimes are not committed by the wealthy. See Comment, *Criminal Acts, supra* note 2, at 459, n.4. Trial attorney F. Lee Bailey has noted; "Violent criminal defendants are generally penniless. You seldom collect." Beach, *Getting Status and Getting Even*, Time, Feb. 7, 1983, at 40.

5. See Comment, *California Approach, supra* note 2, 540-44.

injury for which compensation is being sought.⁶ These third party suits have led to a demonstrable and dynamic increase in civil litigation whereby injured plaintiffs have sought to ascertain the scope of liability, and hence recovery, for the consequences of criminal activity in society.⁷ These actions are meeting with considerable and significant success in the courts.⁸

Recent societal attention has been focused upon the potential civil tort liability of manufacturers of products for the harm caused to consumers by the criminal tampering of those products. Several lawsuits filed in the wake of this modern day tragedy have raised the spectre of an issue of tort law hitherto unaddressed by the courts: The scope of a manufacturer's product liability for products that operate to cause consumer injury due to criminal tampering. The twofold purpose of this comment is (1) to explore the outer parameters of a manufacturer's liability for criminally tampered products by an analysis of the law of products liability, and (2) to adopt the position that civil liability for criminally tampered products may be established by resort to the prevailing concepts of products liability. Since there is no decisional law and scant scholarly commentary with which to support the position that tort liability exists for criminally tampered products,¹⁰ this comment purports to do no more than present an initial approach and general starting point for a theory enabling the imposition of liability. As Dean Prosser has noted, the law of torts is a battleground of social theory.¹¹ Thus, whether the imposition of tort liability in a given situation is appropriate traditionally has hinged upon, and been justified by, the seriousness of the dilemma that the liability was called upon to resolve.¹² The problem of criminally tampered products that make their

6. See *infra* note 8.

7. See *supra* note 2; Beach, *supra* note 4, at 40.

8. See generally Hoyom v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978); Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); Dailey v. L.A. Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); O'Harara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977); Grimm v. Arizona Board of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977); Gaizilli v. Howard Johnson's Motor Lodge, Inc., 419 F. Supp. 1210 (E.D.N.Y. 1976); Samson v. Saginaw Professional Bldg., 393 Mich. 393, 224 N.W.2d 843 (1975); Kline v. 1500 Mass. Ave. Corp., 439 F.2d 477 (D.C. Cir. 1970).

9. See generally Bass & Weisen, *Tylenol's Aftermath: Product Liability Implications*, 69 A.B.A.J. 287 (1983); Ranii, *Obstacles Abound for Suits Filed After Tylenol Deaths*, NAT'L L.J., Oct. 18, 1982, at 3; L.A. Daily Journal, Oct. 25, 1982, at 4; Church, *Murder by Remote Control*, Time, Oct. 18, 1982, at 16-19; Church, *Copcats Are on the Prowl*, Time, Nov. 8, 1982, at 27; Note, *Cyanide Again*, Time, Jan. 17, 1983, at 18.

10. A products liability decision for criminally tampered products would be a case of first impression in every state and federal court in the nation.

11. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 15 (4th ed. 1971).

12. See Bazzyler, *supra* note 1, at 728; PROSSER, *supra* note 11, at 15. Dean Keeton notes that this allows the judicial process to continue the "creative continuity" necessary to respond to the ineluctable changes in society and living conditions. See Keeton, *Manufacturers' Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 559-60

way into the marketplace presents an issue of grave and portentous significance to a society so necessarily dependent on the availability and safety of a myriad of consumer goods. One of the primary policies of tort law is the deterrence of socially undesirable behavior,¹³ and criminal product tampering, socially undesirable by definition, should fall within the general ambit of tort liability.¹⁴ Although courts have been reluctant, historically, to impose liability for the intervening criminal acts of others,¹⁵ this comment will demonstrate that the trend of the law is to the contrary.¹⁶ Moreover, California courts have traditionally been sensitive to the problems faced by consumers injured by defective products in their attempts to establish the evidentiary requirements of a prima facie case of liability.¹⁷ Several recent instances of product tampering aptly illustrate the situation in which a cause of action for injury from criminally tampered products would arise.

In October 1982, several bottles of Extra-Strength Tylenol, an over-the-counter pain reliever, were criminally adulterated with doses of cyanide.¹⁸ As a result, several persons died after using the product, and numerous others became ill. Shortly thereafter, the manufacturer of the product withdrew all remaining Tylenol from the marketplace and subsequently reintroduced the product in a specially designed tamper-resistant package.¹⁹ Whether the manufacturer of Tylenol will ultimately be held liable cannot be foretold with any degree of accuracy, however, the elements of a cause of action for injury resulting from a criminally tampered product have probably been established.²⁰ As Judge Hand once observed, an entire industry may be in error for unduly lagging in the adoption of new and available technology.²¹ The issue of the defendant's liability is one of A's responsibility to C for the criminally intervening act of B. Specifically, the question becomes

(1969) [hereinafter referred to as Keeton, *Meaning of Defect*]. See generally Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725 (1937); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962). But compare Dean Pound's admonition that the tendency to call upon the law in periods of transition and expansion to do more than it was adapted to do often leads to failure. R. POUND, *CRIMINAL JUSTICE IN AMERICA*, 62, 69 (1930).

13. See Bazylar, *supra* note 1, at 734; PROSSER, *supra* note 11, at 7. But cf. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 173-74 (1976).

14. See Bazylar, *supra* note 1, at 734. The author suggests that inasmuch as an individual will almost always conform his behavior in order to avoid potential tort liability, the imposition of liability for criminal activity will almost certainly result in less consumer injury and a reduction in the crime rate. *Id.* at 734, 747-50. See PROSSER, *supra* note 11, at 23.

15. See *infra* notes 192-03 and accompanying text.

16. See *infra* notes 70-302 and accompanying text.

17. See *infra* notes 32-38 and accompanying text.

18. See *supra* note 9.

19. See *supra* note 9.

20. See *infra* notes 39-302 and accompanying text.

21. See The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

whether the traditional tools of tort law provide an effective and justifiable remedy for persons injured by products rendered defective through criminal tampering. This comment will address and explore the outer limits of a manufacturer's liability for criminally tampered products in light of general products liability law and California's ostensive judicial predilection and policy for supporting injured consumers in their quest for recovery.²² Pursuant to this objective, a brief discussion of products liability law, entailing a delineation of the strict liability and negligence bases for recovery, will be set forth as a precursor to the primary analysis of whether criminally tampered products may be properly designated defective as to design under these two theories of liability. The conceptual and analytical framework of liability can be viewed as comprising three broad areas of discussion: First, that a product which incorporates a design inordinately susceptible to criminal tampering may be properly adjudged defective; second, that a criminally tampered product may constitute the cause of a plaintiff's injury; and third, that consideration of the judicial and public policy rationales underlying the imposition of product liability for defective products may support the imposition of liability for criminally tampered products. Specifically, this comment will demonstrate that a cause of action for strict liability and for negligence exists and may be justifiably imposed upon manufacturers of criminally tampered products.²³ Finally, this comment will demonstrate that the judicial and public policy rationales underlying the doctrine of products liability in California forcibly mandate consumer recovery for injuries caused by criminally tampered products.

A. The Law of Products Liability

The collective body of law commonly referred to as products liability has existed historically as a means of compensating consumers for injuries sustained through the use of defective products.²⁴ Since the first

22. See *infra* notes 70-100 and accompanying text.

23. See *infra* notes 39-302 and accompanying text.

24. See generally Dworkin, *Product Liability of the 1980s: "Repose is Not the Destiny" of Manufacturers*, 61 N.C.L. REV. 33 (1982); Vandall, *"Design Defect" in Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61 (1982); Calabresi, *Product Liability: Curse or Bulwark of Free Enterprise?* 27 CLEV. ST. L. REV. 313 (1978); Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185 (1976); Klemme, *supra* note 13, at 153; Donaher, Piehler, Twerski, & Weinstein, *The Technical Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303 (1974) [hereinafter referred to as Donaher]; Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Keeton, *Meaning of Defect*, *supra* note 12, at 559; Freedman, *"Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty*, 33 TENN. L. REV. 323 (1966); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

modern decision over a century ago,²⁵ this adventitious assemblage of competing doctrines has undergone a significant and dynamic evolution²⁶ from which three theories have emerged as the most prevalent and frequently alleged bases for recovery²⁷—strict liability, negligence, and warranty. However, numerous authorities have expressly rejected the notion of warranty in products actions involving physical injury as beyond the intended scope and efficacy of a justifiable basis for recovery.²⁸ Moreover, the California Supreme Court has specifically eschewed the utilization of warranty in light of strict liability theory.²⁹

25. Historically, the law of products liability initially began with the case of *Winterbottom v. Wright*, 10 M & W 109, 152 Eng. Rep. 402 (1842). See PROSSER, *supra* note 11, at 641; Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 25 (1965) [hereinafter referred to as Wade, *Liability of Manufacturers*].

26. Much of the development of products liability has centered around the massive accident problems occasioned by the industrial revolution. See Traynor, *supra* note 24, at 364-65, 376. Dean Prosser has extensively traced the historical development of products liability doctrine in Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter referred to as Prosser, *Assault Upon the Citadel*], continued in Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)* [hereinafter referred to as Prosser, *Fall of the Citadel*], 50 MINN. L. REV. 791 (1966). There may be anywhere from 12 to 29 different theories of products liability extant in the United States. See Note, *Products Liability: Three Theories of Recovery or Twelve?* 56 CAL. ST. B.J. 194 (1981); 72 C.J.S. *Products Liability* §3, at 5 (Supp. 1975). Products liability actions are increasing almost exponentially: there were 50,000 products actions filed in 1960, and over 1,000,000 filed in 1976. See Dworkin, *supra* note 24, at 34, n.5.

27. See Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 36 (1973) [hereinafter referred to as Keeton, *Products Liability*]; J. ADAMS, *ADVANCED TORTS* 9 (Rev. ed. 1982); B. WITKIN, *CALIFORNIA EVIDENCE Circumstantial Evidence* §293A, at 77-78 (2d ed. Supp. 1982); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 849 (1973) [hereinafter referred to as Wade, *The Nature of Strict Tort Liability*].

28. See, e.g., Vandall, *supra* note 24, at 71; Wade, *The Nature of Strict Tort Liability*, *supra* note 27, at 829; Wade, *Liability of Manufacturers*, *supra* note 25, at 6-8; Traynor, *supra* note 24, at 365-66; PROSSER, *supra* note 11, at 653; Prosser, *Assault Upon the Citadel*, *supra* note 26, at 1124-34; Prosser, *Fall of the Citadel*, *supra* note 26, at 800-05; RESTATEMENT (SECOND) OF TORTS §402A, comment c (1965). Although the action for warranty was originally tortious in nature, similar to deceit, it nonetheless developed along contract lines in commercial settings; the original action was brought on the contract for the economic loss sustained by the buyer because the product purchased was substandard, and hence not what the buyer had contracted to purchase. Wade, *Liability of Manufacturers*, *supra* note 25, at 5-8; PROSSER, *supra* note 11, at 634-54. Consequently, the doctrine of warranty in products actions became impregnated with many of the requisites of contract law, such as privity and notice, and the courts were forced to resort to "an infinite variety of highly ingenious and equally fictitious theories," in order to impose liability. Prosser, *Fall of the Citadel*, *supra* note 26, at 800-01. See Prosser, *Assault Upon the Citadel*, *supra* note 26, at 1124-26 for an interesting compilation of these theories. As Dean Prosser noted, "[t]here is no need to borrow a concept from the contract law of sales; and it is 'only by some violent pounding and twisting' that warranty can be made to serve the purpose at all. Why talk of it?" *Id.* at 1134.

29. Seeking to establish that a manufacturer's liability for products is not to be governed by the law of warranty, but rather by the doctrine of strict liability, the California Supreme Court has stated that:

Rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability for its defective products unless those rules also serve the purpose for which such liability is imposed.

Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). This statement makes clear that the only acceptable kind of warranty doctrine in California is that which operates exactly as strict liability, and does not allow the manufacturer to define the scope of his own liability for defective products through the abstruse concept of warranty. *Id.* See Traynor, *supra* note 24, at 365-66. Several authorities have noted that the concept of warranty has always existed as a convenient form with which to invoke strict liability ahead of

The prevailing view apparently supports the proposition that the invocation of the law of warranty in products actions is inappropriate and confusing to the jury.³⁰ The approach utilized herein, therefore, employs a dual analysis of liability under the theories of strict liability and negligence. Finally, the scope of this comment is restricted to a discussion of liability for products rendered defective as to design.³¹

The constituent elements of proof in the causes of action of strict liability and negligence are largely analagous, consisting of a physical injury caused by a defective product.³² California courts traditionally have been sensitive to the problems faced by consumers of defective products in proving defect and causation,³³ and it is well-settled that a plaintiff may establish both the elements of defect and causation by

its time. See PROSSER, *supra* note 11, at 656-58; 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §809, at 3105 (1965) [hereinafter referred to as WITKIN]; RESTATEMENT (SECOND) OF TORTS 402A, comment m (1965). See generally 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697.

30. See *supra* notes 28-29 and accompanying text. As Justice Traynor observed, "[h]owever well warranty served in the field of commercial transactions, its invocation in torts to rationalize compensation for injury also served to frustrate it." Traynor, *supra* note 24, at 365. Professor Wade has noted that "[n]ow that strict liability has become the dominant theory . . . it is time to abandon the warranty way of thinking and its terminology just as we have abandoned other 'impedimenta' of the warranty approach . . ." Wade, *The Nature of Strict Tort Liability*, *supra* note 27, at 834. In their adoption of strict liability, the authors of the Restatement expressly rejected warranty language as superfluous and likely to prove misleading, RESTATEMENT (SECOND) OF TORTS §402A, comment m; (1965); Wade, *Liability of Manufacturers*, *supra* note 25, at 10-11. Thus, since warranty has been relegated to a position not inconsistent with that of strict liability, *supra* note 29, it appears that the doctrine of warranty is anachronistic and hence cannot be utilized to accomplish anything in the area of products liability that strict liability cannot effectuate. As one court noted at 1913: "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." *Mazetti v. Armour*, 75 Wash. 622, 627, 135 P. 633, 636 (1913). *But cf.* *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975) (wherein the court held that the plaintiff could recover, concurrently, as a matter of law, under the theories of strict liability, breach of warranty, and misrepresentation).

31. Generally, a plaintiff may allege that a product is defective as to design, manufacture, or failure to warn. See *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413-28, 573 P.2d 443-53, 143 Cal. Rptr. 225-35 (1978); J. ADAMS, *ADVANCED TORTS* 191-211 (Rev. ed. 1982). See generally Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 CIN. L. REV. 101 (1977). Unfortunately, considerations of defect as to manufacture or failure to warn are beyond the scope of this comment.

32. See *Jiminez v. Sears, Roebuck & Co.*, 4 Cal. 3d 379, 387, 482 P.2d 681, 686, 93 Cal. Rptr. 769, 774 (1971); WITKIN, *supra* note 29, §812, at 3108-09; PROSSER, *supra* note 11, at 671. The similarity of proof is particularly important in design defect actions; thus, the quantum of proof necessary to establish strict liability for defective design is often sufficient to show negligence on the part of the manufacturer. See Wade, *The Nature of Strict Tort Liability*, *supra* note 27, at 836-41. See generally *Roach v. Kononen*, 269 Ore. 457, 525 P.2d 125 (1974). Consequently, California courts have held that when the plaintiff's cause of action is based on two or more theories of products liability, the claims may merge into a single cause of action inasmuch as each allegation seeks damages for physical injury caused by defectively designed products. See *Balido v. Improved Machinery, Inc.*, 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (1972); WITKIN, *supra* note 29, §812, at 3108-09. Moreover, California law does not require the plaintiff to elect one theory of liability in order to recover. See 4 Cal. 3d 379, 387, 482 P.2d 681, 686, 93 Cal. Rptr. 769, 774.

33. See *Dimond v. Caterpillar Tractor Co.*, 65 Cal. App. 3d 173, 183, 134 Cal. Rptr. 895, 901-02 (1976). See generally *Campbell v. G.M. Corp.*, 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).

resort to the use of circumstantial evidence, as direct evidence is frequently impossible in many products actions.³⁴ As a result, the use of expert testimony is often employed by plaintiffs in order to establish the circumstantial foundation for their cause of action,³⁵ and the technical expert may play a pivotal role in the eventual outcome of a products action.³⁶ Coterminous with this consideration is California's judicial predilection to favor consumers injured by defective products in the establishment of an evidentiary basis for products liability.³⁷ Consequently, a plaintiff injured by a criminally tampered product should be afforded considerable latitude in the presentation of evidence tending to support a bona fide claim of injury.³⁸ Next, this comment will demonstrate that a manufacturer may be strictly liable for injuries resulting from criminally tampered products.

THE DOCTRINE OF STRICT LIABILITY IN TORT

The classical definition of the doctrine of strict liability for products has been enunciated by the California Supreme Court in the landmark opinion of *Greenman v. Yuba Power Products, Incorporated*³⁹ as follows: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . ."⁴⁰ Under California law, a plaintiff satisfies the burden of proof required by this formulation once he presents evidence of a defect in the product, and that the defect was a proximate cause of the resulting injury.⁴¹ The indispensable precondition of the strict liability

34. See 32 Cal. 3d 112, 122-23, 649 P.2d 224, 230-31, 184 Cal. Rptr. 891, 896-98 (1982); *Elmore v. American Motors Co.*, 70 Cal. 2d 578, 583-84, 451 P.2d 84, 75 Cal. Rptr. 652, 655 (1969); 65 Cal. App. 3d 173, 183, 134 Cal. Rptr. 895, 901-02; WITKIN, *supra* note 29, §833, at 3128.

35. See Prosser, *Fall of the Citadel*, *supra* note 26, at 840-41; Freedman, *supra* note 24, at 325-26. See generally *Endicott v. Nissan Motors Corp.*, 73 Cal. App. 3d 917, 141 Cal. Rptr. 95 (1977); *Truman v. Vargas*, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969).

36. See Donaher, *supra* note 24, at 1309-27; Keeton, *supra* note 12, at 563-65; Freedman, *supra* note 24, at 325-26. See generally *Huffman v. Lindquist*, 37 Cal. 2d 465, 234 P.2d 34 (1951); *Putenson v. Clay Adams, Inc.*, 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319 (1970); Weinstein, Twerski, Pieler & Donaher, *Products Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425 (1974). Annot., 4 A.L.R. 4th 651 (1981). Although not all cases require expert testimony, *Campbell v. G.M. Corp.*, 32 Cal. 3d 112, 124-25, 649 P.2d 224, 231-32, 184 Cal. Rptr. 891, 898-99 (1982), the courts continue to accord great deference to expert opinion in products actions. See generally *id.*; *Buccery v. G.M. Corp.*, 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976).

37. See *supra* notes 32-34 and accompanying text.

38. See *supra* notes 32-37 and accompanying text.

39. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). This was the first judicial decision to expressly adopt the principles of strict liability in tort.

40. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. See *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 427, 573 P.2d 443, 452, 143 Cal. Rptr., 225, 234 (1978); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 130-31, 501 P.2d 1153, 1159, 104 Cal. Rptr. 433, 439 (1972); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 260-61, 391 P.2d 168, 170, 37 Cal. Rptr. 896, 898 (1964).

41. See 20 Cal. 3d 413, 427, 573 P.2d 443, 452, 143 Cal. Rptr. 225, 234; 8 Cal. 3d 121, 133-34, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442; *McGee v. Cessna Aircraft Co.*, 82 Cal. App. 3d 1005,

cause of action is the existence of a defect inherent in the product.⁴² The primary focus in a strict liability action, therefore, is on the product itself, and not on the manufacturer's fault or negligence in the production or marketing of the product.⁴³ In short, the plaintiff is not required to impugn the manufacturer, but rather, to impugn the product.⁴⁴ Consequently, the judicial trend since the *Greenman* decision has been away from fault or negligence as the governing principle for liability in products actions.⁴⁵ Rather, the California courts have increasingly relied upon the relative flexibility of strict liability theory in order to eliminate any existing barriers to an injured consumer's recovery for defective products.⁴⁶

A. *Strict Liability is a Doctrine of Judicial Policy*

Traditionally, strict liability was adopted because the demands of public policy required that responsibility for defective products be fixed wherever it would most effectively reduce the dangers to consumers

1013, 147 Cal. Rptr. 694, 699 (1978); *Baker v. Chrysler Corp.*, 55 Cal. App. 3d 710, 715, 127 Cal. Rptr. 745, 748 (1976).

42. See *Miller v. Los Angeles Co. Flood Control Dist.*, 8 Cal. 3d 689, 703, 505 P.2d 193, 202-03, 106 Cal. Rptr. 1, 10-11 (1973); *Vandall*, *supra* note 24, at 72; *Calabresi & Hirschhoff*, *supra* note 24, at 1061; *Freedman*, *supra* note 24, at 323-27. Professor Wade suggests that the phrase "not duly safe" is preferable to the term defective, *Wade, The Nature of Strict Tort Liability*, *supra* note 27, at 833; Justice Traynor would impose liability whenever there is something "wrong" with the product. *TRAYNOR*, *supra* note 24, at 366. See 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236.

43. See 20 Cal. 3d 413, 418, 573 P.2d 443, 446-47, 143 Cal. Rptr. 225, 228-29; *Ault v. Int'l Harvester*, 13 Cal. 3d 113, 121, 528 P.2d 1148, 1152, 117 Cal. Rptr. 812, 816 (1974); 82 Cal. App. 3d 1005, 1013-14, 147 Cal. Rptr. 694, 699; *Wade, Liability of Manufacturers*, *supra* note 25, at 13. *But cf.* *Horn v. G.M. Corp.*, 17 Cal. 3d 359, 373-74, 551 P.2d 398, 405-06, 131 Cal. Rptr. 78, 85-86 (1976) (Clark, J., dissenting); *Lascher, Strict Liability in Tort for Defective Products: The Road To and Past Vandermark*, 38 S. CAL. L. REV. 30, *passim* (1965). These authorities, among others, claim that strict liability is in fact a doctrine of fault, since the plaintiff must prove that the manufacturer erred in marketing a defective product. Such views are, at best, disparate, as California law makes clear that the only fault in a strict liability action is directed at the product.

44. *Keeton, Products Liability*, *supra* note 27, at 33. See 20 Cal. 3d 413, 425, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 229.

45. See 20 Cal. 3d 413, 434-35, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978); *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 101 (D.C. Cir. 1972), *cert. denied* 412 U.S. 939 (1973); *Vandall*, *supra* note 24, at 63-64; *Donaher*, *supra* note 24, at 1307; *Klemme*, *supra* note 13, at 153-54; *Traynor*, *supra* note 24, at 375; *Keeton*, *supra* note 27, at 33. See generally *Peck, Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225 (1971); *Wade, The Continuing Development of Strict Liability in Tort*, 22 ARK. L. REV. 233 (1968).

46. See *infra* notes 75-93 and accompanying text. See *PROSSER*, *supra* note 11, at 644; *Wade, The Nature of Strict Tort Liability*, *supra* note 27, at 834. The vast majority of states have now adopted strict liability for products by either decisional law or statute. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 130-31, 501 P.2d 1153, 1160, 104 Cal. Rptr. 433, 440 (1972); *PROSSER*, *supra* note 11, at 657-58; *Annot.*, 13 A.L.R. 3d 1057 (1967 & Supp. 1975). Dean Prosser has referred to the national adoption of strict liability as the "most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts." *Prosser, Fall of the Citadel*, *supra* note 26, at 793-94. The Dean's hyperbole notwithstanding, many authorities now tout strict liability as the superior basis for recovery in products actions. See generally *Vandall*, *supra* note 24, at 61; *Fletcher, Fairness and Utility in Torts*, 85 HARV. L. REV. 537 (1972); *Epstein, A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); *Calabresi & Hirschhoff*, *supra* note 24, at 1055.

that result when such products reach the marketplace.⁴⁷ Thus, the primary purpose of strict liability is "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."⁴⁸ Concurrent with this primary consideration, California courts generally consider three additional policy rationales when determining whether the imposition of strict liability is justified: 1) Recognizing the problems of proof inherent in negligence and warranty actions,⁴⁹ strict liability should operate to relieve an injured plaintiff of any onerous evidentiary burdens in order to allow the plaintiff a greater chance to recover;⁵⁰ 2) Fixing liability without fault upon manufacturers should result in an economic incentive to improve product design and create safer products in gen-

47. Justice Traynor eloquently defined this policy in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring) as follows:

[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they make strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best suited to afford such protection.

Id. at 461-62, 150 P.2d at 440-41. See Traynor, *supra* note 24, at 366.

48. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). See *Campbell v. G.M. Corp.*, 32 Cal. 3d 112, 122, 649 P.2d 224, 230, 184 Cal. Rptr. 891, 987 (1982); *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 251, 46 P.2d 722, 725, 85 Cal. Rptr. 178, 181 (1970). See generally *Elmore v. American Motors Co.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); 24 Cal. 2d 453, 150 P.2d 436; *McGee v. Cessna Aircraft Co.*, 82 Cal. App. 3d 1005, 147 Cal. Rptr. 694 (1978).

49. See *infra* note 50. As Professor Wade has noted,

[i]t is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, *res ipsa loquitur* often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This is often not present, and strict liability eliminates the need of the proof.

WADE, *The Nature of Strict Tort Liability*, *supra* note 27, at 826.

50. See 32 Cal. 3d 112, 119, 649 P.2d 224, 228, 184 Cal. Rptr. 891, 895; *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 431-32, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978); 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41; Wade, *The Nature of Strict Tort Liability*, *supra* note 27, at 826. As the California Supreme Court in *Cronin* noted,

the very purpose of our pioneering effects in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence . . . and warranty . . . remedies, and thereby "to insure that the costs of injuries resulting from defective products are borne by the manufacturer. . . ."

8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442.

eral, thereby reducing the risk of serious consumer injury;⁵¹ and 3) Recognizing that the manufacturer may be best able to absorb and spread the cost of injuries from defective products by obtaining insurance and distributing this expense to the public as a cost of doing business, the risk of loss should be shifted onto the manufacturer as the party in the best economic position to bear the financial burden.⁵² Generally, shifting the onus of liability for defective products onto the manufacturer who produced those products is the most efficacious means of compensating injured consumers.⁵³ Products that are defective as to design present the most conceptually difficult area of the strict liability cause of action.

B. Defective Design Under Strict Liability

Recognizing the problems inherent in giving meaning and substance to the concept of defect,⁵⁴ particularly in design cases,⁵⁵ the California

51. See 32 Cal. 3d 112, 122, 649 P.2d 224, 230, 184 Cal. Rptr. 891, 897; Spradley, *Defensive Use of State of the Art Evidence in Strict Products Liability*, 67 MINN. L. REV. 343, 348-49 (1982); Keeton, *supra* note 27, at 34; Traynor, *supra* note 24, at 366; Prosser, *Assault Upon the Citadel*, *supra* note 26, at 1119; Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 781 (1964). From a practical standpoint, strict liability should deter the manufacturer from foolhardy business ventures that pose a risk to consumer safety. See Wade, *The Nature of Strict Tort Liability*, *supra* note 27, at 826. This incentive policy may be used to rationalize strict liability even when the design change is a technological impossibility. See Spradley, *supra* note 51, at 409; Epstein, *Products Liability: the Search for the Middle Ground*, 56 N.C.L. REV. 643, 658-59 (1978).

52. See Price v. Shell Oil Co., 2 Cal. 3d 245, 251, 466 P.2d 722, 725-26, 85 Cal. Rptr. 178, 181-82 (1970); Vandemark v. Ford Motor Co., 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964); *Escola*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441; Dimond v. Caterpillar Tractor Co., 65 Cal. App. 3d 173, 183, 134 Cal. Rptr. 895, 902 (1976); Vandall, *supra* note 24, at 69-79; Keeton, *supra* note 27, at 35; Wade, *The Nature of Strict Tort Liability*, *supra* note 27, at 826; Traynor, *supra* note 24, at 366. See generally Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Henningson v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).

53. See Calabresi & Hirschhoff, *supra* note 24, at 1057-58; PROSSER, *supra* note 11, at 492-540; James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L.J. 360-61 (1958). The historical justification for loss shifting is based on a premise of classical economics, and requires that losses traditionally recognized as compensable when caused by certain businesses ought to be borne by those persons who have some logical relationship with those businesses; thus, no matter where the loss would fall normally, judicial policy mandates where it shall fall legally. See Klemme, *supra* note 13, at 158-65; Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 449, 500-06 (1961); James, *An Evaluation of the Fault Concept*, 32 TENN. L. REV. 394, 400-01 (1965). *But cf.* Henderson, *Extending the Boundaries of Strict Product Liability: Implications of the Theory of Second Best*, 128 U. PA. L. REV. 1036 (1980). The theory of shifting the loss onto the party best able to bear it is a common and consistent theme in tort law. See Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 775 n.20, 478 P.2d 465, 477 n.20, 91 Cal. Rptr. 745, 757 n.20 (1970); Henningson v. Bloomfield Motors, 32 N.J. 358, 379, 161 A.2d 69, 81 (1960); Vandall, *supra* note 24, at 62-65; Calabresi, *supra* note 24, at 319.

54. See 20 Cal. 3d 413, 427-29, 573 P.2d 443, 453-54, 143 Cal. Rptr. 225, 235-36; Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134 n.16, 501 P.2d 1153, 1162 n.16, 104 Cal. Rptr. 433, 442 n.16 (1972); Jimenez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 383, 482 P.2d 681, 684, 93 Cal. Rptr. 769, 772 (1971); Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976); Self v. General Motors Corp., 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974).

55. The concept of defect is considerably more problematic in the design defect context: manufacturing defects create an aberrant product that becomes readily identifiable to the consumer, whereas design deficiencies reflect the entire product line and hence cannot be so easily

Supreme Court set forth an innovative, bifurcated approach for the ascertainment of a defectively designed product in *Barker v. Lull Engineering Company*.⁵⁶ Pursuant to this analysis, a product may be found defective as to design under either of two alternative tests.⁵⁷ First, the plaintiff may demonstrate that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.⁵⁸ However, the court was critical of this approach as indicative of only the bare minimal standard with which a product must comport.⁵⁹ Moreover, utilization of ordinary consumer expectations as the exclusive measure for recovery posed an additional problem: In many cases the consumer would not know what to expect as he would have no idea how safe the product could be made.⁶⁰ Therefore, the court formulated a second, alternative test: Even if the product does, in fact, satisfy ordinary consumer expectations, it may still be found defective if the jury finds that the design of the product embodies an "excessive preventable danger."⁶¹ A product embodies an excessive preventable danger if the jury determines, retrospectively, that the risk of danger inherent in the challenged design of the product outweighs the benefits of that design.⁶² This risk-benefit test⁶³ employs, in essence, a traditional tort balancing of utility against

distinguished. See *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 429, 573 P.2d 443, 453-54, 143 Cal. Rptr. 225, 235-36 (1978); Keeton, *Products Liability*, supra note 27, at 30-35.

56. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

57. See *infra* notes 58-61 and accompanying text. See generally Wade, *The Nature of Strict Tort Liability*, supra note 27, at 825; Keeton, *Meaning of Defect*, supra note 12, at 559, for two alternative formulations of design deficiencies. See also Spradley, supra note 51, at 424.

58. 20 Cal. 3d 413, 429-30, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236. This approach, which is similar to the U.C.C. warranties of fitness and merchantability, reflects in part the warranty heritage whence California products liability doctrine historically derived. *Id.* at 429-30, 573 P.2d at 454, 143 Cal. Rptr. at 236. Compare *id.* with U.C.C. §§2-314, 2-315 (1978).

59. The *Barker* court was critical of this approach insofar as it treated consumer expectations as a "ceiling" for a manufacturer's liability, rather than as a "floor": consumer expectations are the lowest standard a product must meet. 20 Cal. 3d 413, 425-26 n.7, 573 P.2d 443, 451 n.7, 143 Cal. Rptr. 224, 233 n.7.

60. See *id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. 236; Wade, *The Nature of Strict Tort Liability*, supra note 27, at 829. From an evidentiary standpoint, the California Supreme Court has queried as to the potential qualifications a witness must possess before he could be certified as an expert on the issue of ordinary consumer expectations. *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 127, 649 P.2d 224, 233, 184 Cal. Rptr. 891, 900 (1982); Schwartz, *Forward: Understanding Products Liability*, 67 CALIF. L. REV. 435, 480 (1979).

61. 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236-37. See *Self v. General Motors Corp.*, 42 Cal. App. 3d 1, 6, 116 Cal. Rptr. 575, 578 (1974), wherein the court noted that "while defective design is an amorphous and elusive concept . . . its contours certainly include the notion of excessive preventable danger." *Id.*

62. 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236-37. See generally *Campbell v. G.M. Corp.*, 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982); *McGee v. Cessna Aircraft Co.*, 82 Cal. App. 3d 1005, 147 Cal. Rptr. 694 (1978).

63. The California Supreme Court was not the first to employ a risk-benefit test to ascertain the existence of a defective product. See, e.g., Keeton, *Products Liability: Design Hazards and the Meaning of Defect*, 10 CUM. L. REV. 293, 313 (1979); Wade, *The Nature of Strict Tort Liability*, supra note 27, at 837-38. Apparently, the *Barker* court found these formulations too inextricably linked with concepts of negligence to be of any value in California. Compare *id.* with RESTATE-

risk,⁶⁴ and appears, therefore, appropriately suited as the superior analysis with which to ascertain defective design with respect to criminally tampered products.⁶⁵ Moreover, this second test pragmatically represents the virtual impossibility of eliminating the weighing of competing considerations from the deliberations of the jury.⁶⁶

In order to clarify application of the risk-benefit test, and to guide and instruct the jury as to the standard to be applied in a given case,⁶⁷ the *Barker* court enunciated a series of policy factors to be considered: *viz.*, the gravity of the danger posed by the challenged design; the likelihood that danger would occur; the mechanical feasibility of a safer, alternative design; the financial cost of an improved design; and the adverse consequences to the product and the consumer that would result from an alternative design.⁶⁸ Thus, by resorting to these relevant policy factors, a plaintiff injured by a criminally tampered product must attempt to establish a *prima facie* case of liability for defective design under the second prong of the *Barker* analysis. Finally, the court held that once the plaintiff has made a *prima facie* showing that the injury was proximately caused by the product's design by use of the enumerated factors, the burden of proof then shifts to the defendant-manufacturer to attempt to prove, in light of the same considerations, that the product was not defective.⁶⁹ This comment next will demonstrate that under the second prong of the *Barker* formulation of defect, a manufacturer who produces a product that is, by virtue of its design, inordinately susceptible to criminal tampering may be strictly liable if that product could have been produced with a safer, alternative design.

MENT (SECOND) OF TORTS §§291-93, 520 (1965) (factors for determining negligence and abnormally dangerous activities, respectively).

64. See generally Calabresi & Hirschoff, *supra* note 24, at 1055. One of the reasons for employing a balancing test is that since strict liability is not designed to constitute insurance, *infra* note 95, any evaluation of a product's design must necessarily involve the weighing of danger against utility. See *Daly v. G.M. Corp.*, 20 Cal. 3d 725, 746-47, 575 P.2d 1162, 1174-75, 144 Cal. Rptr. 380, 393 (1978); *Vandall*, *supra* note 24, at 74.

65. See *supra* notes 101-63 and accompanying text.

66. See 20 Cal. 3d 413, 433, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238.

67. See *id.*

68. See *id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

69. See *id.* at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237. The court found justification for this action flowing from and implicit in the fundamental policies of strict liability that require a manufacturer who seeks to escape liability for an injury caused by a defective product to bear the burden of persuading the jury that the product should not be adjudged defective. *Id.* The California Supreme Court has long adhered to the principle of shifting burdens whenever it would effectively accommodate a plaintiff's cause of action. See generally *Sindell v. Abbott Labs. Inc.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) *cert. denied*, 449 U.S. 912 (1980); *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970); *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948); *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944).

UNDER CALIFORNIA LAW A MANUFACTURER MAY BE HELD
STRICTLY LIABLE FOR CRIMINALLY TAMPERED PRODUCTS

Although no court has expressly decided the issue of a manufacturer's strict liability for products rendered defective through criminal tampering,⁷⁰ California courts have traditionally and consistently demonstrated support for consumers injured by defective products. The continuum of products liability decisions since *Greenman* forcibly illustrates California's adherence to the principle that manufacturers must bear primary responsibility for the consequences of defective products in society.⁷¹ The judiciary has stood pertinaciously at the vanguard of consumer recovery by expanding existing theories of law and by formulating new ones whenever necessary to protect the interests of injured plaintiffs.⁷² In order to effectuate these policies, the California courts frequently have utilized the relatively extensible nature of strict liability theory to broaden and expand existing concepts of liability.⁷³ Whether strict liability may be imposed for criminally tampered products must be viewed in light of this clear predilection for consumer recovery at the expense of legal finesse.⁷⁴ For example, strict liability has been interpreted to include not only manufacturing defects, but also design defects,⁷⁵ failure to warn defects,⁷⁶ and patent defects.⁷⁷ California strict liability theory comprehends market share liability,⁷⁸ the application of comparative fault,⁷⁹ and a cause of action

70. See *supra* note 10.

71. See *infra* notes 75-100 and accompanying text. Justice Traynor has noted:

The cases on products liability are emerging as early chapters of a modern history on strict liability that will take long in the writing. There is a wealth of analogy yet to be developed from the exploding bottles of yesteryear, from lathes on the loose, and capricious safety valves, and drugs with offside effects. There are meanings for tomorrow to be drawn from their exceptional behavior.

Traynor, *supra* note 24, at 376.

72. See *infra* notes 75-100 and accompanying text. See generally Note, *Continuing Corporate Existence for Post-Dissolution Claims: The Defective Products Dilemma*, 13 PAC. L.J. 1227 (1982); Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225 (1971); Wade, *The Continuing Development of Strict Liability in Tort*, 22 ARK. L. REV. 233 (1968).

73. See *infra* notes 75-100 and accompanying text.

74. *Id.* For example, the California Supreme Court justified extending the principles of comparative fault to strict liability because it was "fair to do so. The law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation." *Daly v. G.M. Corp.*, 20 Cal. 3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978).

75. See generally *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 153, 104 Cal. Rptr. 433 (1972). The court noted that a defect could emerge from the mind of a designer as well as from the hands of a workman. *Id.* at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

76. See generally *Cavers v. Cushman Motor Sales, Inc.*, 95 Cal. App. 3d 338, 157 Cal. Rptr. 142 (1979); *Midgley v. S.S. Kresge, Co.*, 55 Cal. App. 3d 67, 127 Cal. Rptr. 217 (1976).

77. See generally *Luque v. McLean*, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

78. See generally *Sindell v. Abbott Labs. Inc.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980).

79. See generally *Daly v. G.M. Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

for the infliction of emotional distress.⁸⁰ Additionally, the California Supreme Court has assiduously attempted to expurgate all vestiges of negligence theory from strict liability principles,⁸¹ and has extended the rule of liability not only to actual consumers, but also to any person to whom an injury is reasonably foreseeable.⁸² Concurrently, the courts have extended the application of strict liability to successor corporations,⁸³ retailers,⁸⁴ bailors and lessors,⁸⁵ wholesalers and distributors,⁸⁶ licensors,⁸⁷ and sellers of mass produced homes.⁸⁸ In sum, these inexorable extensions of strict liability theory may be taken as illustrative of California's ability to assimilate new and unique challenges to existing legal theory by incorporating novel situations within existing principles of liability. Specifically, these decisions indicate that a strict liability cause of action for injuries resulting from criminally tampered products is well within the continuum of products liability decisions.⁸⁹ Moreover, the most compelling aspect of California's judicial inclination to broaden the scope of strict liability whenever necessary to protect the interests of injured plaintiffs is the direction of the courts' emphasis: The decisions have consistently advanced the theories and favored the policies that would best operate to secure consumer recovery in virtually *all* instances, irrespective of the novelty of the cause of action.⁹⁰ As a result, the court's inquiry becomes weighted from the beginning in favor of the injured consumer.⁹¹ Although this hardly constitutes a neutral balancing of interests,⁹² the practical result is that the onus of liability initially is placed upon the manufacturer, and remains there in the absence of some egregious consumer fault.⁹³ Therefore, it appears

80. See generally *Shepard v. Superior Court*, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977).

81. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132, 501 P.2d 1153, 1161-62, 104 Cal. Rptr. 433, 441-42 (1972); Wade, *the Nature of Strict Tort Liability*, *supra* note 27, at 831-32.

82. See generally *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); *Putenson v. Clay Adams Inc.*, 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319 (1970).

83. See generally *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

84. See generally *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

85. See generally *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

86. See generally *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968).

87. See generally *Garcia v. Hasslett*, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

88. See generally *Kriegler v. Eichlor Homes Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

89. See *supra* notes 70-88 and accompanying text.

90. See *Vandall*, *supra* note 24, at 63-64. See, e.g., *Sindell v. Abbott Labs. Inc.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980).

91. See *Vandall*, *supra* note 24, at 63-64; Calabresi, *supra* note 24, at 319; Klemme, *supra* note 13, at 153.

92. See *Vandall*, *supra* note 24, at 63-64. See generally Calabresi, *supra* note 24, at 319.

93. See *Vandall*, *supra* note 24, at 64; Calabresi, *supra* note 24, at 319. One authority has suggested that shifting the onus of loss to the manufacturer may compel the consumer, in effect, to purchase accident insurance for himself through increased prices. See Kalven, *Torts: The Quest for Appropriate Standards*, 53 CALIF. L. REV. 189, 205-06 (1965).

that a consumer injured by a criminally tampered product may be accorded a considerable degree of latitude not only in the evidentiary elements of the cause of action, but also in the fundamental premises of liability that may operate to hasten the consumer's recovery.

An argument may be made, however, that despite the extensible nature of strict liability theory, the cause of action should not be burdened further with an additional basis of recovery grounded upon harm caused by criminally tampered products.⁹⁴ Additionally, there is the argument that to allow recovery would open floodgates of litigation, and would operate to render the manufacturer a veritable insurer for his products.⁹⁵ In apparent contradiction to these arguments, the California courts have never eschewed the opportunity to overturn existing precedent in favor of compelling policy rationales that support consumer recovery.⁹⁶ Moreover, shifting the loss onto the manufacturer is the most efficacious means of actually securing consumer recovery.⁹⁷ In addition, the imposition of liability for criminally tampered products should promote product safety by encouraging tamper-resistant products.⁹⁸ Finally, the manufacturer should not be regarded as an insurer of his products, because liability for any defective product may not be imposed merely because an injury has occurred;⁹⁹ the plaintiff must always demonstrate that the product was defectively designed and that the design deficiency was a proximate cause of the resultant injury.¹⁰⁰ This comment next will specifically address the determination of defective design under the second prong of the *Barker* analysis.

94. For example, recovery under strict liability theory for solely economic loss and the rendition of services has been denied. *See generally* *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Shepard v. Alexian Brothers Hosp.*, 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973).

95. Notwithstanding the inexorable pace of strict liability doctrine, strict liability does not constitute absolute liability so as to render the manufacturer a veritable insurer of his product. Authorities for this are legion. *See, e.g.*, Wade, *Liability of Manufacturers*, *supra* note 25, at 13-16; Wade, *The Nature of Strict Tort Liability*, *supra* note 27, at 828; Traynor, *supra* note 24, at 366-67; Freedman, *supra* note 24, at 323. *See generally* *Daly v. General Motors Corp.*, 70 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

96. *See supra* notes 70-93 and accompanying text.

97. *See supra* note 53.

98. *See supra* note 51.

99. *See* Henderson, *supra* note 53, at 1041-42; Wade, *Liability of Manufacturers*, *supra* note 25, at 13. *See generally* *Henderson v. Harnischfeger Corp.*, 12 Cal. 3d 663, 527 P.2d 353, 117 Cal. Rptr. 1 (1974); *Buccery v. G.M. Corp.*, 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976). Although an accident-free world may be desirable, the attainment is singularly beyond the scope of the judiciary. But compare *Cushing v. Rodman*, 82 F.2d 864 (D.C. Cir. 1936), wherein the court remarked that nothing but wholesome products could effectively protect consumers from harm. *Id.* at 869.

100. *See supra* notes 54-69 and accompanying text.

A. *Products That Embody an Excessive Preventable Danger of Criminal Tampering Are Defectively Designed Under The Second Prong of the Barker Analysis.*

The determination of defect for a product rendered defective as to design through criminal tampering is predicated upon the analysis set forth in the *Barker* decision. In applying the second prong of that formulation, the analysis should focus on the adequacy of the product's design to determine if, on balance and through hindsight, that design was not as safe as it should have been.¹⁰¹ The issue may be framed in the form of a query: Would the plaintiff have been injured if the design of the product had been otherwise?¹⁰² The specific analysis should hinge, therefore, upon the social utility of the product *qua* product in light of alternative means of designing that product,¹⁰³ if the danger of criminal tampering inherent in the design of the product outweighs the social benefits, the product becomes a thing of excessive danger for which strict liability may be imposed. As a general proposition, any product designed in a way that causes injury when used in a foreseeable manner becomes defective if that design created an excessive danger that was readily preventable through the employment of existing technology at a cost consonant with the economic use of the product.¹⁰⁴ California courts have held that part of the plaintiff's burden of proof includes evidence of feasible, alternative designs that might have made the product safer.¹⁰⁵ The crucial issue, therefore, in demonstrating that a product was inordinately susceptible to criminal tampering is the plaintiff's ability to establish through the existence of feasible, alternative designs that the manufacturer could have designed a tamper-resistant product.¹⁰⁶ The plaintiff may attempt to establish this by utilization of the policy factors enunciated by the *Barker* court.¹⁰⁷ The plaintiff may satisfy the first set of factors, the gravity and likelihood of the danger posed by the challenged design, by demonstrating that the environment into which the product was marketed requires the neces-

101. See *supra* notes 54-69 and accompanying text.

102. See Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 382-83 (1950) [hereinafter referred to as Prosser, *Proximate Cause*]. See generally *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).

103. See Donaher, *supra* note 24, at 1307.

104. *Buccery v. G.M. Corp.*, 60 Cal. App. 3d 533, 547, 132 Cal. Rptr. 605, 614 (1976). See generally *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

105. *Baker v. Chrysler Corp.*, 55 Cal. App. 3d 710, 716, 127 Cal. Rptr. 745, 749 (1976); Wade, *The Nature of Strict Tort Liability*, *supra* note 27, at 841; WITKIN, *supra* note 29, §816, at 3111-12 (citing cases).

106. See *infra* notes 120-36 and accompanying text.

107. See *supra* note 68.

sity of a safer design commensurate with the gravity of the danger inherent in that environment.

B. The Dangerous Social Environment and the "Crashworthiness" Analogue

California courts have on numerous occasions embraced the concept of "crashworthiness," or the idea that a manufacturer of certain products must take accidents into consideration when designing those products and employ the design precautions necessary to forestall the risk of injury.¹⁰⁸ Additionally, since the potential of a second accident is also within reason, the law now requires that the manufacturer be aware of some degree of abuse of his product, either by the user or by *third parties*.¹⁰⁹ Although the problem of criminal tampering does not comprise the issue of use per se, as this relates to the conduct of the plaintiff rather than to the criminal agency,¹¹⁰ the concept of "crashworthiness" presents an illustrative and useful analogy as to the applicability of the legal reasoning which gave rise to the concept in the first instance. This comment adopts the position that the application of the conceptualization of crashworthiness with respect to criminally tampered products may be the most efficient and legally supportable basis for establishing the necessity for tamper-proof designs. The doctrine of crashworthiness requires that an automobile be designed so as to withstand the impact not only of an initial collision, but also of a subsequent crash thereafter.¹¹¹ The reasoning is that automobile accidents, while certainly not normal occurrences, are nonetheless an inescapable component of the environment in which cars are sold.¹¹² By analogous reasoning, a logical extension of this principle appears to require all manufacturers to be aware of the environment in which their product is to be used, and if a constituent element of that environment involves the risk of crime in the form of product tampering, to design a product that is safe against that possibility.¹¹³ The California Court of Appeal has already extended the concept to include aircraft manufacturers.¹¹⁴

108. See generally *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *McGee v. Cessna Aircraft Co.*, 82 Cal. App. 3d 1005, 147 Cal. Rptr. 694 (1978); *Buccery v. General Motors Corp.*, 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976); *Self v. G.M. Corp.*, 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974) Annot., 4 A.L.R. 4th 651 (1981); *Passwaters v. General Motors Corp.*, 454 F.2d 1270 (8th Cir. 1972); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

109. See 82 Cal. App. 3d 1005, 1013, 147 Cal. Rptr. 694, 698. See generally *supra* note 108.

110. See 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437; 60 Cal. App. 3d 533, 546, 132 Cal. Rptr. 605, 613; *WITKIN, supra* note 29, §835, at 3130-31.

111. See 82 Cal. App. 3d 1005, 1012, 147 Cal. Rptr. 694, 698. See generally *supra* note 108.

112. See 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437. See generally *supra* note 108.

113. See *supra* notes 108-12 and accompanying text.

114. *McGee v. Cessna Aircraft Co.*, 82 Cal. App. 3d 1005, 1019, 147 Cal. Rptr. 694, 702-03

Thus, the proposition logically follows that just as automobile and aircraft manufacturers must design their products to be safe within the chosen marketing environment, so too must other manufacturers design their products to be equally safe within alternate environments. Further support for this proposition may be found in the judicial recognition of the general danger to be encountered in society.

The California Supreme Court has recognized that the design of products is not carried out in an industrial vacuum, but rather with the appropriate and proper realization of the realities of the product's everyday use.¹¹⁵ One of these realities is the ever increasing risk of danger from multi-varied sources within society. The *Barker* court took notice of this fact when it stated that

[t]he technological revolution has created a society that contains dangers to the individual never before contemplated. The individual must face the threat to life and limb not only from the car on the street or highway but from a massive array of hazardous mechanisms and products. This radical change from a comparatively safe, largely agricultural, society to this industrial unsafe one has been reflected in the decisions that formerly tied liability to the fault of the tortfeasor but now are more concerned with the safety of the individual who suffers the loss.¹¹⁶

This "radical change" includes, among other things, a steadily rising crime rate,¹¹⁷ and now, the very considerable danger of product tampering.¹¹⁸ To paraphrase Justice Traynor of the California Supreme Court, however intermittently or haphazardly these incidents of product tampering may occur, the risk of their occurrence is a constant and a general one, and against such a risk the manufacturer is best suited to provide general and constant protection.¹¹⁹ In summary, there may no longer be any valid reason why *all* manufacturers should not be required to be aware of the dangers inherent to the chosen marketplace for their products, and to provide a general and constant protection to consumers in the form of tamper-resistant products that are safe for use within that environment. Next, the plaintiff may attempt to establish the second set of factors given by the *Barker* court, the feasibility and

(1978). The appellate court dispatched with the defendant's argument that the concept of crashworthiness should not be extended to include aircraft manufacturers by stating that "[t]hese are not legal arguments. They are best left for the Legislature." *Id.*

115. *See Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972).

116. *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 434-35, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978).

117. *See supra* note 1.

118. *See supra* notes 18-19 and accompanying text.

119. *See supra* note 47.

financial cost of a safer design and the lack of adverse consequences to the product and the consumer, by presenting evidence of subsequent remedial design modifications.

C. Subsequent Remedial Design Modifications May Be Used To Establish the Existence and Feasibility of Safer, Alternative Designs

The evidentiary provisions of the California Evidence Code¹²⁰ that preclude the introduction of a manufacturer's subsequent remedial design modifications or precautions in a negligence case¹²¹ do not apply to an action based on strict liability.¹²² Therefore, it is admissible that the manufacturer changed the method of making the product, altered the product's design in order to make it safer, or employed existing safety measures after the injury in question took place.¹²³ The practical significance of such a rule of evidence in a products action is that the rule operates to place the defendant-manufacturer in a no-win position: The manufacturer must redesign the product in order to prevent future injuries¹²⁴ and continue the product line, but the reintroduction of the improved design creates demonstrable evidence not only of the excessive danger inherent in the prior design, but also the feasibility of designing a superior product through the employment of existing technology.¹²⁵ Moreover, it is of no consequence that the manufacturer complied with the state of the art¹²⁶ or the general industry standards utilized by other manufacturers:¹²⁷ The manufacturer's reasonableness

120. See CAL. EVID. CODE §1151.

121. Evidence of subsequent repairs is generally inadmissible in products actions predicated upon negligence. See *id.*

122. See *id.*; *Ault v. Int'l Harvester Co.*, 13 Cal. 3d 113, 119, 528 P.2d 1148, 1151, 117 Cal. Rptr. 812, 815 (1974); *Spradley*, *supra* note 51, at 431-33; B. WITKIN, CALIFORNIA EVIDENCE 2d, *Circumstantial Evidence* §385A, at 146-47 (Supp. 1982). The provisions of the Evidence Code were designed for cases involving the defendant's negligence or culpable conduct; thus, the exclusion of subsequent remedial repairs is not appropriate in strict liability actions where negligence or culpability is irrelevant.

123. See *supra* notes 121-22 and accompanying text. An increasing number of jurisdictions are now permitting evidence of alternative designs and subsequent modifications in strict liability actions. See generally *Caprara v. Chrysler Corp.*, 436 N.Y.S.2d 251 (1981); *Farner v. Paccar Inc.*, 562 F.2d 518 (8th Cir. 1977); *Calio*, *Significant Recent Developments in Products Liability Law*, 17 FORUM 112 (1982); Note, *The Admissibility of Subsequent Remedial Measures in Strict Liability Actions: Some Suggestions Regarding Federal Rule of Evidence 407*, 39 WASH. & LEE L. REV. 1415 (1982); *Davis*, *Evidence of Post Accident Failures, Modifications, and Design Changes in Products Liability Litigation*, 6 ST. MARY'S L.J. 792 (1975).

124. As a general proposition, a manufacturer who has taken all reasonable precautions to correct his error may succeed in absolving himself from potential future liability. See generally *Balido v. Improved Machinery Co.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973).

125. See *infra* notes 129-36 and accompanying text.

126. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-34, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). *But cf.* *Spradley*, *supra* note 51, at 343 *passim*.

127. See generally *Horn v. G.M. Corp.*, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433; *Jiminez v. Sears, Roebuck & Co.*, 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971). See also *Rexrode v. American Laundry Press Co.*, 674

in choosing a particular design is not relevant to the determination of whether that design could have been made safer.¹²⁸ Ostensively, the very existence of an improved design may be utilized by the plaintiff to show, comparatively, that the prior design was deficient.¹²⁹ Presented with this kind of evidence, the manufacturer may neither assert that the plaintiff should have been aware of the improved design,¹³⁰ nor claim that the defect was obvious¹³¹—neither consideration is germane to the determination of defective design under the second prong of the *Barker* test.¹³² Clearly, the most topical application of this argument is in relation to the subsequent redesign of Extra-Strength Tylenol.

Subsequent to the criminal tampering of the original product, Tylenol was quickly reintroduced¹³³ with a vastly improved design that incorporated several safety features specifically designed to prevent future criminal tampering.¹³⁴ Apparently, the plaintiffs who have filed suit against the manufacturer of Tylenol may argue that the existence of the improved product design virtually establishes the second set of relevant policy factors required by *Barker*.¹³⁵ The plaintiff's expert could testify, by comparative resort to the reparatory design, that safer alternative designs were, in fact, not only technologically feasible but also capable of adoption with a minimum of cost and aberration to the product.¹³⁶ Next, the plaintiff may attempt to establish causation by pointing to the lack of the improved design as a proximate cause of the injury.

F.2d 826 (10th Cir. 1982); *Page v. Barko Hydraulics*, 673 F.2d 134 (5th Cir. 1982); *Halloway v. J.B. Systems Ltd.*, 609 F.2d 1069 (3d Cir. 1979).

128. See *supra* notes 43-45 and accompanying text. As a result, the manufacturer may be strictly liable notwithstanding the fact that he utilized the best design or materials available when the product was first designed or manufactured. See *Vandall, supra* note 24, at 74-75; *Spradley, supra* note 51, at 417-33; 4 U.S. DEP'T OF COMMERCE, INTER-AGENCY TASK FORCE ON PRODUCT LIABILITY, 91 (1977). This has resulted in legislative modifications of products liability law in several states. See *Vandall, supra* note 24, at 74-75.

129. See *infra* notes 133-36 and accompanying text.

130. See *supra* notes 54-69 and accompanying text.

131. The California Supreme Court dispensed with the "latent-patent" distinction in strict liability actions altogether when it held that "[r]equiring the defect to be latent would severely limit the cases in which the financial burden would be shifted to the manufacturer." *Luque v. McLean*, 8 Cal. 3d 136, 144-45, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972). See *Traynor, supra* note 24, at 371.

132. See *supra* notes 54-69 and accompanying text.

133. The manufacturers of Extra-Strength Tylenol replaced the tampered product with an improved design within three months. See *supra* note 9. The California Supreme Court noted in *Ault v. Int'l Harvester Co.*, 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974), that evidence of subsequent remedial repairs may illustrate the feasibility of the improvement "if the changes occur closely in time. . . ." *Id.* at 119, 528 P.2d at 1151, 117 Cal. Rptr. at 815.

134. See *supra* note 9.

135. See *supra* notes 61-69 and accompanying text. California courts have held that the product includes the container or packaging thereof, such that it too must be safe. *Wade, The Nature of Strict Tort Liability, supra* note 27, at 849. See generally *Vallis v. Canada Dry Ginger Ale, Inc.*, 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (1961).

136. See *supra* notes 61-69 and accompanying text.

D. The Lack of A Safer, Alternative Design May Be Sufficient to Establish Proximate Causation

Utilization of the *Barker* analysis requires that the plaintiff present a prima facie case of causation.¹³⁷ The plaintiff must present a sufficient quantum of evidence to allow a jury to find that the defectively designed product was a proximate cause of the plaintiff's harm.¹³⁸ Once the existence of a defect has been established, it is generally sufficient that the plaintiff show the defective design to have been a substantial factor in causing the injury in order to shift the burden of proof to the defendant.¹³⁹ Frequently, the plaintiff seeks to accomplish this on the basis of the manufacturer's failure to include a particular safety precaution in the design of the product.¹⁴⁰ The plaintiff argues that had the design of the product been otherwise, he would more probably than not have escaped injury.¹⁴¹ Several recent decisions may be indicative as to the quantum of evidence necessary to establish the plaintiff's prima facie case of causation under *Barker* with respect to criminally tampered products.

In *Campbell v. General Motors Corporation*,¹⁴² the plaintiff was injured when the city bus in which she was traveling made a sharp turn and hurled her to the ground. The plaintiff alleged that the bus was defectively designed in that it lacked handrails within reasonable proximity, and that this defect was a proximate cause of the injury.¹⁴³ The California Supreme Court, after establishing that the plaintiff need not disprove every possible alternative explanation of the injury in order to have the case submitted to the jury,¹⁴⁴ held that it was sufficient that the plaintiff present just enough factual evidence to allow a jury to reasonably infer that had the design of the bus been otherwise, the plaintiff would probably not have been injured.¹⁴⁵ The court noted that taking the case from the jury merely because the plaintiff could not conclu-

137. See *Campbell v. G.M. Corp.*, 32 Cal. 3d 112, 119, 649 P.2d 224, 228, 184 Cal. Rptr. 891, 895 (1982); *McGee v. Cessna Aircraft Co.*, 83 Daily Journal D.A.R. 228, 229 (1982); WITKIN, *supra* note 29, §833, at 3128-30. Professor Wade states that the causation element in strict liability is considerably more narrow than in negligence. Wade, *Liability of Manufacturers*, *supra* note 25, at 22-23.

138. See *supra* notes 54-69 and accompanying text.

139. See 32 Cal. 3d 112, 125, 649 P.2d 224, 232, 184 Cal. Rptr. 891, 899. See generally *Horn v. G.M. Corp.*, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); 83 Daily Journal D.A.R. 228.

140. See generally 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891; *Henderson v. Harnischfeger Corp.*, 12 Cal. 3d 663, 527 P.2d 353, 117 Cal. Rptr. 1 (1974); 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 443; *Luque v. McLean*, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); *Balido v. Improved Machinery Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972).

141. See *supra* note 102.

142. 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).

143. *Id.* at 116, 649 P.2d at 226, 184 Cal. Rptr. at 893.

144. *Id.* at 121, 649 P.2d at 229, 184 Cal. Rptr. at 896.

145. *Id.* at 122, 649 P.2d at 230, 184 Cal. Rptr. at 897. See generally *Dimond v. Caterpillar*

sively prove that the existence of a safety precaution would have prevented the injury would allow the manufacturer to prevail upon the basis of his failure to provide the required safeguard.¹⁴⁶ Moreover, the court noted that such a holding would be in contravention of the underlying policy rationales of strict liability that favor protection of otherwise defenseless consumers, spreading the risk, and providing an incentive to manufacturers to develop safer products.¹⁴⁷ Similarly, in *Dimond v. Caterpillar Tractor, Company*,¹⁴⁸ wherein the plaintiff was unable to establish any direct evidence of a causal link between the defect and his injury, the appellate court allowed an inference of proximate cause by circumstantial evidence in light of the strict liability policy favoring injured plaintiffs in the area of proof.¹⁴⁹ If these cases can be viewed as demonstrative of the general trend of products law with respect to causation, the courts appear to be relying more on the underlying policies of strict liability and inferences of proximate causation rather than on complicated evidentiary or causative analyses.¹⁵⁰ Apparently, the judiciary would have to greatly controvert its holdings to date in order to deny liability for criminally tampered products on the basis of causation. Moreover, the jury should in every case be given the opportunity to decide the social utility of the product as well as the cause of the injury.

Finally, the whole of the strict liability policies, which forcibly advocates protecting and securing consumer interests,¹⁵¹ strongly favors jury resolution whenever the evidence can be interpreted to support the plaintiff's position.¹⁵² Thus, once the plaintiff introduces evidence that he was injured while using a criminally tampered product in a reasonably foreseeable manner, and that the avoidance of harm was frus-

Tractor Co., 65 Cal. App. 3d 173, 134 Cal. Rptr. 895 (1976); B. WITKIN, CALIFORNIA EVIDENCE 2d, *Circumstantial Evidence* §1133, at 1050-51.

146. 32 Cal. 3d 112, 121, 649 P.2d 224, 229, 184 Cal. Rptr. 891, 896. See generally Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).

147. 32 Cal. 3d 112, 121-22, 649 P.2d 224, 229-30, 184 Cal. Rptr. 891, 896-97. See *supra* notes 47-53 and accompanying text.

148. 65 Cal. App. 3d 173, 134 Cal. Rptr. 895 (1976).

149. *Id.* at 183, 134 Cal. Rptr. at 902.

150. See *supra* notes 137-49 and accompanying text. Professor Vandall posits that any proximate cause analysis in strict liability design defect actions is redundant and misleading: Vandall notes that since the findings of both proximate cause and defective design invoke identical policy considerations, the social policy issue is asked and answered once the trier of fact ascertains the existence of a defectively designed product. Vandall, *supra* note 24, at 75. See Wade, *The Nature of Strict Tort Liability*, *supra* note 27, at 837-41; Green, *supra* note 24, at 758-59.

151. See *supra* notes 47-53 and accompanying text.

152. See Campbell v. G.M. Corp., 32 Cal. 3d 112, 126, 649 P.2d 224, 230-31, 184 Cal. Rptr. 891, 897-98 (1982); Dimond v. Caterpillar Tractor Co., 65 Cal. App. 3d 173, 183, 134 Cal. Rptr. 895, 901-02 (1976); Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 573 (1980); Prosser, *Proximate Cause*, *supra* note 102, at 382-83. See generally Self v. G.M. Corp., 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974); Donahue v. United Artists Corp., 2 Cal. App. 3d 794, 83 Cal. Rptr. 131 (1970).

trated by the absence of a feasible alternative design, the jury should, in every case, be given the opportunity to render a decision as to the adequacy of the design of the particular product.¹⁵³ This follows *a fortiori* when the injury that occurs is precisely the kind of harm that the safety precaution was designed to prevent.¹⁵⁴ In addition, automatic jury resolution ameliorates one of the frequent criticisms in design defect cases that such actions almost invariably emphasize a single aspect of the product's design, such as lack of a safety precaution, to the exclusion of all other considerations.¹⁵⁵ While it may be true that the litigation of a lawsuit is a very poor way to design a product,¹⁵⁶ the weighing and balancing of policy considerations that the jury employs in its determination of defective design necessarily include the societal value of the product as a whole.¹⁵⁷

In summary, it may be established that the strict liability cause of action for products rendered defective through criminal tampering may succeed. The general policy of the judiciary is to strongly support injured plaintiffs in their quest for relief from the dangers of defective products,¹⁵⁸ and the underlying policy rationales of strict liability forcibly mandate consumer recovery in virtually every instance in which a *prima facie* case may be established.¹⁵⁹ The plaintiff may seek to establish a *prima facie* case under the second prong of the *Barker* analysis by demonstrating the dangerousness of the environment and the crashworthiness analogue,¹⁶⁰ and by comparative resort to subsequent design modifications.¹⁶¹ The plaintiff may demonstrate the causal relation between the defective design and the injury by a circumstantial showing that existence of an improved design would, more probably than not, have saved the plaintiff from injury.¹⁶² Since the elements of proof necessary to establish a strict liability cause of action for defective design may also establish the manufacturer's negligence as well,¹⁶³ an injured plaintiff may proceed on an alternative theory of recovery

153. See 32 Cal. 3d 112, 125-26, 649 P.2d 224, 230-31, 184 Cal. Rptr. 891, 899.

154. See *id.*

155. See generally *Daly v. G.M. Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); 42 Cal. App. 3d 1, 116 Cal. Rptr. 575; *Dreisonstak v. Volkswagenwerk A.G.*, 489 F.2d 1066 (4th Cir. 1974).

156. See 42 Cal. App. 3d 1, 7, 116 Cal. Rptr. 575, 579. See generally Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COL. L. REV. 1531 (1973).

157. See 20 Cal. 3d 725, 746-47, 575 P.2d 1162, 174-75, 144 Cal. Rptr. 380, 392-93; WITKIN, *supra* note 29, §816 at 342.

158. See *supra* notes 70-100 and accompanying text.

159. See *supra* notes 70-100 and accompanying text.

160. See *supra* notes 108-19 and accompanying text.

161. See *supra* notes 120-36 and accompanying text.

162. See *supra* notes 137-50 and accompanying text.

163. See *supra* note 32.

that considers the manufacturer's failure to design a reasonably safe product as the basis for liability.

NEGLIGENCE LIABILITY FOR PRODUCTS

Although the strict liability cause of action has apparently eclipsed the field of products liability in recent years,¹⁶⁴ the doctrine of negligence continues to be a viable basis for recovery in products actions: many attorneys are more familiar with the negligence cause of action, and evidence of unreasonable behavior frequently results in higher jury awards.¹⁶⁵ Since the landmark case of *MacPherson v. Buick Motor Company*,¹⁶⁶ negligence principles in products actions have remained relatively constant insofar as the plaintiff is required to present the same basic case for a product recovery as for a traditional negligence recovery.¹⁶⁷ Generally, a plaintiff must allege five constituent elements in order to establish a prima facie case:¹⁶⁸ 1) a duty requiring the defendant to conform to a certain standard of conduct designed to protect the plaintiff from an unreasonable risk of harm; 2) a breach of that duty; 3) the breach as the actual cause of the harm; 4) the breach as the proximate cause of the harm; and 5) actual damages to the plaintiff.¹⁶⁹ Of these five elements, duty and proximate cause comprise the bulwark of the negligence analysis; consequently, these two concepts receive the most attention from the courts,¹⁷⁰ and California decisions frequently treat both duty and proximate cause as synonymous in many instances.¹⁷¹ Both elements are linked by the integral concept of foreseeability.

164. See *supra* notes 39-46 and accompanying text. Compare Wade, *The Nature of Strict Tort Liability*, *supra* note 27, at 825 (referring to negligence as a secondary line of attack).

165. See Green, *supra* note 24, at 1187 n.5, 1187-1213; PROSSER, *supra* note 11, at 644. See generally Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 482 P.2d 687, 93 Cal. Rptr. 769 (1971).

166. 217 N.Y. 382, 111 N.E. 1050 (1916). Judge Cardozo successfully overturned the prevailing view of nonliability and set forth the rule that "if the nature of a thing is such that it is reasonably certain to place life and limb in peril if negligently made, it is then a thing of danger." *Id.* at 389, 111 N.E. at 1053.

167. See *infra* notes 168-69 and accompanying text.

168. See Vandall, *supra* note 24, at 65-66; PROSSER, *supra* note 11, at 143-44, 236-50; WITKIN, *supra* note 29, §488, at 2749-50. Dean Prosser adds the additional requirement of an act, or failure to act when such is required. PROSSER, *supra* note 11, at 143-44, 236-50.

169. See e.g., *Beauchene v. Synanon Foundation Inc.*, 88 Cal. App. 3d 342, 345-46, 151 Cal. Rptr. 796, 797 (1979); Vandall, *supra* note 24, at 65-66; PROSSER, *supra* note 11, at 143-44, 236-50; WITKIN, *supra* note 29, §488, at 2749-50.

170. Duty and proximate cause receive primary attention from the courts because both issues may generally constitute threshold questions of law, rather than of fact. See generally *Goodman v. Kennedy*, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976); *Weirum v. R.K.O. General, Inc.*, 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975); 88 Cal. App. 3d 343, 151 Cal. Rptr. 796.

171. See *Tarasoff v. The Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 433-34, 555 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976); *Tara v. Cal. State Auto Ass'n.*, 93 Cal. App. 3d 227, 231, 155 Cal. Rptr. 497, 499 (1979); 88 Cal. App. 3d 342, 347, 151 Cal. Rptr. 796, 798; PROSSER, *supra* note 11, at 244-45, 325-26.

A. *Duty, Proximate Cause, and the Concept of Foreseeability*

In order to recover for an injury caused by a criminally tampered product, the plaintiff must demonstrate that the defendant-manufacturer acted unreasonably in designing a product that was inordinately susceptible to criminal tampering.¹⁷² Basically, the plaintiff must show that the defendant was under a duty not to subject the plaintiff to the risk of criminally tampered products, that the failure to do so constituted the proximate cause of the resulting injury, and that the risk of criminal tampering was reasonably foreseeable under the circumstances.¹⁷³ Although no rigid or definitive rule may be set forth conclusively establishing the existence of a specific duty,¹⁷⁴ California courts have enunciated a series of policy factors which, taken in the aggregate, may lead a court to conclude that the plaintiff was entitled to protection.¹⁷⁵ These policy considerations are: the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff would suffer injury; the closeness of connection between the defendant's act and the plaintiff's injury; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the defendant's burden and the consequences to the community of imposing a duty; and the availability of insurance.¹⁷⁶ Taken in sum, these factors demonstrate that the ultimate imposition of a specific duty is inherently a question of policy and judicial fairness with respect to a given factual situation.¹⁷⁷ Although an in-depth discussion of the tangled maze of conflicting themes and theories that constitutes proximate cause is beyond the scope of this comment,¹⁷⁸ the traditional imposition of liability

172. See *infra* notes 268-80 and accompanying text.

173. See *infra* notes 235-302 and accompanying text; Note, 24 MINN. L. REV. 666, 670-80 (1941) [hereinafter referred to as Note].

174. See *Bigbee v. Pac. Tel. & Tel. Co.*, 131 Cal. App. 3d 999, 1010-11, 183 Cal. Rptr. 535, 541-42 (1982). Duty is often referred to as the indispensable precondition to liability predicated upon negligence. See *id.*; *McEvoy v. American Pool Corp.*, 32 Cal. 2d 295, 298-99, 195 P.2d 783, 785-86 (1948).

175. See *infra* note 176. Duty is not sacrosanct in itself, but is only an expression of the sum total of judicial policy factors that may eventually give rise to liability. See *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968); 131 Cal. App. 3d 999, 1011, 183 Cal. Rptr. 535, 542-43.

176. See 17 Cal. 3d 425, 434, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23; *Connor v. Great Western Savings & Loan Ass'n.*, 69 Cal. 2d 850, 865, 447 P.2d 609, 617, 73 Cal. Rptr. 369, 377 (1968); *Rowland v. Christian*, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968); *Valdez v. J.D. Diffenbaugh Co.*, 51 Cal. App. 3d 494, 507, 124 Cal. Rptr. 467, 475 (1975). *Accord*, *Smith v. Arbaugh's Restaurant Inc.*, 469 F.2d 97, 100-02 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).

177. See *Totton v. More Oakland Residential Housing, Inc.*, 63 Cal. App. 3d 538, 545, 134 Cal. Rptr. 29, 34 (1976); Comment, *Criminal Acts*, *supra* note 2, at 427-76; PROSSER, *supra* note 11, at 244.

178. Reflective commentary upon the whys and wherefors of proximate causation are legion; for a good cross-section of the multitudinous array of materials, see generally PROSSER, *supra* note 11, at 236-90; Prosser, *Proximate Cause*, *supra* note 102, at 369; Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. (pts. 1, 2, and 3) 471, 621, 755 (1950); Gregory, *Proximate Cause*

ity for causes of action involving criminally intervening acts almost invariably includes a discussion of proximate causation.¹⁷⁹ Practically, proximate cause has little to do with causation;¹⁸⁰ rather, it is, like the determination of duty,¹⁸¹ a question of judicial policy whereby the courts attempt to limit the extent of a defendant's liability and to control the scope of the deliberations of the jury.¹⁸² Intrinsic to a determination of both duty and proximate cause is the inchoate threat of foreseeability, which runs through both analyses, albeit in different ways.¹⁸³

Of the enumerated policy considerations that will give rise to a specific duty,¹⁸⁴ the foreseeability of harm to the plaintiff is of primary importance.¹⁸⁵ The concept of foreseeability operates within the framework of a duty analysis to both establish a particular duty,¹⁸⁶ and, thereafter, to limit the character of that duty by restricting the scope of the defendant's responsibility with respect to certain kinds of extraordinary injuries.¹⁸⁷ Since this second facet of the duty analysis functions in much the same manner as the proximate cause formulation,¹⁸⁸ it has

in Negligence—A Retreat from "Rationalization", 6 U. CHI. L. REV. 36 (1938); Green, *The Rationale of Proximate Cause* (1927).

179. See Prosser, *Proximate Cause*, *supra* note 102, at 398. See generally Case Note, 33 TENN. L. REV. 407 (1966); Freezer & Favour, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635 (1940); Note, *supra* note 173, at 666; Eldridge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121 (1937).

180. See Vandall, *supra* note 24, at 67-69; PROSSER, *supra* note 11, at 244-45; Prosser, *Proximate Cause*, *supra* note 102, at 391-98; WITKIN, *supra* note 29, §622, at 2904. As Dean Prosser has noted, California decisional law indicates

that 'proximate cause' covers a multitude of sins, that it is a complex term of highly uncertain meaning under which other rules, doctrines, and reasons lie buried, and that at least in many cases there is no real question of causation at all.

PROSSER, *supra* note 11, at 244-45; Prosser, *Proximate Cause*, *supra* note 102, at 374-75.

181. See *supra* notes 173-77 and accompanying text.

182. See Vandall, *supra* note 24, at 67; PROSSER, *supra* note 11, at 236-45; Prosser, *Proximate Cause*, *supra* note 102, at 398; Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19, 22 (1936); WITKIN, *supra* note 29, §622, at 2904.

183. See *infra* notes 184-203 and accompanying text. Generally, the prediction of liability predicated upon negligence requires evidence from which a finding can reasonably be made that the injury was foreseeable, and that the probable occurrence and seriousness of the harmful consequence were sufficient to require the taking of precautions that the manufacturer did not take in order to satisfy the standard of reasonableness. See Keeton, *Products Liability*, *supra* note 27, at 28. Unfortunately, the principle of foreseeability is an elusive and overworked concept, the nebulousness of its definition being exceeded only by the disparity of its application. See Vandall, *supra* note 24, at 67-68.

184. See *supra* notes 175-76 and accompanying text.

185. See *Coulter v. Superior Court*, 21 Cal. 3d 144, 147, 577 P.2d 669, 670, 145 Cal. Rptr. 534, 535 (1978); *Dillon v. Legg*, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968); *Bigbee v. Pac. Tel. & Tel. Co.*, 131 Cal. App. 3d 999, 1013, 183 Cal. Rptr. 535, 543 (1982).

186. See 131 Cal. App. 3d 999, 1012, 183 Cal. Rptr. 535, 543; PROSSER, *supra* note 11, at 267-75; Comment, *Criminal Acts*, *supra* note 2, at 471-72; see also *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 862 (5th Cir. 1967).

187. The practice of limiting the scope of duty by resort to foreseeability was first established in the landmark case of *Palsgraf v. Long Island Ry. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

188. Compare *supra* notes 173-177 and accompanying text (duty) with *supra* notes 178-182 and accompanying text (proximate cause).

been suggested that liability should be predicated upon the sole measure of duty.¹⁸⁹ California decisional law in the area of criminally intervening acts tends to support this proposition,¹⁹⁰ and California courts have frequently emphasized the existence of a duty as determinative in cases involving criminal activity.¹⁹¹

B. *The Law of Intervening Acts*

One of the greatest hurdles the plaintiff must overcome in seeking recovery for an injury caused by a criminally tampered product is the classification of the criminal intervention as a superseding cause of the harm.¹⁹² Generally, an intervening act is one that actively operates in causing the plaintiff's injury after the original act of the defendant has already occurred.¹⁹³ A superseding cause will operate to break the chain of causation between the original act of the defendant and the plaintiff's injury by becoming the proximate cause of the resulting harm and thereby relieving the defendant from liability for the original

189. See *Vandall*, *supra* note 24, at 67-68; *Green*, *supra* note 24, at 774; PROSSER, *supra* note 11, at 244-45; Prosser, *Proximate Cause*, *supra* note 102, at 412-13; L. GREEN, *THE DUTY PROBLEM IN NEGLIGENCE CASES* 755-56, 772-76 (1928).

190. See generally *Tarasoff v. The Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); *Gibson v. Garcia* 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1969); *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 157 P.2d 372 (1945); Comment, *California Approach*, *supra* note 2, at 547; *Bazyler*, *supra* note 1, at 737-40.

191. See *supra* note 190. The ill-fated attempt by the California Supreme Court to impose "dram shop liability" on tavern owners for the consequences of their inebriated patrons presents an illustrative example of this policy. See generally *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976); *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). Rejecting traditional notions of proximate cause as inapplicable, the court imposed liability predicated upon an extensive concept of duty. As the California Supreme Court noted in *Vesely*, "[t]o the extent that the common law rule of nonliability is based on concepts of proximate cause, we are persuaded by the reasoning of the cases that have abandoned the rule." 5 Cal. 3d 153, 163, 486 P.2d 151, 158, 95 Cal. Rptr. 623, 630. Moreover, "[t]he central question in this case, therefore, is not one of proximate cause, but rather one of duty . . ." *Id.* at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631; see Comment, *California Approach*, *supra* note 2, at 538-40. Although the Legislature subsequently overturned these decisions, CAL. CIV. CODE §1714(b),(c), the judicial attempt is nonetheless indicative of the court's ability to stress notions of duty whenever a compelling social policy issue is at stake.

192. Initially, the issue appears to be whether the defendant shall be liable for an injury to which he has substantially contributed, but for which he may not be liable due to a subsequent cause of independent origin which actually causes the harm. However, the issue of superseding causes is essentially a question of whether the defendant shall be relieved of responsibility; in fact, the ultimate determination is generally one of judicial policy. Prosser, *Proximate Cause*, *supra* note 102, at 398. See *id.* at 401; PROSSER, *supra* note 11, at 270-72, 283; Note, *supra* note 173, at 407; Freezer & Favour, *supra* note 179, at 642-49. See generally *Eldridge*, *supra* note 179, at 121; Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934).

193. See RESTATEMENT (SECOND) OF TORTS §441; PROSSER, *supra* note 11, at 271; Prosser, *Proximate Cause*, *supra* note 102, at 399; WITKIN, *supra* note 29, §§627-48 at 2909-28. Intervening acts may be either dependent or independent: the former operates in response or in reaction to the original actor's conduct, whereas the latter functions from an independent origin not stimulated by the original actor's conduct. RESTATEMENT (SECOND) OF TORTS §441, comment c (1965).

conduct.¹⁹⁴ The general test as to whether a particular act supersedes is the reasonable foreseeability of harm to the defendant.¹⁹⁵ Historically, California courts have been reluctant to impose liability for the results of criminally intervening acts,¹⁹⁶ citing the relative unforeseeability of crime in general.¹⁹⁷ However, the modern trend of the law appears to be to the contrary,¹⁹⁸ and numerous decisions have uniformly rejected the notion that criminally intervening conduct must automatically cut off liability for the original conduct.¹⁹⁹ Rather, the current approach is that an intervening act will not operate to relieve an otherwise culpable defendant from liability if the act or risk thereof was reasonably foreseeable,²⁰⁰ irrespective of whether the intervening agency was criminal, negligent, or innocent.²⁰¹ Thus, California courts have recognized that

194. See *Bigbee v. Pac. Tel. & Tel. Co.*, 131 Cal. App. 3d 999, 1014, 183 Cal. Rptr. 535, 544 (1982); RESTATEMENT (SECOND) OF TORTS §§440-442 (1965); Note, *supra* note 173, at 668.

195. See 131 Cal. App. 3d 999, 1014, 183 Cal. Rptr. 535, 544-45; *Pappert v. San Diego Gas & Elec. Co.*, 137 Cal. App. 3d 205, 210, 186 Cal. Rptr. 847, 850 (1982); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 316-17, 59 Cal. Rptr. 463, 472 (1967); PROSSER, *supra* note 11, at 270-72, 647-48; Eldridge, *supra* note 179, at 125; RESTATEMENT (SECOND) OF TORTS §§440-447; WITKIN, *supra* note 29, §§629-643 at 2910-12, 2922-23. See generally *Gill v. Epstein*, 62 Cal. 2d 611, 401 P.2d 397, 44 Cal. Rptr. 45 (1965); *McEvoy v. American Pool Co.*, 32 Cal. 2d 295, 195 P.2d 783 (1948). The foreseeability required is that of risk of harm, not of the particular intervening act; thus, if the defendant's conduct was a substantial factor in bringing about the injury, he may be liable despite the fact that he neither foresaw or should have foreseen either the extent of the harm or the precise manner in which it occurred. See RESTATEMENT (SECOND) OF TORTS §435 (1965); WITKIN, *supra* note 29, §629, at 2911-12 (citing cases). See generally *Taylor v. Oakland Scavenger Co.*, 17 Cal. 2d 594, 110 P.2d 1044 (1941); *Gibson v. Garcia*, 96 Cal. App. 2d 681, 216 P.2d 119 (1950).

196. The approach of older cases was that intervening criminal acts were simply less foreseeable than intervening negligent acts, and therefore to be regarded as superseding causes. See Comment, *Criminal Acts*, *supra* note 2, at 464; Prosser, *Proximate Cause*, *supra* note 102, at 369; WITKIN, *supra* note 29, §642, at 2921-22. The courts often took refuge in antiquated theories of law such as the "last human wrongdoer" rule, and other vestiges of anachronistic jurisprudence. See Comment, *Criminal Acts*, *supra* note 2, at 464; PROSSER, *supra* note 11, at 247; Eldridge, *supra* note 179, at 124. See, e.g., *Stasilat v. Pac. Gas & Elec. Co.*, 8 Cal. 2d 631, 67 P.2d 678 (1937); *Hale v. Pac. Tel. & Tel. Co.*, 42 Cal. App. 55, 183 P. 280 (1919).

197. See generally *Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954); *Kane v. Hartford Accident & Indem. Co.*, 98 Cal. App. 3d 350, 159 Cal. Rptr. 446 (1979); *Brooker v. El Encino Co.*, 216 Cal. App. 2d 598, 31 Cal. Rptr. 24 (1963); *Holder v. Reber*, 146 Cal. App. 2d 557, 304 P.2d 204 (1956).

198. The view that a criminally intervening act is *ipso facto* a superseding cause has been rejected by California courts as an illogical and undesirable formula. Authorities point out that in many instances the very reason why the defendant is negligent is that his conduct creates the risk of criminal intervention, and it is, therefore, absurd to invoke the very fact that established culpability in order to absolve the defendant from negligence. See *infra* notes 283-297 and accompanying text; Prosser, *Proximate Cause*, *supra* note 102, at 398-408; Harper & Kime, *supra* note 192, at 898; RESTATEMENT (SECOND) OF TORTS §§440-449 (1965); WITKIN, *supra* note 29, § 643 at 2922-23.

199. See generally *Tarasoff v. The Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 93 Cal. Rptr. 630 (1971); *Landeros v. Flood*, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976); *Schwartz v. Helms Bakery Ltd.*, 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967); *McEvoy v. American Pool Co.*, 32 Cal. 2d 295, 195 P.2d 783 (1948); *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 157 P.2d 372 (1945); *Richardson v. Ham*, 44 Cal. 2d 772, 285 P.2d 269 (1955); *Campodonico v. State Auto Parks*, 10 Cal. App. 3d 803, 89 Cal. Rptr. 270 (1970); *Gibson v. Garcia*, 96 Cal. App. 2d 681, 216 P.2d 119 (1950); *Terrell v. Key Systems*, 69 Cal. App. 2d 682, 159 P.2d 704 (1945); *supra* note 8.

200. See *supra* note 195.

201. *Freezer & Favour*, *supra* note 179, at 639-42; Eldridge, *supra* note 179, at 125-33; Harper

criminal activity is to be expected in many instances,²⁰² and decisional law is replete with cases imposing liability for the criminally intervening conduct of others.²⁰³ Next, this comment will address the two broad areas of law with which to establish a manufacturer's duty to protect consumers from criminally tampered products: The establishment of special relationships and the general policy considerations underlying the concept of duty.

C. *Negligence Liability for Criminal Activity*²⁰⁴

Generally, negligence liability for criminally intervening activity has been premised upon the breach of a duty arising from either various "special relationships" formed between the plaintiff and the defendant,²⁰⁵ or from the general policy considerations underlying the concept of duty.²⁰⁶ The determination as a matter of law that no duty existed is particularly common in cases involving a defendant's responsibility for criminal acts.²⁰⁷ Therefore, the establishment of a duty to protect consumers from the risk of product tampering at the outset is of critical importance in attempting to present the case to the jury. First, the plaintiff may allege that there exists a special relationship between himself and the defendant.

1. *Special Relationships That Give Rise to a Duty*

There is no duty at common law to anticipate the criminal acts of others.²⁰⁸ Generally, the reasonable person may assume that most people will obey the criminal law,²⁰⁹ and is, therefore, under no corre-

& Kime, *supra* note 192, at 898; Bohlen, *supra* note 12, at 1229; RESTATEMENT (SECOND) OF TORTS §§302B, 442A, 447-449 (1965); WITKIN, *supra* note 29, §643, at 2922-23 (citing cases).

202. *See supra* note 199.

203. *See supra* note 199.

204. Dean Freezer has posed the issue of a defendant's liability for intervening criminal acts as follows: "Shall one who by his negligence has set a stage upon which a third person commits a crime be responsible to the person suffering loss or injury from the crime?" Freezer & Favour, *supra* note 179, at 637.

205. *See infra* notes 208-230 and accompanying text.

206. *See infra* notes 231-33 and accompanying text.

207. *Bigbee v. Pac. Tel. & Tel. Co.*, 131 Cal. App. 3d 999, 1010, 183 Cal. Rptr. 535, 545 (1982).

208. *See Tarasoff v. The Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976); Comment, *Criminal Acts*, *supra* note 2, at 462-65; Bazylar, *supra* note 1, at 735; PROSSER, *supra* note 11, at 173-76, 340-41; Harper & Kime, *supra* note 192, at 887 RESTATEMENT (SECOND) OF TORTS §315 (1965). The common law rule derived from the historical distinction between misfeasance and nonfeasance and the equally traditional reluctance by the courts to impose liability for the latter; thus, one may watch another drawn with impunity. Harper & Kime, *supra* note 192, at 887. 17 Cal. 3d 425, 435 n.5, 551 P.2d 334, 343 n.5, 131 Cal. Rptr. 14, 23 n.5. Comment, *Criminal Acts*, *supra* note 2, at 467; Bazylar, *supra* note 1, at 735; PROSSER, *supra* note 11, at 339-40; RESTATEMENT (SECOND) OF TORTS §315 (1965). *See generally* Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908).

209. *See* Comment, *Criminal Acts*, *supra* note 2, at 464-66; PROSSER, *supra* note 11, at 173-76, 340-41.

sponding duty to protect others against the risk of criminal conduct.²¹⁰ As a result, the law has traditionally carved out a series of exceptions, or special relationships, the breach of which may give rise to liability for negligence.²¹¹ These relationships are generally predicated upon the element of control or influence inherent in the relationship which the defendant occupies with respect to the plaintiff.²¹² The *Restatement (Second) of Torts* (hereinafter referred to as the *Restatement*) has classified several relationships as special in this regard,²¹³ and this comment submits that the entire issue of a manufacturer's liability for criminally intervening acts may be particularly suited to the special relationship analysis.²¹⁴ Utilizing the rules set forth in Sections 315,²¹⁵ 302B,²¹⁶ 449,²¹⁷ and 448,²¹⁸ California courts have established both duty and

210. See *supra* notes 208-209 and accompanying text.

211. See *Tarasoff v. The Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 434-35, 551 P.2d 334, 342-43, 131 Cal. Rptr. 14, 22-23 (1976); Comment, *Criminal Acts*, *supra* note 2, at 462-63; Bazylar, *supra* note 1, at 734-36; Comment, *California Approach*, *supra* note 2, at 545-52. See generally RESTATEMENT (SECOND) OF TORTS §§314-320 (1965).

212. See Comment, *Criminal Acts*, *supra* note 2, at 468; Bazylar, *supra* note 1, at 736; Comment, *California Approach*, *supra* note 2, at 549-50; RESTATEMENT (SECOND) OF TORTS §320 (1965).

213. See generally RESTATEMENT (SECOND) OF TORTS §§302B (1965), comment e; 314(a), 315, 320. The RESTATEMENT specifically recognizes that there may be additional relationships not enumerated therein. *Id.* §314(a).

214. See RESTATEMENT (SECOND) OF TORTS §302 (1965) comment m; Note, *supra* note 173, at 671-79. California courts have fully accepted the principles of causation as set forth by the Restatement. See, e.g., *McEvoy v. American Pool Corp.*, 32 Cal. 2d 295, 298-99, 195 P.2d 783, 786 (1948); *Stewart v. Cox*, 55 Cal. 2d 857, 863-64, 362 P.2d 345, 348-49, 13 Cal. Rptr. 521, 524-25 (1961); *Pappert v. San Diego Gas & Elec. Co.*, 137 Cal. App. 3d 205, 210, 186 Cal. Rptr. 847, 850 (1982).

215. RESTATEMENT (SECOND) OF TORTS §315 (1965) is as follows:

There is no duty to so control the conduct of a third person as to prevent him from causing physical harm to another unless,

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) a special relation exists between the actor and the other which gives to the other the right of protection.

216. RESTATEMENT (SECOND) OF TORTS §302B (1965) is as follows:

An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

217. RESTATEMENT (SECOND) OF TORTS §449 (1965) is as follows:

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for the harm caused thereby.

The authors of the RESTATEMENT suggest that sections 302B and 449 be read in conjunction so as to give rise to the following rule:

[T]he mere possibility or even likelihood that there may exist intentional or criminal misconduct is not in all cases sufficient to characterize the actor's conduct as negligence. It is only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, or his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent.

Id. §449 comment a.

218. RESTATEMENT Section 448 provides that an individual's criminal act does not constitute a superseding cause under sections 302B and 449:

proximate cause for injuries occasioned by criminal conduct.²¹⁹ The sum of these rules, which generally presuppose some kind of special relationship between the parties,²²⁰ create duties and establish breaches for failure to protect plaintiffs from reasonably foreseeable risks of crime brought about by the defendant's original conduct.²²¹ Basically, the *Restatement* approach posits that if the likelihood that a third party will act in a criminal manner is one of the hazards that renders the defendant's conduct negligent in the first instance, any resulting injury caused by the intervening criminal act will not relieve the defendant from liability.²²²

California courts have expanded the litany of special relationships, and have found liability for criminal acts to exist with respect to common carriers,²²³ innkeepers,²²⁴ landlords,²²⁵ psychotherapists,²²⁶ hospitals,²²⁷ schools,²²⁸ and parole boards.²²⁹ Moreover, the California Supreme Court recently suggested that the appropriate analysis with which to establish a duty to protect another from criminal activity is not by rejecting the common law rule of nonliability, but rather "*by expanding the list of special relationships* which will justify departure

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

219. See *supra* note 199.

220. See RESTATEMENT (SECOND) OF TORTS §449 comment a (1965).

221. See *supra* notes 215-19 and accompanying text.

222. See *supra* notes 215-19 and accompanying text. Not all authorities have been enamored with the RESTATEMENT approach. Dean Freezer noted that "[t]aking the whole title on superseding cause as it appears in the Restatement, the reader is left in greater confusion than if he had not read it." Freezer & Favour, *supra* note 179, at 644.

223. See generally *Terrell v. Key Systems*, 69 Cal. App. 2d 682, 159 P.2d 704 (1945); Comment, *Criminal Acts*, *supra* note 2, at 462-63; Comment, *California Approach*, *supra* note 2, at 545; Bazylar, *supra* note 1, at 735-36. See also *Hanback v. Seaboard Coastline Ry.*, 396 F. Supp. 80 (D.S.C. 1975); *Lillie v. Thompson*, 332 U.S. 459 (1947).

224. See generally *Kingen v. Weyant*, 148 Cal. App. 2d 656, 307 P.2d 369 (1957); Comment, *Criminal Acts*, *supra* note 2, at 462-63; Comment, *California Approach*, *supra* note 2, at 545; Bazylar, *supra* note 1, at 735-36; *Garzilli v. Howard Johnson's Motor Lodges*, 419 F. Supp. 1210 (E.D.N.Y. 1976); *Toblin v. Slutsky*, 506 F.2d 1097 (2d Cir. 1974).

225. See generally *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977); Comment, *Criminal Acts*, *supra* note 2, at 462-63; Comment, *California Approach*, *supra* note 2, at 545; *Ramsay v. Morrisette*, 252 A.2d 509 (D.C. 1969).

226. See generally *Tarasoff v. The Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); Comment, *California Approach*, *supra* note 2, at 545.

227. See generally *Vistica v. Presbyterian Hosp. & Med. Center*, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967); Comment, *California Approach*, *supra* note 2, at 545.

228. See generally *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978); *Dailey v. L.A. Unified School Dist.*, 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970); Comment, *California Approach*, *supra* note 2, at 545; Bazylar, *supra* note 1, at 735-36; *McLeod v. Grant County School Dist.*, 42 Wash. 2d 316, 255 P.2d 360 (1953).

229. See generally *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 353, 73 Cal. Rptr. 240 (1968); *Beauchene v. Synanon Foundation Inc.*, 88 Cal. App. 3d 342, 151 Cal. Rptr. 796 (1979); Comment, *California Approach*, *supra* note 2, at 545.

from that rule.”²³⁰ Thus, the court has explicitly left open the possibility of finding additional special relationships when necessary. The underlying policy considerations of duty may also give rise to a specific duty to protect against criminal activity.

2. *General Considerations of Policy as Establishing The Existence of a Specific Duty*

Although the California courts have suggested that expanding the special relationship rubric may be an appropriate means of establishing liability in the area of intervening criminal conduct,²³¹ decisional law indicates that liability for criminal acts has traditionally been predicated upon the general duty of reasonable care and foreseeability of harm under the circumstances.²³² This approach utilizes the enumerated policy considerations that may give rise to a general duty in order to create a specific duty of care with respect to the protection of innocent plaintiffs from the risk of criminal conduct.²³³

In summary, the crucial element of the existence of a duty may be established through either the special relationship doctrine or the policy considerations underlying the general concept of duty.²³⁴ Next, this comment will demonstrate that both these indicia of duty may give rise to a specific duty to protect consumers from harm caused by criminally tampered products.

A MANUFACTURER MAY BE LIABLE UNDER NEGLIGENCE THEORY FOR INJURIES CAUSED BY CRIMINALLY TAMPERED PRODUCTS

Specifically, in order to hold a manufacturer liable for injuries resulting from a criminally tampered product, the plaintiff should establish that 1) the manufacturer was under a specific duty to protect the plaintiff from injury caused by criminal tampering, 2) the manufacturer breached this duty by his failure to produce and design a product that

230. See *Tarasoff v. The Regent of the Univ. of Cal.*, 17 Cal. 3d 425, 435 n.5, 551 P.2d 334, 343 n.5, 131 Cal. Rptr. 14, 23 n.5 (1978); Comment, *California Approach*, *supra* note 2, at 551.

231. See *supra* note 230.

232. See 17 Cal. 3d 425, 434-39, 551 P.2d 334, 343-45, 131 Cal. Rptr. 14, 23-28; 88 Cal. 3d 342, 348-49, 151 Cal. Rptr. 796, 798-99; Comment, *California Approach*, *supra* note 2, at 547-49; Bazylar, *supra* note 1, at 737-40. The California Supreme Court noted in *Tarasoff* that in each case the sufficiency of the defendant's conduct was to be "measured against the traditional negligence standard of the rendition of reasonable care under the circumstances." 17 Cal. 3d 425, 439, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25. See generally *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

233. See 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22; *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 804, 142 Cal. Rptr. 487, 490 (1977); Vandall, *supra* note 24, at 67-68; Comment, *California Approach*, *supra* note 2, at 547-48.

234. See *supra* notes 205-33 and accompanying text.

included reasonably necessary safety precautions, and 3) the intervention of criminal tampering did not constitute a superseding cause that could foreclose the defendant's liability.²³⁵ Although California courts have traditionally relied upon the rule set forth in the *Restatement*²³⁶ as indicative of a manufacturer's general duty with respect to potentially dangerous products,²³⁷ this rule does no more than supply a loose definitional framework of liability. Moreover, it adds little to an appropriate analysis by which it may be said that the manufacturer's duty includes protecting consumers against criminally tampered products. Rather, the plaintiff should seek to establish and premise this specific duty upon either the special relationship doctrine or the general policy considerations underlying the concept of duty. First, this comment will demonstrate the special relationship that may exist between manufacturers and consumers.

A. The Manufacturer Occupies a Special Relationship With the Consumer

The authors of the *Restatement* have stated that a manufacturer of products undertakes a "special responsibility" toward all members of the consuming public that could be injured by those products.²³⁸ Justice Traynor of the California Supreme Court observed in 1944 that the relationship between manufacturers and consumers was not as it once was, noting that the consumer's erstwhile vigilance was being lulled by the incessant efforts of the manufacturer to build up trust and confidence in the manufacturer's product.²³⁹ Thus, the consumer was no longer able to investigate for himself the safety of a product, but was forced to rely upon the reputation of the manufacturer.²⁴⁰ This led Justice Traynor to state that "[t]he manufacturer's obligation to the

235. See *supra* notes 164-203 and accompanying text.

236. RESTATEMENT (SECOND) OF TORTS §395 (1965) states:

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

237. See generally *Putenson v. Clay Adams Inc.*, 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319 (1970); *Sheward v. Virtue*, 20 Cal. 2d 410, 126 P.2d 345 (1942); *Nebelung v. Norman*, 14 Cal. 2d 647, 96 P.2d 327 (1939); *Kalash v. L.A. Ladder Co.*, 1 Cal. 2d 229, 34 P.2d 481 (1934).

238. See RESTATEMENT (SECOND) OF TORTS §402A comment c (1965). Dean Prosser notes that purveyors of products for human consumption have been under a "special responsibility" to the consuming public since the year 1266 when the English common law imposed civil liability by virtue of the "common custom of the realm." Prosser, *Assault Upon the Citadel*, *supra* note 26, at 1103.

239. See *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring).

240. See *id.*; RESTATEMENT (SECOND) OF TORTS §402A comment c (1965).

consumer must keep pace with the changing relationship between them. . . .”²⁴¹ An argument may be made that by the incessant efforts of the manufacturer to influence and control the consumer’s purchasing power with respect to the manufacturer’s product, a special relationship has been established between the manufacturer and the consumer whom he attempts to control.²⁴² Concurrent with this relationship would exist the duty not to subject the consumer to an unreasonable risk of danger from criminal product tampering.²⁴³ This would be especially true inasmuch as it is the defendant-manufacturer’s affirmative conduct that has created a situation of danger to the consumer by encouraging the consumer to purchase a criminally tampered product.²⁴⁴ Logically, once the manufacturer has influenced the consumer to purchase a particular product, the manufacturer should not be allowed to assert that his responsibility ended at that point if the proffered product embodied a risk of unreasonable danger from criminal tampering.²⁴⁵

Although there is no specific decisional law expressly adopting the relationship between a manufacturer and a consumer as special in this context, the California Supreme Court has stated that expanding the list of special relationships would be an effective way of protecting the plaintiff’s interests,²⁴⁶ especially when failure to do so would result in a morally insupportable result.²⁴⁷ Apparently, there is little justifiable reason why the special relationship doctrine should not be expanded so as to include manufacturers and consumers.²⁴⁸ Finally, to deny an injured consumer recovery merely because he was unable to establish a legally recognized special relationship would work exactly the kind of manifest injustice that the court sought to avoid.²⁴⁹ Next, this comment will demonstrate that the general policy considerations underlying the concept of duty may give rise to a specific duty to protect consumers from criminally tampered products.

241. 24 Cal. 2d 453, 467, 150 P.2d 436, 443.

242. See *supra* notes 238-241 and accompanying text. It has been suggested that a “dependence-control” approach, based upon the defendant’s voluntary assumption of responsibility toward the plaintiff, may present the superior analysis. See Comment, *California Approach*, *supra* note 2, at 552-57. The author posits that a voluntary and gratuitous assumption of responsibility for the plaintiff may give rise to a concordant duty to protect that person from the risk of harm to be reasonably expected from the relationship. *Id.* at 553-54.

243. See *supra* notes 206-234 and accompanying text.

244. RESTATEMENT (SECOND) OF TORTS §320 (1965). See *supra* notes 215-219 and accompanying text.

245. As Dean Green notes, manufacturers should simply be taken at their word. Green, *supra* note 24, at 1191. See Vandall, *supra* note 24, at 76-77.

246. See *supra* note 230.

247. See *Tarasoff v. The Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 435 n.5, 551 P.2d 334, 345 n.5, 131 Cal. Rptr. 14, 23 n.5 (1976).

248. See *supra* notes 238-47 and accompanying text.

249. See *supra* notes 238-47 and accompanying text.

B. General Policy Considerations May Be Utilized To Establish a Specific Duty to Protect Consumers From Criminally Tampered Products

Irrespective of the relationship between the parties,²⁵⁰ the plaintiff may argue that the reasonably foreseeable risk of crime in general, and of product tampering in specific, should give rise to a duty based on policy considerations not to unreasonably subject consumers to this risk of harm.²⁵¹ The foreseeability of harm to the plaintiff is the most important element of the several policy considerations that will, in the aggregate, give rise to a specific duty;²⁵² thus, the reasonableness of the defendant-manufacturer should be measured by the relative foreseeability of harm to consumers through product tampering.²⁵³

The existence of crime in a populous, industrialized society is by no means uncommon.²⁵⁴ Decisional law indicates that California courts have never been reticent to impose liability for the consequences of criminal activity if the occurrence of that activity was reasonably foreseeable to the defendant.²⁵⁵ The ubiquitous cases of automobiles in which the keys are left in the ignition present both a frequent cause of litigation and an illustrative analogy with respect to criminally tampered products. Generally, the courts have held that the foreseeable risk of crime inherent in leaving the keys in an unattended and unlocked automobile was sufficient to give rise to a duty of care to any person subsequently injured by the thief-driver.²⁵⁶ In *Richardson v. Ham*,²⁵⁷ for example, the California Supreme Court held that there was a reasonably foreseeable risk that the defendant's bulldozers might be tampered with if left unattended, and imposed liability for the con-

250. See *supra* notes 238-49 and accompanying text. Notwithstanding the viability of finding an additional special relationship between manufacturers and consumers, California courts have rejected the notion of relationships between the parties as dispositive of liability in other contexts. See *Rowland v. Christian*, 69 Cal. 3d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

251. Dean Freezer has stated that the question of responsibility for intervening criminal acts can be distilled into one question: "Is it the policy of this court that a negligent person shall bear the risk that a third person will take advantage of the opportunity afforded by such negligence to commit a crime?" *Freezer & Favour*, *supra* note 179, at 642.

252. See *supra* notes 184-85 and accompanying text.

253. See Comment, *California Approach*, *supra* note 2, at 545; *Freezer & Favour*, *supra* note 179, at 643.

254. See *supra* note 1. As the Lord Chancellor noted in 1918, "[c]rime is, indeed, a very serious matter, but everyone knows that crime is not uncommon." *London Joint Stock Bank, Ltd. v. MacMillan & Arthur*, 1918 App. Cas. 777, 789, 119 L.T. 387, 34 T.L.R. 509. See Note, *supra* note 173, at 673 n.25.

255. See *supra* notes 184-203 and accompanying text.

256. See generally *Hergenreth v. East*, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964); *Richardson v. Ham*, 44 Cal. 2d 772, 285 P.2d 269 (1955); *Enders v. Apocoa, Inc.*, 55 Cal. App. 3d 897, 127 Cal. Rptr. 751 (1976); *Azcona v. Tibbs*, 190 Cal. App. 2d 425, 12 Cal. Rptr. 232 (1961); WITKIN, *supra* note 29, §645, at 2924-26.

257. 44 Cal. 2d 772, 285 P.2d 269 (1955).

sequent injuries that occurred.²⁵⁸ Similarly, in *Murray v. Wright*,²⁵⁹ it was held that the risk of a theft from a used car lot was a matter of common knowledge in the community, and, therefore, the defendant came under a specific duty to protect innocent plaintiffs from the results of the stolen automobile.²⁶⁰ Although these decisions frequently place emphasis upon the existence of unique or special circumstances, such as the neighborhood in which the car was left,²⁶¹ these circumstances are not always required. In *Enders v. Apcoa, Incorporated*,²⁶² the court held that the intervening chase of a police car was sufficiently foreseeable to create a duty to protect the plaintiff from injury resulting from the thief's attempt to elude the police officer.²⁶³

Unfortunately, it is difficult to state with precision or acuity what a particular court will find to be reasonably foreseeable under the circumstances.²⁶⁴ Until recently, instances of product tampering were scattered and few.²⁶⁵ With the advent of the Tylenol tamperings,²⁶⁶ and the flurry of federal legislative action that followed,²⁶⁷ it seems clear that manufacturers may no longer be able to claim that product tampering is too unforeseeable to warrant the imposition of liability. In effect, all manufacturers may be on notice that instances of product tampering are, henceforth, reasonably foreseeable under all circumstances. Apparently, a manufacturer of products could ignore this very real and present danger only at the peril of the imposition of liability. Next, this comment will demonstrate how the manufacturer may

258. *Id.* at 776, 285 P.2d at 271.

259. 166 Cal. App. 2d 589, 333 P.2d 111 (1958).

260. *Id.* at 592, 333 P.2d at 113.

261. *See, e.g.*, *Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954).

262. 55 Cal. App. 3d 897, 127 Cal. Rptr. 751 (1976).

263. *Id.* at 905-06, 127 Cal. Rptr. at 755-56.

264. It thus becomes apparent that to attempt to lay down any general rule as to what is or what is not a foreseeable intervening crime is wholly impracticable if not impossible. Each case must be decided upon its particular facts, the rule being that if, under the circumstances, a reasonable man in the position of the defendant would have foreseen the intervening crime, the defendant may be liable.

Note, *supra* note 173, at 683. *See generally supra* notes 184-203 and accompanying text.

265. *See supra* notes 18-19 and accompanying text. *But cf.* Barowitz, *Packaged Death: Fore-runners of the Tylenol Poisonings*, 69 A.B.A.J. 282, 282-86 (1983) for an interesting historical perspective of product tampering.

266. *See supra* notes 18-19 and accompanying text.

267. The federal government has already enacted the Product Liability Risk Detention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (1981), which provides for nationwide manufacturers' self-insurance groups. *See Dworkin, supra* note 24, at 34 n.9. Several commentators have urged a nationwide reform of products liability law due to perceived disparate laws and inconsistent results from state to state, *id.*, and further federal legislation is currently being considered that would drastically alter the law in California by requiring, among other things, that: 1) the plaintiff prove that the defendant manufactured the allegedly defective product; 2) a presumption of products safety be established once the product meets federal standards; and 3) the burden of proof be shifted from manufacturers to consumers. *See id.*; Calabresi, *supra* note 24, at 314. This legislation would, if passed, effectively overrule the decisions in *Sindell, supra* note 78, and *Barker, supra* note 56. *See Dworkin, supra* note 24, at 34 n.9. *See generally* Calio, *supra* note 123, at 112.

breach his duty by designing a product that is not reasonably safe from product tampering.

THE MANUFACTURER BREACHES HIS DUTY TO DESIGN A SAFE
PRODUCT IF HE FAILS TO INCLUDE REASONABLY
NECESSARY SAFETY PRECAUTIONS IN THE
DESIGN OF THE PRODUCT

Generally, the extent of a manufacturer's duty is commensurate with the danger inherent in the foreseeable risk of harm that gives rise to the duty in the first instance.²⁶⁸ Whether the manufacturer can satisfy that duty may ultimately depend upon his ability "to so design his product as to make it not accident-proof, but safe for the use for which it was intended."²⁶⁹ It is well settled that a manufacturer may breach this duty by designing a product that fails to include reasonably necessary safety precautions.²⁷⁰ The *Restatement* specifically states that a manufacturer should be subject to liability for his failure to exercise reasonable care in the adoption of a safe plan or design for the product.²⁷¹ Although what constitutes reasonable care varies with the facts and circumstances of each case,²⁷² the traditional inquiry employs a balancing of the likelihood of harm to be expected from a product with a given design, and the gravity of that harm should it occur, against the burden of employing the safety precautions that would be effective to avoid the injury.²⁷³ In determining whether the manufacturer has exercised reasonable care in designing a product against criminal tampering, two general propositions weigh heavily in favor of the consumer. First, the manufacturer is under the duty of an expert to be aware of the latest developments in the field, inclusive of all available safety precautions

268. See generally *Putenson v. Clay Adams Inc.*, 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319 (1970); *Reynolds v. Natural Gas Equipment Inc.*, 184 Cal. App. 2d 724, 7 Cal. Rptr. 879 (1960).

269. *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 470, 467 P.2d 229, 232, 85 Cal. Rptr. 629, 632 (1970) (quoting *Veras v. Barco Mfg. Co.*, 205 Cal. App. 2d 246, 258, 22 Cal. Rptr. 737, 747 (1962)); Noel, *Manufacturers' Liability for Negligence*, 33 TENN. L. REV. 444, 447 (1966) [hereinafter referred to as Noel, *Liability for Negligence*]; Noel, *Recent Trends in Manufacturers' Negligence as to Design, Instructions, or Warnings*, 19 Sw. L.J. 26, 45 (1965) [hereinafter referred to as Noel, *Recent Trends*]; Prosser, *supra* note 11, at 644.

270. See generally 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629; 205 Cal. App. 2d 246, 22 Cal. Rptr. 737; *Darling v. Caterpillar Tractor Co.*, 17 Cal. App. 2d 713, 341 P.2d 23 (1959); Noel, *Liability for Negligence supra* note 269, at 454. See also *Boeing Airplane Co. v. Brown*, 29 F.2d 310 (9th Cir. 1961).

271. RESTATEMENT (SECOND) OF TORTS §398 (1965) states:

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

272. See *supra* notes 268-69 and accompanying text.

273. See 2 Cal. 3d 465, 470, 467 P.2d 229, 232, 85 Cal. Rptr. 629, 632; 12 Cal. App. 3d 1062, 1077-78, 91 Cal. Rptr. 319, 329; Bazylar, *supra* note 1, at 751, Keeton, *supra* note 27, at 28.

which could feasibly be employed.²⁷⁴ Second, the gravity of harm from criminal tampering is so egregious that presentation of the case to the jury may have a profound impact upon the eventual imposition of liability.²⁷⁵

A. The Manufacturer's Duty as an Expert Requires That the Manufacturer Be Aware of Situations Involving the Possibility of Criminal Product Tampering

What is not obvious to an ordinary consumer with respect to the design safety of a given product may be glaringly so to an expert in the field who is cognizant of all the latest scientific and technological developments. Consequently, the manufacturer is charged with the knowledge and skill of an expert in the field.²⁷⁶ Thus, the manufacturer's duty as to design includes all reasonably necessary design precautions that are consistent with that knowledge, and requires that the design of the product be consonant with the technological and scientific advances in the field.²⁷⁷ This includes designing against even obvious dangers,²⁷⁸ as the patency of danger is germane only to the manufacturer's defenses, and not to whether he has satisfied his duty of reasonable care as to design.²⁷⁹ Therefore, it is proper to introduce evidence as to the necessity and feasibility of alternative design choices that would have enhanced the factor of safety, for the purpose of demonstrating the manufacturer's failure to exercise reasonable care in the design of the product.²⁸⁰ Whether the manufacturer should have employed alternative designs may ultimately depend upon how great the jury determines the gravity of danger to be from criminal product tampering.

B. The Gravity of Injury From Criminal Product Tampering, is so Egregious That the Manufacturer May Always Be Unreasonable in Not Adopting Safer Designs

Once evidence of any alternative design has been introduced, the jury must balance the burden to the defendant in employing an alter-

274. See *infra* notes 276-80 and accompanying text.

275. See *infra* notes 281-82 and accompanying text.

276. See Noel, *Liability for Negligence supra* note 269, at 452; Noel, *Recent Trends, supra* note 269, at 51-53; 42 C.J.S. *Products Liability* §16, at 25 (Supp. 1975). See generally, Borel v. Fibreboard Paper Products, Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 95 S. Ct. 127 (1974); Ross v. Phillip Morris & Co., 328 F.2d 3 (8th Cir. 1964).

277. See *supra* note 276.

278. See 2 Cal. 3d 465, 473-74, 467 P.2d 229, 234-35, 85 Cal. Rptr. 629, 634-35.

279. See *id.*

280. See *id.* at 472, 467 P.2d at 233-34, 85 Cal. Rptr. at 633-34; Varas v. Barco Mfg. Co., 205 Cal. App. 2d 246, 259, 22 Cal. Rptr. 737, 744 (1962); Spradley, *supra* note 51, at 431. See also Hoppe v. Midwest Conveyor Co., 485 F.2d 1196 (8th Cir. 1973).

native design against the likelihood of gravity of danger.²⁸¹ Balancing the risk of injury from criminally tampered products against a manufacturer's financial burden in employing a reasonably necessary design modification may present a rhetorical question: Given the tragic consequences and egregious manner in which criminally tampered products affect society, is there any economic burden on the manufacturer that is sufficiently great so as to force the injured consumer to bear the physical burden of product-caused injury? The argument may be made that if a manufacturer is unable to produce an economically feasible product due to the necessity of including tamper-resistant designs, then that manufacturer should produce no product at all. Moreover, production of the product without safety designs may be tantamount to extremely unreasonable behavior in the face of the presently foreseeable risk of product tampering.²⁸² Next, this comment will demonstrate that general notions of proximate causation will not relieve the manufacturer of criminally tampered products from liability.

PROXIMATE CAUSATION WILL NOT OPERATE TO RELIEVE A
MANUFACTURER FROM LIABILITY ONCE DUTY HAS BEEN
ESTABLISHED

Unfortunately, proximate cause analyses tend more to the ingenious than to the ingenuous,²⁸³ and whenever a plaintiff attempts to establish liability for criminally intervening activity, the issue of proximate cause is generally the most formidable hurdle to be overcome.²⁸⁴ If the intervening act is designated a superseding cause, the plaintiff fails in his case for lack of proximate causation.²⁸⁵ However, California courts have abandoned the once restrictive rules of proximate cause for the relatively flexible concept of duty in determining liability for intervening criminal acts.²⁸⁶ Moreover, California decisional law frequently treats duty and proximate cause as synonomous in cases of criminal conduct,²⁸⁷ and cases imposing liability for intervening crimes generally emphasize the existence of a duty as determinative of liability.²⁸⁸ The argument may be made that once the defendant's duty to protect the plaintiff is established, it should be of no consequence what occurs

281. *See supra* notes 268-73 and accompanying text.

282. *See supra* notes 264-67 and accompanying text. *See generally*, Annot., 95 A.L.R.3d 1066 (1981) (duty of manufacturer to equip product with safety device to protect against a patent or obvious danger).

283. *See supra* notes 178-82 and accompanying text.

284. *See supra* notes 178-82 and accompanying text.

285. *See supra* notes 192-203 and accompanying text.

286. *See supra* notes 184-91 and accompanying text.

287. *See supra* notes 171-91 and accompanying text.

288. *See supra* notes 184-91 and accompanying text.

in the interim.²⁸⁹ Moreover, there is a compelling logic to this proposition: If the reason the defendant may be negligent is that he has failed to protect the plaintiff from a reasonably foreseeable risk of criminal product tampering, then it becomes inherently illogical and legally suspect to invoke the very occurrence of criminal tampering in order to absolve the defendant from liability.²⁹⁰ This comment takes the position that when criminal product tampering occurs, it should not be utilized to insulate the manufacturer from liability under an attenuated proximate cause analysis. Furthermore, it appears unsound in terms of policy to limit a manufacturer's liability merely because an intervening criminal act, the very probability of which may have rendered his conduct unreasonable in the first instance, has brought about the expected harm.²⁹¹

The preferable approach, therefore, in determining which party shall ultimately bear the loss for criminally tampered products²⁹²—the negligent defendant or the innocent plaintiff—is to make the dispositive issue that of duty.²⁹³ As Dean Prosser has noted, “[a] criminal intervening act will not relieve the defendant if he was under a duty to protect the plaintiff against it,”²⁹⁴ and “[o]nce that question is answered in the affirmative, nothing more remains to be said.”²⁹⁵ Inasmuch as California decisional law has consistently emphasized the existence of duty in imposing liability for criminally intervening acts,²⁹⁶ it appears both legally sound and internally consistent to make a manufacturer's liability for criminally tampered products dependent upon this same approach. Dean Prosser has observed that there is a definite tendency of the courts to avoid entirely any discussion of proximate cause and to abdicate this troublesome issue to the jury,²⁹⁷ with that premise, this comment is in complete accord.

In summary, a plaintiff injured by a criminally tampered product may attempt to establish a manufacturer's duty by demonstrating either the existence of a special relationship between the plaintiff and the

289. See *supra* notes 184-91 and accompanying text; PROSSER, *supra* note 11, at 271. See generally Freezer & Favour, *supra* note 179, at 635; Eldridge, *supra* note 179, at 121; Harper & Kime, *supra* note 192, at 886.

290. See *supra* notes 192-203 and accompanying text.

291. See *supra* notes 192-203 and accompanying text.

292. See Klemme, *supra* note 13, at 161; Calabresi, *supra* note 24, at 500-06; Prosser, *Proximate Cause*, *supra* note 102, at 397. See generally Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 365, 91 Cal. Rptr. 745 (1970).

293. See Prosser, *Proximate Cause*, *supra* note 102, at 401-03. See generally *supra* notes 171-191 and accompanying text.

294. Prosser, *Proximate Cause*, *supra* note 102, at 382-83, 403.

295. *Id.* at 401.

296. See *supra* notes 184-91 and accompanying text.

297. See Prosser, *Proximate Cause*, *supra* note 102, at 420.

manufacturer,²⁹⁸ or that the general considerations of policy underlying the concept of duty support the imposition of liability.²⁹⁹ The manufacturer may be shown to have breached this duty by his failure to include reasonably necessary safety precautions as indicated by his status as an expert and the gravity of harm to be expected from this failure.³⁰⁰ Finally, it may be demonstrated that the primary concept of duty should be determinative of the manufacturer's liability for criminally tampered products irrespective of any attenuated proximate causation,³⁰¹ and that it is inherently logical to support liability for the results of criminally tampered products.³⁰²

CONCLUSION

The cumulative history of California products liability law forcibly demonstrates that the judiciary will seek to secure and protect the interests of consumers injured by defective products.³⁰³ Plaintiffs are allowed broad latitude in the evidentiary elements of a *prima facie* case for products liability.³⁰⁴ Moreover, California decisional law indicates that existing theories of liability are sufficiently broad to include new causes of action for injuries wrought by a changing society.³⁰⁵ This comment has demonstrated that causes of action for strict liability³⁰⁶ and for negligence³⁰⁷ may exist for harm caused by criminally tampered products. Further, it has been shown that the continuum of products liability decisions strongly recognizes California's prevailing judicial policy for supporting plaintiff's injured by defective products, irrespective of the means by which the harm occurred.³⁰⁸ It has been submitted that criminally tampered products may now constitute a constant and general danger to consumers of those products.³⁰⁹ Finally, this comment has demonstrated that the manufacturer must bear the primary responsibility for the results of criminally tampered products in society,³¹⁰ and that the manufacturer is in the best position to

298. *See supra* notes 238-49 and accompanying text.

299. *See supra* notes 250-63 and accompanying text.

300. *See supra* notes 268-82 and accompanying text.

301. *See supra* notes 283-97 and accompanying text.

302. *See supra* notes 283-97 and accompanying text.

303. *See supra* notes 70-100 and accompanying text.

304. *See supra* notes 33-38 and accompanying text.

305. *See supra* notes 70-100 and accompanying text.

306. *See supra* notes 39-163 and accompanying text.

307. *See supra* notes 164-302 and accompanying text.

308. *See supra* notes 39-100 and accompanying text.

309. *See supra* notes 39-100 and accompanying text.

310. *See supra* notes 39-100 and accompanying text. Although some 86% of firms subject to products liability actions carry some form of insurance, U.S. DEPARTMENT OF COMMERCE, FINAL REPORT OF THE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, III-2 (1978), the judicial increase in manufacturers' liability for defective products has led to alarm on several fronts: in-

provide compensation for the harm resulting from criminally tampered products.³¹¹ In sum, it appears that the California courts that have so long occupied the vanguard of consumer recovery for defective products would have to undergo a 180-degree about face in order to deny recovery for criminally tampered products once the basic elements of a prima facie case have been established.

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urers are raising their premiums for product liability insurance by hundreds, sometimes thousands of percent. See Dworkin, *supra* note 24, at 34; Note, *When the Product Ticks: Products Liability and Statutes of Limitations*, 11 IND. L. REV. 693, 698-99 (1978). Consequently, many product manufacturers have difficulty in obtaining liability insurance. See Calabresi, *supra* note 24, at 313.

311. See *supra* notes 47-53 and accompanying text. Professor Calabresi has criticized manufacturers for suggesting a crisis in products liability law. Although manufacturers may wish to shift the loss to consumers, *supra* note 267, Calabresi posits that this contravenes a basic economic premise: taking risks is what corporations do best. Calabresi, *supra* note 24, at 321. See Vandall, *supra* note 24, at 77 n.130. See generally Calabresi & Hirschoff, *supra* note 24, at 1055.