The Expanding Scope of Products Liability: New Jersey Extends A Manufacturer's Responsibility To Include Injuries Caused After A Substantial Alteration of its Product

I. INTRODUCTION

New Jersey has long been in the forefront of states allowing recovery under the theory of strict products liability.1 During the past twenty-five years, the state supreme court has provided injured plaintiffs with a variety of substantive and procedural weapons to wield against manufacturers who are often shielded by complicated corporate structures and the commercial distribution chain itself.2 As a result, the balance of power has shifted. Plaintiffs claiming that they were injured by an allegedly defective product now possess an inordinate degree of influence over the corporate decision-making process.3 In two recent cases, Soler v. Castmaster4 and Brown v. United States Stove Co.5 the New Jersey Supreme Court missed an opportunity to halt this alarming trend. Instead, the court once again expanded the scope of a manufacturer's liability by holding that the maker of a machine may be accountable for injuries that occur after the machine has

3 See, e.g., infra note 183; see also Sorry, Your Policy Is Canceled, TIME, Mar. 24, 1986, at 16, 18-19 (discussing per-unit cost of products liability insurance in industries such as aircraft manufacture, day-care centers, and hospital service).
been substantially modified by a subsequent user.\textsuperscript{6}

This comment will first provide a brief historical introduction to the law of products liability.\textsuperscript{7} It will then analyze the Soler and Brown cases in detail.\textsuperscript{8} Finally, the comment will explore some of the ramifications of these decisions, including the possibility of a nationwide legislative response to the judicial expansion of strict products liability.\textsuperscript{9}

\section{II. Background}

Throughout the nineteenth century and well into the twentieth, the leading case in the field that eventually became known as products liability\textsuperscript{10} was Winterbottom v. Wright.\textsuperscript{11} In that case, the court barred liability for breach of contract because of lack of privity between the parties.\textsuperscript{12} In accordance with the broad language in that decision,\textsuperscript{13} subsequent courts held that privity was essential to any claim based on injuries caused by a defective product.\textsuperscript{14} By the turn of the century, however, several courts had formulated exceptions to this rule, primarily for imminently dangerous products.\textsuperscript{15} Then, in 1916, in MacPherson v. Buick Motor Co.,\textsuperscript{16} Justice Cardozo extended the exception for imminently

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\textsuperscript{6} Soler, 98 N.J. at 151, 484 A.2d at 1232; Brown, 98 N.J. at 166, 484 A.2d at 1239.
\textsuperscript{7} See infra notes 10-39 and accompanying text.
\textsuperscript{8} See infra notes 40-163 and accompanying text.
\textsuperscript{9} See infra notes 164-203 and accompanying text.
\textsuperscript{10} The term "products liability" denotes the area of law that establishes the liability of manufacturers and sellers for injuries caused by their products to third parties. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 693 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].
\textsuperscript{11} 152 Eng. Rep. 402 (Ex. P. 1842). In the Winterbottom case, the driver of a mail coach was injured when faulty repairs caused the coach to collapse. See id. at 403. The defendant had contracted with the Postmaster General to perform maintenance on the latter's mail coaches. Id. at 402-03. The injured driver attempted to impose liability on the defendant for his failure to keep the coaches in a safe condition. Id. at 403.
\textsuperscript{12} See id. at 405.
\textsuperscript{13} See id. Lord Abinger thought that to allow liability to third parties would lead to "the most absurd and outrageous consequences." Id. He observed that if a driver were allowed to sue the contractor regardless of privity, a "passenger, or even any person passing along the road, who was injured by the upsetting of the coach," might also do so. Id.
\textsuperscript{14} See Prosser & Keeton, supra note 10, § 96, at 681 & n.4.
\textsuperscript{16} 217 N.Y. 382, 111 N.E. 1050 (1916). This landmark case held an automobile manufacturer liable for injuries caused by a defective wheel it had negligently failed
dangerous products to include any negligently manufactured product.\textsuperscript{17} It was not until the 1960's, however, that liability was imposed in the absence of privity or negligence, first on the basis of breach of warranty\textsuperscript{18} and then on the basis of strict liability in tort.\textsuperscript{19}

The California Supreme Court, in the 1963 case of \textit{Greenman v. Yuba Power Products, Inc.},\textsuperscript{20} was the first to recognize the doctrine of strict products liability. In developing this doctrine, courts since \textit{Greenman} have had to struggle with a variety of issues, such as setting standards to define a defective condition,\textsuperscript{21}

17 See id. at 389-90, 111 N.E. at 1053.

18 See \textit{Henningsen v. Bloomfield Motors, Inc.}, 32 N.J. 358, 161 A.2d 69 (1960). \textit{Henningsen} was the leading case in establishing breach of warranty as a basis for a manufacturer's liability. See \textit{PROSSER & KEETON, supra note 10, § 97}, at 690. Under this theory, a third party could bring suit for injuries caused by a defective product, regardless of negligence, if he was a foreseeable user of that product. See \textit{Henningsen}, 32 N.J. at 413, 414-15, 161 A.2d at 99, 100. Earlier cases had permitted liability for breach of warranty only to persons who were in privity to the contract. See, e.g., \textit{Berg v. Rapid Motor Vehicle Co.}, 78 N.J.L. 724, 75 A. 933 (1910).

19 Strict liability has long been an established principle in tort law. See, e.g., \textit{Rylands v. Fletcher}, 3 L.R.-H.L. 330 (1868). A defendant is strictly liable for harm caused by an abnormally dangerous activity even though "he has exercised the utmost care to prevent the harm." \textit{RESTATEMENT (SECOND) OF TORTS} § 519(1) (1965). The relatively recent application of this principle to the field of products liability results in the imposition of liability on anyone who sells a defective product that causes injury to the ultimate user or consumer, regardless of the degree of care exercised by the seller. See id. § 402A. Section 402A provides as follows:

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\item One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if 
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\item the seller is engaged in the business of selling such a product, and
\item it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
\end{enumerate}
\item The rule stated in Subsection (1) applied although
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\item the seller has exercised all possible care in the preparation and sale of his product, and
\item the user or consumer has not bought the product from or entered into a contractual relation with the seller.
\end{enumerate}
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20 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In \textit{Greenman}, the plaintiff was injured while using a defective power tool. See id. at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698. Although the plaintiff sued on the theories of negligence and breach of warranty, the California Supreme Court found the manufacturer liable by applying the principles of strict liability. Id. at 62-63, 377 P.2d at 900, 27 Cal. Rptr. at 700.

contributory negligence, and the effect of misuse or abuse of the product on liability. Recently, in *Soler* and its companion case *Brown*, the Supreme Court of New Jersey addressed yet another important question: the impact that substantial alteration of a product has on a manufacturer's liability.

In New Jersey, as in other jurisdictions, it is well-established that a manufacturer has a duty to place into the stream of commerce only products that are reasonably fit and safe for their intended or foreseeable purposes. Thus, in a strict products liability action, a defect in design may be the basis for imposing liability on a manufacturer. In New Jersey, the leading case of *Cepeda v. Cumberland Engineering Co.* established that such design defects are measured by a risk-utility test. This type of analysis balances the product's usefulness against the risk that it will result in injury. In *Soler*, the court set forth the elements for a prima facie design defect case: "(1) the product design must be defective; (2) the defect must exist when the product is under the control of the manufacturer; and (3) the defect must cause injury to a reasonably foreseeable user." *Michalko*, 91 N.J. at 394, 451 A.2d at 183.

The New Jersey Supreme Court has been a leader in formulating innovative changes in tort law. See, *supra* note 18 and accompanying text; *see also* *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984) (social host who negligently serves liquor to intoxicated guest liable to injured party when guest causes auto accident).

The New Jersey Supreme Court recog-nized seven factors suggested by Dean Wade to be considered in risk-utility analysis:
cause harm. In addition, before a design defect will result in liability, the plaintiff must prove that the defect was the proximate cause of the injury. A failure to install safety equipment on a product or to give adequate warnings at the time of sale can be considered the proximate cause of an injury, thus giving rise to liability. Furthermore, the plaintiff must have been a foreseeable user of the product, and he must have been using it for its intended purposes.

One possible defense available to a manufacturer in a strict products liability suit based on a design defect, implicit in section 402A(1)(b) of the Second Restatement of Torts, is substantial altera-

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

Id. at 174, 386 A.2d at 826-27 (quoting Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 837-38 (1973)).

See Wade, supra note 29, at 835. Only safe products are to be marketed. Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 238 n.1, 432 A.2d 925, 930 n.1 (1981). Under the risk-utility standard, a product is considered safe when its utility outweighs its risk. See Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 394, 451 A.2d 179, 183 (1982); Freund, 87 N.J. at 238 n.1, 432 A.2d at 930 n.1. One important qualification, however, is that the risk must be reduced to the fullest extent possible while still maintaining the product’s usefulness. See id.


See, e.g., Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 410-11, 290 A.2d 281, 285 (1972) (liability imposed on manufacturer of machine for failure to install safety device, even though custom of trade was for purchasers to install such devices).


See Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 169, 406 A.2d 140, 149 (1979). The manufacturer will also be liable if the injured plaintiff was using the product for a reasonably foreseeable purpose. Id.
tion of the product after it leaves the manufacturer's control.\textsuperscript{35} Several jurisdictions have held, however, that under certain circumstances, even substantial alteration of a product will not relieve the manufacturer of liability.\textsuperscript{36} For example, if the manufacturer knows or anticipates that a change will be made that will create a risk of injury to a potential user, the product is considered to be defective.\textsuperscript{37} In order to be relieved of liability, the manufacturer must show that the alteration itself created the defect that caused the injury and that the alteration was not reasonably foreseeable.\textsuperscript{38} Although the New Jersey Supreme Court had intimated prior to \textit{Soler} and \textit{Brown} that it would accept this view of the law,\textsuperscript{39} it had never before considered the issue in the context of a design defect case.

\section{III. The \textit{Soler} Case}

In \textit{Soler}, New Jersey's highest court addressed for the first time the question of a manufacturer's liability for injuries sustained by a foreseeable user of a product where the product was substantially altered after leaving the manufacturer's control.\textsuperscript{40} Manuel Soler, alleging a cause of action in strict liability,\textsuperscript{41} sued

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\item\textsuperscript{35} See \textit{Restatement (Second) of Torts} § 402A(1)(b) (1965); see also supra note 19 (setting forth text of § 402A).
\item\textsuperscript{36} See, e.g., \textit{Whitehead v. St. Joe Lead Co.}, 729 F.2d 238, 250 (3d Cir. 1984) (interpreting New Jersey law); \textit{States S.S. Co. v. Stone Manganese Marine, Ltd.}, 371 F. Supp. 500, 505 (D.N.J. 1973); \textit{Union Supply Co. v. Pust}, 196 Colo. 162, 172, 583 P.2d 276, 283 (1978); \textit{Sharp v. Chrysler Corp.}, 432 S.W.2d 131, 136 (Tex. Civ. App. 1968). The \textit{Second Restatement of Torts} takes no position on the liability of sellers for products that undergo substantial change, preferring to leave that to judicial decisions. See \textit{Restatement (Second) of Torts} § 402A comment p (1965). The drafters of the \textit{Restatement} recognized, however, that substantial processing or alteration of a product would not excuse the seller from liability in all cases. See \textit{id.}
\item\textsuperscript{37} See \textit{Whitehead v. St. Joe Lead Co.}, 729 F.2d 238, 250 (3d Cir. 1984). The \textit{Whitehead} court stated that a manufacturer may be held liable if it is "foreseeable that the alteration will cause injury." \textit{id.}
\item\textsuperscript{38} See \textit{States S.S. Co. v. Stone Manganese Marine, Ltd.}, 371 F. Supp. 500, 505 (D.N.J. 1973). The manufacturer's liability will remain intact if the plaintiff can prove that a pre-existing design defect, rather than the substantial change, actually caused his injury. See \textit{Union Supply Co. v. Pust}, 196 Colo. 162, 172, 583 P.2d 276, 283 (1978).
\item\textsuperscript{39} See \textit{Michalko v. Cooke Color & Chem. Corp.}, 91 N.J. 386, 400, 451 A.2d 179, 186 (1982). The \textit{Michalko} court stated that "[e]ven a significant subsequent alteration of a manufactured product will not relieve the manufacturer of liability unless the change itself creates the defect that constitutes the proximate cause of the injury." \textit{id.}
\item\textsuperscript{40} See \textit{Soler}, 98 N.J. at 141, 484 A.2d at 1227.
\item\textsuperscript{41} \textit{id.} Soler's complaint also alleged negligence and intentional wrongdoing on the part of Castmaster. \textit{id.}
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the defendant for injuries he sustained while operating a die-casting machine.\textsuperscript{42} The operation of the machine consisted of two cycles.\textsuperscript{43} In the first cycle, two parts of a mold would close, forming a cavity, which would receive molten metal.\textsuperscript{44} During the second cycle, the metal would cool and the mold would separate, thus permitting the finished cast to be removed from the mold.\textsuperscript{45}

Under the machine's original design, the operator was required to start each cycle manually.\textsuperscript{46} The first cycle was started by pressing an electrical push button, which caused the mold to close.\textsuperscript{47} The operator then initiated the second cycle by pressing another button, which permitted the completed cast to fall from the mold or, if the cast failed to drop from the machine, allowed it to be removed by hand.\textsuperscript{48} As originally designed and manufactured by Castmaster, the machine lacked a safety gate or other device to prevent the machine's moving parts from making contact with a worker's hand while the machine "was either in motion or capable of being set in motion."\textsuperscript{49} Additionally, the machine did not have an interlock, which would have cut off the power if the operator's hands were inside the machine removing a jammed part.\textsuperscript{50}

Soler's employer changed the manual method of operation by adding a trip wire to start each cycle automatically after the machine was activated.\textsuperscript{51} Upon completion of the second cycle, the cast would fall from the mold and strike the trip wire, restarting the first cycle and allowing the die-caster to operate continuously.\textsuperscript{52} The employer also installed a safety gate, which would shut off power to the machine when opened, thus preventing the mold from opening or closing.\textsuperscript{53}

Soler was injured when he tried to free a finished cast that had not fallen from the mold.\textsuperscript{54} He testified at trial that when the

\textsuperscript{42} Id. at 142, 484 A.2d at 1227.
\textsuperscript{43} See id.
\textsuperscript{44} Id.
\textsuperscript{45} Id. The completed cast could either be removed by hand or permitted to fall from the mold automatically. Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 142-43, 484 A.2d at 1228.
\textsuperscript{51} Id. at 143, 484 A.2d at 1228.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
product jammed, he opened the safety gate, thereby stopping the machine. When he reached into the machine and dislodged the part, however, the machine started up again, trapping his hand within the mold.

Although the machine had been altered by his employer, Soler's expert witness testified that it was unsafe as originally designed because of the absence of a safety gate or other device to prevent the operator's hands from touching the machine's moving parts. The expert also testified that the machine was dangerous because it lacked a safety interlock to shut off power to the machine. He said that it was foreseeable that the machine could start up accidentally, either in the manual mode or in the automatic mode of operation. According to the expert, these safety devices were available when the die-caster was manufactured and could have been installed without impairing the machine's utility or unduly increasing its cost. Finally, the expert concluded that even though the machine had been altered, "the original machine was still there." This conclusion was supported by the testimony of Soler's supervisor that the alterations had not changed the machine's function.

Notwithstanding the expert's testimony, the trial court granted the defendant's motion to dismiss Soler's claim. The lower court ruled that the die-caster, as altered by the plaintiff's employer, was "an entirely different functional machine" than the one initially sold by Castmaster. Additionally, the court held that there was no evidence that would permit a finding that the machine, as originally designed, could be the proximate

55 See id. There was testimony that this kind of jamming occurred frequently. See id.
56 Id. Soler's supervisor testified that when he arrived at the machine moments after the accident, Soler's arm was under the closed safety gate. Id.
57 Id.
58 Id. At the trial, the plaintiff failed to explain how the machine had restarted; however, at his deposition, he indicated that the trip wire had reactivated the first cycle when the jammed piece fell from the mold. Id.
59 Id.
60 Id.
61 See id. at 143-44, 484 A.2d at 1228.
62 See id. at 144, 484 A.2d at 1228. This was possible because a large surge of electricity could conceivably override the push button and start the machine. Id. The expert testified that an interlock would have removed this risk. Id.
63 Id.
64 Id.
65 Id.
66 See id. at 141, 484 A.2d at 1227.
67 Id.
cause of the accident.\footnote{Id. at 141-42, 484 A.2d at 1227.}

Soler subsequently appealed the trial court's judgment.\footnote{See id. at 142, 484 A.2d at 1227.} In reversing the lower court's decision, the appellate division ruled that there were several unresolved factual issues: first, whether there was a design defect in the original machine; second, whether the changes made by the employer created an entirely different machine; and third, whether the design defect was the proximate cause of the injury.\footnote{Id. Additionally, the appellate division held that there was enough evidence to warrant consideration of the claim of a design defect based on an inadequate warning. \textit{Id.} At trial, there was testimony that there were no "danger" warnings on the machine at the time of the accident. \textit{Id.} at 144, 484 A.2d at 1228. There was no evidence, however, concerning the presence or absence of warnings when the machine left the manufacturer's control. \textit{Id.; see also infra note 93 (absence of warnings would be considered on remand).}}

The New Jersey Supreme Court granted Castmaster's subsequent petition for certification.\footnote{\textit{See Soler v. Castmaster, 93 N.J. 272, 460 A.2d 674 (1984).}} The supreme court first inquired whether there was sufficient evidence for the jury to find that the machine, as originally designed and while under the control of the manufacturer, was defective under the risk-utility standard.\footnote{\textit{Soler, 98 N.J. at 145-46, 484 A.2d at 1229.} The court cited Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979). The \textit{Suter} case requires an examination of the nature of the manufacturer's conduct and an assessment of the feasibility of designing and producing the product in a way that would have prevented the accident. \textit{See id. at 171-72, 406 A.2d at 150.} The relevant inquiry is whether "the manufacturer act[ed] as a reasonably prudent person by designing the item as he did and by placing it on the market in that condition." \textit{Id.} at 171, 406 A.2d at 150; \textit{see also supra note 29 (setting forth risk-utility factors).}} Justice Handler, writing for the court, noted that the plaintiff's expert witness had testified that the die-casting machine was designed without a safety gate and an interlock, thus making it defective because it could accidentally start up while the operator's hands were in contact with the machine's moving parts.\footnote{Soler, 98 N.J. at 146, 484 A.2d at 1229.} In addition, the expert had also opined that these safety devices were available at a reasonable cost at the time of manufacture and would not have impaired the utility of the machine.\footnote{\textit{Id.}, 484 A.2d at 1230.} According to the court, this testimony was adequate under the risk-utility standard to allow the jury to decide that the machine was defective as initially designed and while under the manufacturer's control.\footnote{\textit{Id.} at 146-47, 484 A.2d at 1230.}
The court then addressed the issue of proximate cause, noting that the plaintiff must prove that the defect "proximately caused the . . . injuries to a foreseeable user while the product was being used for its intended or anticipated purposes." Justice Handler refused to give a literal interpretation to section 402A(1)(b) of the Second Restatement of Torts, which imposes liability on a manufacturer only if the product "reach[es] the user without substantial change in the condition in which it is sold." Instead, he held that a subsequent alteration of a product will not relieve a manufacturer of liability if the change "is not substantial in terms of the essential features of the product." Furthermore, the court declared that for strict liability purposes, a change is substantial only when it affects the product's safety.

Justice Handler concluded that, under the facts of the Soler case, it was for the jury to determine whether the machine had been substantially altered in the strict liability sense.

The court then reached the critical question of whether the original design defect could constitute a proximate cause of the injury despite a substantial, subsequent alteration of the machine. According to Justice Handler, a manufacturer may be held liable despite a significant modification of the product if a pre-existing design defect was "either the sole or a concurrent or contributing proximate cause of the accident." In the present case, the court held that the jury could reasonably conclude that the machine's original design had contributed to the accident; thus, the manufacturer could be held accountable for the plaintiff's injuries even though the substantial change made by the

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76 See id. at 147-52, 484 A.2d at 1230-33; see also supra notes 31-34 and accompanying text (proximate cause is an essential element of strict products liability).
77 Soler, 98 N.J. at 147, 484 A.2d at 1230.
78 See supra note 19 (setting forth text of Restatement).
79 RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965).
80 Soler, 98 N.J. at 147, 484 A.2d at 1230.
81 Id. at 148, 484 A.2d at 1230.
82 See id. at 148-49, 484 A.2d at 1231.
83 Id. at 149, 484 A.2d at 1231. The court noted that Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 290 A.2d 286 (1972) had "foreshadowed" this notion of proximate cause. Soler, 98 N.J. at 149, 484 A.2d at 1231. Finnegan held that the jury should decide whether or not the replacement of a mechanical foot treadle on a power punch press with an electrical pedal constituted a "substantial change" that would relieve the manufacturer of liability. Finnegan, 60 N.J. at 423, 290 A.2d at 292. The Finnegan court also noted that the jury was free to conclude that the subsequent modification "had little or nothing to do with the happening of the accident." Id. at 424, 290 A.2d at 292.
84 Soler, 98 N.J. at 149, 484 A.2d at 1231.
employer might also have contributed to the accident.\textsuperscript{85}

The defendant argued that the jury could have found that the employer’s alteration was the sole cause of the accident.\textsuperscript{86} In response to this, Justice Handler noted that the trial court had apparently accepted this argument because it had held that the original design defect was not the proximate cause of the accident.\textsuperscript{87} Nevertheless, the supreme court refused to accept the defendant’s contention that only those responsible for the alteration should be held liable.\textsuperscript{88} According to the court, this would be an inappropriate application of the doctrine of foreseeability.\textsuperscript{89} Relying on the Cepeda rule that a manufacturer is liable for injuries resulting from any misuse or abnormal use of its product that is “objectively foreseeable,”\textsuperscript{90} the court extended this principle, by analogy, to a foreseeable, substantial alteration of the product.\textsuperscript{91} Thus, the court concluded that a manufacturer can be liable for injuries caused by a substantial alteration or misuse of its product “if the alteration or misuse . . . was foreseeable and could have been prevented or reduced by the manufacturer.”\textsuperscript{92}

IV. The Brown Case

The companion case to Soler, Brown v. United States Stove Co.,\textsuperscript{93} also raised the issue of a manufacturer’s liability for a design defect when the product is substantially altered after leaving the

\textsuperscript{85} Id. at 150, 484 A.2d at 1231-32. The court quoted the following passage with approval: “ ‘The jury could infer that because of the lack of a safety device the accident would have occurred notwithstanding the change to an electrical foot pedal. . . . At the most the alteration bears on the issue of proximate cause and was a matter for the jury.’ ” Id. (quoting Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 423-24, 290 A.2d 286, 292 (1972)).

\textsuperscript{86} Id. at 150-51, 484 A.2d at 1232.

\textsuperscript{87} Id. at 151, 484 A.2d at 1232.

\textsuperscript{88} See id.

\textsuperscript{89} Id.

\textsuperscript{90} Cepeda v. Cumberland Eng’g Co., 76 N.J. 152, 386 A.2d 816 (1978).

\textsuperscript{91} Id. at 177, 386 A.2d at 828.

\textsuperscript{92} Soler, 98 N.J. at 151, 484 A.2d at 1232.

\textsuperscript{93} Id. The court also noted Soler’s claim that Castmaster had provided inadequate safety warnings. See id. at 152, 484 A.2d at 1233. Although Justice Handler ruled that this claim was properly dismissed because the plaintiff had introduced evidence relating only to the absence of warnings at the time of the accident, he observed that Soler should be given an opportunity upon retrial to prove that the machine lacked proper warnings at the time of the initial sale by Castmaster. Id. at 153, 484 A.2d at 1233. The court directed that the adequacy of any warnings was to be determined by the jury. See id.

\textsuperscript{94} 98 N.J. 155, 484 A.2d 1234 (1984).
manufacturer's control. In so doing, Brown involved the consideration of two additional questions: first, whether the product was defectively designed solely because it failed "to prevent or avoid a subsequent substantial alteration or misuse that was foreseeable," and second, "whether such a design defect constitutes a proximate cause of [a resulting] accident.

The plaintiff, Fred Brown, suffered extensive burns in a fire caused by a free-standing, unvented space heater manufactured by the United States Stove Company. Brown's employer used the space heater to heat the garage of the salvage yard where Brown worked. As originally designed and manufactured, the heater included a thermocouple valve, a pilot-light tube, and an automatic safety valve to prevent gas from entering the heater if the pressure became too great. Some fifteen years prior to the accident, however, Brown's employer had altered the heater by removing these safety devices so that the gas flow was unregulated.

The trial court dismissed the plaintiff's complaint, ruling that the defendant had no duty to the plaintiff under strict liability principles. It held that the subsequent alteration of the product constituted "'an absolute and total transformation of a good, safe product into a completely unsafe product'" and that such a transformation "was not reasonably foreseeable." The appellate division, however, reversed the trial court, holding that there were factual issues for the jury to decide regarding the foreseeability of the product's alteration. The New Jersey Supreme Court granted certification in 1983.

According to the supreme court, the critical issues were "the design of the heater and the foreseeability of its alteration or misuse." In regard to these issues, the plaintiff's expert witness

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95 Id. at 161, 484 A.2d at 1237.
96 Id.
97 Id.
98 Id. at 162, 484 A.2d at 1237. The incident occurred when propane gas used in the heater ignited and set fire to the plaintiff's clothing. Id., 484 A.2d at 1237-38.
99 See id., 484 A.2d at 1237.
100 Id.
101 Id. The unregulated gas pressure was approximately 100 times greater than the heater's capacity as originally designed. Id.
102 Id. at 161, 484 A.2d at 1237.
103 Id.
104 Id. at 161-62, 484 A.2d at 1237.
106 Brown, 98 N.J. at 162, 484 A.2d at 1238.
testified that it was fair to assume that a certain percentage of heaters of this type would be substantially altered.\(^{107}\) He also testified that it was common knowledge that these heaters were often badly misused on construction sites.\(^{108}\) Because of this information, he maintained that the manufacturer could have reasonably foreseen that the safety features would be circumvented and the heater operated at a pressure greater than that for which it was designed.\(^{109}\) Thus, according to the expert, the heater was defective because “its design rendered it susceptible to the reasonably foreseeable alterations that were made.”\(^{110}\)

The plaintiff’s expert also testified about alternative designs for the device in question.\(^{111}\) Noting that the heater’s safety mechanism was connected by an easily removable right-handed threading, he stated that a possible alternative would have been to use noncommercial left-handed threading or inverted flange connectors, both of which were available at the time of manufacture.\(^{112}\) These changes would have made it much more difficult to alter the heater and would not have impaired its usefulness.\(^{113}\)

On the other hand, the defendant’s expert, an employee of the United States Stove Company, testified that his search of the company’s files going back to the 1950’s revealed no incidents of alterations similar to those made on the heater in question.\(^{114}\) He also stated that the product was designed for residential use rather than for use on a construction site.\(^{115}\) The defendant’s expert further testified that right-handed threading was used because, unlike left-handed threading, “it was a standard component that could be serviced . . . efficiently.”\(^{116}\) Finally, he maintained that an inverted flange would have required copper tubing rather than the solid pipe actually used in the heater, and

\(^{107}\) Id. at 163, 484 A.2d at 1238.

\(^{108}\) Id. There was testimony that the heater in question had been used on construction sites before being moved into the garage of Brown’s employer. Id. at 163 n.l, 484 A.2d at 1238 n.l.

\(^{109}\) Id. at 163, 484 A.2d at 1238.

\(^{110}\) Id.

\(^{111}\) See id. at 163-64, 484 A.2d at 1238.

\(^{112}\) Id. at 163, 484 A.2d at 1238.

\(^{113}\) See id. at 163-64, 484 A.2d at 1238.

\(^{114}\) Id. at 164, 484 A.2d at 1238.

\(^{115}\) Id., 484 A.2d at 1238-39. The defendant’s expert also testified that a different type of heater was available for use on construction sites. Id., 484 A.2d at 1238.

\(^{116}\) Id., 484 A.2d at 1239. According to the defendant’s expert, the use of components that were not commercially available would have resulted in higher service costs to consumers, thus decreasing the product’s utility. See id.
he opined that this would have been impractical.\textsuperscript{117}

As in \textit{Soler}, the supreme court applied the risk-utility formula\textsuperscript{118} to determine whether the product was defective as originally designed.\textsuperscript{119} In the first part of his analysis, Justice Handler, writing for a majority of the court, stated that the most important factor in determining liability under the risk-utility standard was foreseeability.\textsuperscript{120} He stressed that foreseeability in this context was to be measured by an objective standard, rather than by actual knowledge of a product’s danger.\textsuperscript{121} The court concluded that a manufacturer may be held liable for injuries caused by its product where the design of a safety feature on the item “foreseeably leads to a substantial alteration and an increased risk of danger.”\textsuperscript{122}

As a result of his analysis of the foreseeability question, Justice Handler assigned little value to the testimony of the defendant’s expert that there was nothing in the company’s files to put it on notice regarding alterations of its heaters.\textsuperscript{123} The court stated that the defendant’s evidence merely tended to show a lack of actual knowledge, and therefore an absence of subjective foreseeability.\textsuperscript{124} Thus, the court opined that the defendant had failed to rebut the evidence introduced by the plaintiff that such alterations were commonplace.\textsuperscript{125} This testimony, if believed, would show that the alterations were objectively foreseeable.\textsuperscript{126} Consequently, the supreme court concluded the first part of its analysis by holding that the issue of the objective foreseeability of the alterations created a fact question to be decided by the jury.\textsuperscript{127}

\textsuperscript{117} See id. at 164-65, 484 A.2d at 1239.
\textsuperscript{118} See supra notes 27-30 and accompanying text.
\textsuperscript{119} \textit{Brown}, 98 N.J. at 165, 484 A.2d at 1239.
\textsuperscript{120} Id. at 166, 484 A.2d at 1240.
\textsuperscript{121} \textit{Id. Cepeda} held that misuse of a product could not insulate a manufacturer from liability in a design defect case if the misuse was objectively foreseeable. See \textit{Cepeda}, 76 N.J. at 177, 386 A.2d at 828. \textit{Soler} extended this notion to include an objectively foreseeable, substantial alteration of the product when an injury results from a pre-existing design defect. See \textit{Soler}, 98 N.J. at 149, 484 A.2d at 1231. Misuse or substantial alteration of a product is objectively foreseeable when it could reasonably have been anticipated at the time the product was designed and manufactured; however, there is no liability for theoretical or even just possibly foreseeable events. See \textit{Brown}, 98 N.J. at 168, 484 A.2d at 1241.
\textsuperscript{122} \textit{Brown}, 98 N.J. at 167, 484 A.2d at 1240; see also supra notes 80-81 and accompanying text (only a change that affects product’s safety is substantial).
\textsuperscript{123} See \textit{Brown}, 98 N.J. at 167, 484 A.2d at 1241-42.
\textsuperscript{124} Id., 484 A.2d at 1241.
\textsuperscript{125} See id. at 169-70, 484 A.2d at 1241-42.
\textsuperscript{126} See id.
\textsuperscript{127} See id., 484 A.2d at 1242.
The court then addressed the second part of its analysis under the risk-utility standard. According to Justice Handler, a foreseeable risk did not automatically render a product defective; the risk must also outweigh the product’s utility. The court noted that the defendant had introduced evidence that the heater was useful and that the plaintiff’s suggested alternatives would have destroyed that utility. The majority further observed that the plaintiff had failed to rebut this evidence. Nevertheless, Justice Handler stated that “the inferences to be drawn from all of the evidence and the ultimate conclusion to be reached . . . are disputable.” Accordingly, the court held that the question of whether the risks of the product outweighed its utility, and therefore whether the product was defective in design, was a matter to be determined by the jury.

This was not the end of the court’s discussion, however. Justice Handler noted that there was another issue to be considered—the question of whether or not there was enough evidence for the jury to find “that the design defect . . . was a proximate cause of the ensuing injury.” According to the majority, the design defect could be a proximate cause of the injury even if it was a concurrent or contributing factor along with the subsequent alteration of the product. In other words, the design defect must have remained operative despite the subsequent alteration, and it must have been a substantial factor in causing the accident.

The court noted, however, that a factor is not necessarily substantial merely because it contributes to the accident. Justice Handler observed that an event cannot be considered a proximate cause if it is “too remotely or insignificantly related to the accident.” He stated that the concept of proximate cause limits liability to those causes that are closely connected to the re-
sulting harm. The majority opined that to hold otherwise would be contrary to sound public policy and fairness.

In turning to the facts of the Brown case, the court noted that there was no evidence to indicate that a proper design would have made it impossible or "substantially difficult" to remove the heater's safety devices. Rather, the appellate record indicated that the heater had been willfully and intensively misused for approximately fifteen years. This led the court to infer that even if the original design had been in accord with the suggestions made by the plaintiff's expert, it would not have deterred the subsequent abusers or prevented the accident. Consequently, the court concluded that the subsequent alteration of the heater had independently caused the accident. As a result, the court reversed the appellate division's decision and held that the alleged design defect was not a proximate cause of the plaintiff's injuries.

In a concurring opinion, Justice Schreiber disagreed with the majority's view that the defendant manufacturer owed a duty to the plaintiff. He also criticized the majority's conclusion that the jury should decide whether an act is reasonably or objectively foreseeable. Justice Schreiber maintained that almost any act by a human being is foreseeable, including the removal of safety equipment. Therefore, he rejected the imposition of a duty based solely upon a jury's determination of foreseeability.

Arguing that the majority's rationale was too "open-ended"
and that the use of a foreseeability approach did nothing to limit liability.\textsuperscript{151} Justice Schreiber advocated drawing a sharp line between the questions of duty and causation.\textsuperscript{152} In focusing on the question of duty, he would have the inquiry turn on principles of fairness and equity.\textsuperscript{153} Justice Schreiber declared that in the present case, the ultimate question should involve the feasibility of the plaintiff’s proposed alternative of left-handed threading.\textsuperscript{154} He stated that some of the factors for consideration by the trial court in deciding this question should be the additional cost consumers would have to pay, the adverse effect on servicing the product, and the fact that the actual safety devices had proven to be reasonably safe when the product was used for its intended purpose.\textsuperscript{155}

Additionally, Justice Schreiber considered the question of liability in cases where a safety device’s “only alleged flaw is that it can be removed.”\textsuperscript{156} In those instances where “such removal is not required for the machine’s operation and maintenance,” he would hold that the manufacturer has no liability.\textsuperscript{157} Justice Schreiber also argued against strict liability in situations neither intended nor within a manufacturer’s reasonable anticipation.\textsuperscript{158} He declared that this principle had been acknowledged in \textit{Suter v. San Angelo Foundry & Machine Co.},\textsuperscript{159} but that the majority had effectively reversed it in the present case.\textsuperscript{160}

Justice Schreiber concluded his opinion with a discussion of the proximate cause issue.\textsuperscript{161} He agreed with the majority that the plaintiff had failed to prove that the proposed alternative design would have prevented the injury.\textsuperscript{162} As a consequence, Justice Schreiber concurred with the majority in holding that the

\begin{footnotes}
\item[151] Id.
\item[152] Id. at 177, 484 A.2d at 1246 (Schreiber, J., concurring).
\item[153] Id. at 179, 484 A.2d at 1247 (Schreiber, J., concurring).
\item[154] Id.
\item[155] Id. at 179-80, 484 A.2d at 1247 (Schreiber, J., concurring).
\item[156] Id. at 180, 484 A.2d at 1247 (Schreiber, J., concurring).
\item[157] Id. Justice Schreiber cited numerous cases from other jurisdictions holding that removal of safety devices relieves the manufacturer of liability. \textit{See id.} at 180-82, 484 A.2d at 1247-48 (Schreiber, J., concurring). As an exception, he would hold that a manufacturer does have a duty to affix safety devices that cannot be removed by a child. \textit{Id.} at 180, 484 A.2d at 1247 (Schreiber, J., concurring).\textsuperscript{158} \textit{See id.} at 182-83, 484 A.2d at 1249 (Schreiber, J., concurring).\textsuperscript{159} 81 N.J. 150, 406 A.2d 140 (1979). The \textit{Suter} court noted “that an unforeseeable misuse of a product may not give rise to strict liability.” \textit{Id.} at 159, 406 A.2d at 144.
\item[160] Brown, 98 N.J. at 183, 484 A.2d at 1249 (Schreiber, J., concurring).
\item[161] \textit{See id.} at 184-85, 484 A.2d at 1249-50 (Schreiber, J., concurring).
\item[162] Id. at 184, 484 A.2d at 1250 (Schreiber, J., concurring).
\end{footnotes}
plaintiff had failed to meet his burden of proof on the issue of causation.163

V. ANALYSIS AND CONCLUSIONS

Both Soler and Brown were concerned with the liability of a manufacturer whose product had been substantially altered by a user or consumer. Although the manufacturer in Soler was found liable while the manufacturer in Brown was not, the logic used by the supreme court was consistent. In both cases, the court refused to accept the Restatement,164 which relieves a manufacturer of liability if the product has been substantially altered after it has been sold.165 Instead, the court held that a manufacturer may be held liable if a subsequent alteration "was foreseeable and could have been prevented or reduced by the manufacturer."166 In those cases where there is more than one cause of the accident, liability may still be found if "the original design defect . . . [was] a concurrent or contributing proximate cause of the accident."167 Brown simply clarifies Soler by indicating the limits to be placed on the concept of proximate cause. According to the court, a faulty act cannot constitute a cause of the accident if it is "too remotely or insignificantly related to the accident."168

Although Justice Schreiber concurred in the result in Brown,169 his opinion contrasted sharply with that of the majority. In Brown, the majority rejected the imposition of liability on the manufacturer on the ground that there was insufficient causal connection.170 In doing so, the court declared that the analysis of proximate cause was the appropriate means for limiting liability when it serves "fairness and sound public policy" to do so.171 Justice Schreiber, however, took a narrower view. While he agreed with the majority that there was an insufficient causal connection in Brown,172 he would have held that, as a matter of law, a manufacturer should not be liable when adequate safety equip-

163 Id. at 185, 484 A.2d at 1250 (Schreiber, J., concurring).
164 See Soler, 98 N.J. at 147, 484 A.2d at 1230; Brown, 98 N.J. at 165-66, 484 A.2d at 1239.
165 See supra note 19 (quoting the appropriate section of the Restatement).
166 Soler, 98 N.J. at 151, 484 A.2d at 1232; see also Brown, 98 N.J. at 168-69, 484 A.2d at 1241 (quoting this language from Soler).
167 Soler, 98 N.J. at 149, 484 A.2d at 1231.
168 Brown, 98 N.J. at 172, 484 A.2d at 1243.
169 See id. at 175-85, 484 A.2d at 1245-50 (Schreiber, J., concurring).
170 Id. at 174-75, 484 A.2d at 1244.
171 Id. at 173, 484 A.2d at 1243.
172 See id. at 184-85, 484 A.2d at 1249-50 (Schreiber, J., concurring).
ment is removed and the product is used in a way beyond his reasonable anticipation.\textsuperscript{173} Therefore, under the facts of \textit{Brown}, Justice Schreiber would have held that the manufacturer owed no duty to the injured worker.\textsuperscript{174} In contrast, the \textit{Brown} majority held that if a subsequent alteration of the product is foreseeable, it becomes a jury question as to whether or not the manufacturer had a duty to guard against such a change.\textsuperscript{175} Therefore, one difference between the \textit{Brown} majority and Justice Schreiber lay in their views of a manufacturer's duty. The majority rejected the limitations indicated by the \textit{Restatement} in favor of those provided by the concept of foreseeability. Justice Schreiber, on the other hand, noting that "'[t]he removal of a safety device is always objectively foreseeable,'"\textsuperscript{176} would have upheld the \textit{Restatement} rule.\textsuperscript{177}

Underlying this distinction is another, more fundamental disagreement. Both the majority and the concurrence appeal to notions of fairness. It seems the difference between the \textit{Brown} majority and Justice Schreiber can be expressed in a practical way as one of degree—because of their differing views of the manufacturer's duty, the majority would find more instances in which it would be "'fair'" to impose liability than would Justice Schreiber. The majority's decisions in \textit{Soler} and \textit{Brown} are expansive, continuing to enlarge the scope of strict products liability, whereas Justice Schreiber would draw a line beyond which a manufacturer would no longer be liable.

Probably one of the unspoken reasons for allowing the imposition of liability in a case such as \textit{Soler} is that the plaintiff is usually prohibited by state workers' compensation statutes from suing the real wrongdoer\textsuperscript{178}—the employer\textsuperscript{179} who has taken a

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\textsuperscript{173} See id. at 178-79, 182, 484 A.2d at 1247, 1249 (Schreiber, J., concurring).
\textsuperscript{174} Id. at 175, 484 A.2d at 1245 (Schreiber, J., concurring).
\textsuperscript{175} See id. at 169, 484 A.2d at 1241.
\textsuperscript{176} Id. at 183, 484 A.2d at 1249 (Schreiber, J., concurring).
\textsuperscript{177} See id. at 178-79, 484 A.2d at 1246-47 (Schreiber, J., concurring). It is thus difficult to understand why Justice Schreiber joined the majority in \textit{Soler}, which relied on the foreseeability of the substantial alteration of the product by an ultimate user. See \textit{Soler}, 98 N.J. at 151, 484 A.2d at 1232.
\textsuperscript{178} For example, the relevant New Jersey statute prevents any other cause of action. See N.J. STAT. ANN. § 34:15-8 (West Cum. Supp. 1985-1986).
\textsuperscript{179} Of course, employers (and proponents of workers' compensation laws) argue that the statutes are a tradeoff. In return for a statutory limitation on an employer's liability for employee injuries, the employee gains an unfettered right to recover for such injuries. This argument begs the question, however. A tradeoff is certainly appropriate for injuries caused by accidents where there is no deliberate culpability by the employer, but where the employer has altered the basic safety features of a
relatively safe product and substantially altered it by removing its safety devices.\textsuperscript{180} Because the workers' compensation statutes provide limited awards,\textsuperscript{181} the only way that an injured worker can recover adequately in many cases is by suing the manufacturer—a remedy that the Soler court permits by its expansive approach to a manufacturer's liability. This, of course, is a classic "deep-pocket" approach.

It is not the most equitable approach, however. If liability should be imposed in accordance with fairness, then the employee should not be limited to suing the manufacturer of the product, nor should the employer be shielded from liability by statute.\textsuperscript{182} By contrast, in cases where consumers or users are injured in a nonindustrial setting, the plaintiff can sue anyone in the commercial chain who has increased the product's danger by substantially altering it. The same rule should apply in the industrial context. Workers' compensation statutes, which were progressive at a time when actions arising from job-related accidents were often denied on grounds of contributory negligence, are now regressive in that they often insulate the true wrongdoer from liability. The public policies of providing an adequate remedy to the injured party and allocating liability in accordance with

\textsuperscript{180} For example, the trial judge in Soler described the alteration made by Castmaster as creating "'an entirely different functional machine.'" Soler, 98 N.J. at 141, 484 A.2d at 1227.

\textsuperscript{181} For example, compensation for pain and suffering is not permitted under workers' compensation statutes. See A. Larson, Workers' Compensation Law: Cases, Materials and Text § 69.10, at 519 (1984).

\textsuperscript{182} The manufacturer in a products liability suit is also prohibited from introducing evidence that the employer was contributorily negligent. Jarrett v. Duncan Thecker Assocs., 175 N.J. Super. 109, 417 A.2d 1064 (Law Div. 1980). This result follows from New Jersey's comparative negligence statute, which requires an allocation of liability, equaling 100\%, among only the parties named in a suit. See N.J. Stat. Ann. § 2A:15-5.2(b) (West Cum. Supp. 1985-1986). State workers' compensation law also provides that an injured worker may not file a personal injury suit against his employer. See supra note 178 and accompanying text. Therefore, because the employer cannot be named in a products liability action, evidence of his negligence may not be considered by the trier of fact. See Jarrett, 175 N.J. Super. at 114-15, 417 A.2d at 1067. Additionally, an employee's contributory negligence is not a defense available to a manufacturer when sued by an individual who used the product in an industrial setting. Green v. Sterling Extruder Corp., 95 N.J. 263, 271-72, 471 A.2d 15, 20 (1984); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A.2d 140, 153 (1979). Thus, by statute and common law, the manufacturer is the only party against whom a jury may impose liability, even though it is clear that both the employer and the employee may also be at fault.
fault can best be served by allowing the jury to assess a percentage of liability against each party that contributes to the accident.

Without such an allocation of liability, too great a burden is placed upon the manufacturer. This creates problems that extend beyond the question of unfairness to an individual manufacturer in a particular case. In his concurrence in Brown, Justice Schreiber mentioned some of these difficulties, such as the increased cost of products to the public. Another problem has been suggested by Dean William Crowe, who maintains that there is a tension between society's desire to provide compensation to victims injured by products and our economic system. According to Dean Crowe, our system encourages businesses to be productive and creative by bringing new products to the market. Thus, any imposition of liability on manufacturers for harm caused by a product will not only add to the cost of products, but will also have a "chilling effect" on creativity and productivity.

These and other problems in the field of products liability have been widely discussed in recent years. One important response has been the introduction of a bill in Congress to establish a uniform products liability law. This proposed legislation, to be known as the "Product Liability Act," would pre-empt all state law regarding products liability in order to define more clearly the obligations of manufacturers.

Under the Act, a manufacturer would be liable if the product

183 See Brown, 98 N.J. at 179-80, 484 A.2d at 1247 (Schreiber, J., concurring). Costs resulting from potential products liability may become so high that a manufacturer cannot afford to stay in business. Mr. James Winker, vice president of Raven Industries, a manufacturer of hot-air sport balloons, testified before Congress that his company may be forced to abandon that product line. Product Liability Act: Hearing on S. 100 Before the Subcomm. on the consumer of the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. 42 (1985) (statement of James Winker, Vice President, Raven Industries). He stated that in the late 1970's, liability insurance for this line was $100,000 per year, 4% of the product's cost. Id. at 41. By 1985, the insurance premium had risen to $750,000, 31% of the product's cost. Id.


185 Id. at 956.

186 Id.

187 Id.


189 Id. § 1.

190 Id. § 3(b)(1).
was unreasonably dangerous in manufacture191 or design,192 if the manufacturer failed to give adequate instruction or warnings, 193 or if the product did not meet its express warranty.194 Further, under the Act, the unreasonably dangerous aspect of the product must have been the proximate cause of the injury in order for the plaintiff to recover.195 This standard would be consistent with current New Jersey law.196

The Act also adopts comparative negligence principles197 for allocating liability to the various parties in a suit. Misuse198 and alteration199—measured by an objective standard200—are to be considered by the jury in making this allocation, except where the misuse or alteration was by the plaintiff’s employer or fellow employee.201 Thus, if Soler and Brown were considered under the Act, the result would be the same as under New Jersey law, but only because the accidents happened in a work setting—in each case, the plaintiff’s employer had altered the product in question. The rules that come from Soler and Brown, allowing liability when a product has been altered after leaving the manufacturer’s control, and from Cepeda, allowing liability after a product has been misused, would be pre-empted by the Act whenever the injury occurred in a nonwork setting.

The Act is an attempt to provide a national legislative answer to at least some of the perceived problems in the field of products liability. While it does not address the problems and inconsistencies caused by workers’ compensation statutes,202 it does seek to limit the liability of manufacturers in other areas. Most

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191 Id. § 4(1)(A).
192 Id. § 4(1)(B).
193 Id. § 4(1)(C).
194 Id. § 4(1)(D).
195 Id. § 4(2).
196 See supra note 31 and accompanying text.
197 See Proposed Products Liability Act, supra note 188, § 9(a).
198 Id. § 9(c).
199 Id. § 9(d)(1).
200 See id. § 9(c), (d)(1). The Act specifically provides that “[a]lteration or modification [of the product] shall be considered to occur when a product is changed in a manner which is not consistent with the reasonably anticipated conduct of users.” Id. § 9(d)(1) (emphasis added).
201 Id. § 9(c), (d)(1).
202 The Act defers to state laws that prohibit an employee “from recovering in any action other than a workers’ compensation claim against a present or former employer.” Id. § 10(d). This perpetuates the inequity of allowing an employer who has negligently or intentionally altered a product to escape from any liability beyond that provided by state workers’ compensation law. See supra notes 178-182 and accompanying text; see also Proposed Products Liability Act, supra note 188.
importantly, it seeks to provide clear guidelines at a time when manufacturers are more uncertain than ever of their potential liability. While it is too soon to predict whether this or similar legislation will be passed by Congress, the impetus behind it will remain strong as long as state courts continue to follow an expansive and "open-ended" approach to liability. Whatever the merits of the particular holdings in Soler and Brown, the New Jersey Supreme Court, by allowing liability for manufacturers to turn on vague standards such as foreseeability and proximate cause, has missed an opportunity to set clear guidelines and has made the need for a legislative response more imperative.

James R. Icklan

§ 9(b)(1)(B) (trier of fact may assess comparative liability of all nonparties except plaintiff's employer and fellow employees).