No. 103135-1

SUPREME COURT
OF THE STATE OF WASHINGTON

KERRY L. ERICKSON; MICHELLE M. LEAHY;
RICHARD A. LEAHY; AND JOYCE E. MARQUARDT,

Petitioners,

v.

PHARMACIA LLC, a Delaware limited liability corporation, f/k/a Pharmacia Corporation,

Respondent.

RESPONDENT'S ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM

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I. INTRODUCTION

The Washington legislature did here exactly what this Court's precedents endorse: After gathering evidence and documenting its findings, the legislature adopted reasonable, well-supported time limits for commencing an action under the WPLA. In doing so, the legislature properly "weigh[ed] competing interests and ma[de] difficult choices as a matter of policy." *Bennett v. United States*, 2 Wn.3d 430, 435, 539 P.3d 361 (2023). Applying *Bennett* and other precedents, Division One unanimously agreed that the WPLA's statute of repose is constitutional. There is no conflict on that question, and no other reason this Court should again review the constitutionality of a repose provision.

The amicus memorandum from Washington State Association for Justice Foundation ("WSAJF") confirms review is unwarranted. It principally disagrees with Division One's application of *Bennett* to the facts here,

without offering any persuasive justification for review or engaging with the extensive legislative record distinguishing this case from *Bennett*. At bottom, WSAJF invites the Court to second-guess the legislature's well-supported policy judgments, which *Bennett* expressly forbids. The Court should decline that invitation and deny review.

II. ARGUMENT

A. Division One Correctly Concluded that the WPLA's Statute of Repose Is Constitutional.

WSAJF contends Division One's application of *Bennett* and related decisions was erroneous. WSAJF 6-11, 12 n.3. But that is not a ground for review, and, in any event, is incorrect. Unlike in *Bennett*, the legislature provided reasonable grounds to support the WPLA's statute of repose.

Under article I, section 12 of the Washington Constitution, the legislature need offer only "'a reasonable ground'" to support a state law granting a privilege or

immunity to particular persons. *Bennett*, 2 Wn.3d at 442-43. In applying the reasonable-ground test, courts look for "a nexus between the legislature's stated purpose and the challenged statute"—that is, whether the statute "is consistent with its underlying rationale." *Id.* at 449.

In *Bennett*, this Court held that an eight-year medical-malpractice statute of repose failed that test. The legislature there expressed ambivalence about the statute's impact, observing that "'to the extent'" it had any effect on insurance costs, it would "'tend to reduce rather than increase'" them. 2 Wn.3d at 448-49. But the legislature "did not assert that the statute of repose would, *in fact*, decrease the cost," and this Court refused to "'hypothesize facts'" to support that (legitimate) goal. *Id.* at 449 (emphasis added). The legislature also said that defending *any* stale claim was "a substantial wrong," but that justification could not be credited because the statute's "exemptions and tolling provisions" permitted suit on

many old claims. *Id.* at 450. Finally, generic recitations of "legislative compromise" were insufficient without adequate legislative findings. *Id.* at 451.

Although the legislative record in *Bennett* was inadequate, this Court emphasized that reasonable-ground analysis is no license for courts to "second-guess [the legislature's] policy decisions." 2 Wn.3d at 435. In fact, *Bennett* reaffirmed the legislature's "broad authority to set time limits for commencing an action," and "recognize[d] that when exercising this authority, the legislature must weigh competing interests and make difficult choices." *Id.*

The legislative record here stands in stark contrast to the one in *Bennett*. A faithful application of *Bennett* confirms the WPLA's statute of repose is constitutional.

The WPLA was enacted "to create a fairer and more equitable distribution of liability among parties at fault." Laws of 1981, ch. 27 § 1, Preamble. To achieve that purpose, the legislature explained that it was balancing several

competing goals: treating "the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion"; ensuring that "the right of the consumer to recover for injuries" from "an unsafe product" is not "unduly impaired"; and addressing "substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation." *Id.* The legislature was particularly concerned about "[s]harply rising premiums" for product-liability insurance, which it found "ha[d] increased" product costs and disincentivized "innovation" and "development of new products." *Id.*

The legislature's judgments were well supported. After gathering evidence and holding ten public hearings, the Washington State Senate Select Committee on Tort and Product Liability Reform issued a comprehensive 57-page report that summarized its findings and recommended what ultimately became the WPLA. WPLA Committee

Final Report 4 (Jan. 1981), *incorporated into* Senate Journal, 47th Legislature (1981), at 617 ("Final Report"), https://perma.cc/R3XP-CRC8 (attached as Appendix).

The Committee found, among other things, that product-liability insurance premiums had "skyrocketed between 1974 and 1976," Final Report 13, in the wake of early asbestos verdicts. For example, the Insurance Services Organization, which set advisory rates, "submitted increases in excess of 75%" in 1974-75, and businesses likewise reported "dramatic premium increases" from 1974-76. *Id.* Evidence further showed that "transaction costs, including litigation expenses," increased product-liability costs "appreciably," accounting for "35% of bodily injury payments and 48% of property damage payments." *Id.* at 9.

Insurers advised the Committee that "the length of time a product seller is subject to liability" was their "greatest concern" in ratemaking. Final Report 19. But the

Committee did not stop its analysis there. As WSAJF acknowledges (at 10-11), the Committee scrutinized insurers' claims, citing data showing that, historically, "over 97% of product-related incidents occurred within six years" after the product was purchased, and that for "capital goods," "83.5% of all bodily injuries occurred within ten years" of manufacture. *Id.* The Committee noted that this data "raise[d] questions" about the "need and effectiveness of a statute of repose." *Id.* at 9.

But the Committee *also* found that even if insurers' increased rates reflected "'panic pricing'" rather than data-driven ratemaking, these well-documented rate increases nevertheless imposed a "'crisis'" of affordability on businesses and consumers. Final Report 13-14, 27. The Committee found that "an insurer's perception of potential claims, whether substantiated or not, very likely is reflected in [the] rates" it charges businesses. *Id.* at 19. The data supported that finding, as did insurers' statements that the

"potential 'long tail' of exposure is *the primary factor* influencing rate-setting." *Id.* (emphasis added). The Committee thus concluded that product sellers' long-term liability exposure *in fact* "affects insurance rates"—and thus costs businesses and consumers must pay—because premiums "must take into account the possibility of claims on products manufactured many years ago." *Id.* at 42.

The proposed solution—which became the WPLA—was to "bring some certainty to the issue of [liability] exposure" while "preserving those claims" based on "reasonable" product use. Final Report 19. Specifically, the Committee followed the Model Uniform Product Liability Act ("UPLA") by recommending a useful-safe-life standard, after which a product seller ordinarily is not liable. S*ee id.* at 19-20. And in following that recommendation, the legislature adopted a presumption that a product's useful safe life is twelve years (two years longer than the UPLA's), rebuttable by a preponderance of

the evidence. RCW 7.72.060; *see* Final Report 43. It also allowed plaintiffs to bring claims beyond a product's useful safe life in narrow situations where certainty about liability exposure was less relevant (*i.e.*, warranty, fraud, or exposure commencing within the product's useful safe life). RCW 7.72.060; *see* Final Report 43-44.

In sum, the WPLA's statute of repose, as enacted, "create[d] a degree of certainty in the law without depriving the claimant of the ability to demonstrate that, in fact, the product was still in a useful condition at the time of the injury"—striking a balance between insurers, manufacturers, sellers, and consumers. Final Report 43. While WSAJF may disagree with the legislature's policy choices, that is not the test. Applying *Bennett*, Division One correctly held that the Committee "provided specific explanations for the ways in which its research drove [its] recommendations that balance[d] the competing interests." Op. 27. These extensive legislative findings show

"a nexus between the legislature's stated purpose" and the WPLA's statute of repose, so the statute is supported by "reasonable grounds" and constitutional. *Bennett*, 2 Wn.3d at 443, 449.

B. WSAJF Offers No Other Persuasive Reason to Grant Review

WSAJF argues the decision below is in tension with *Bennett* and its predecessor, *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998), and is bad policy. WSAJF 11-15. Neither argument supports review.

1. *WSAJF identifies no inconsistency with precedent.* Division One's conclusion comports with *Bennett* and *DeYoung*. In *DeYoung*, this Court held that, on the record before it, an earlier version of the same repose statute addressed in *Bennett* had no "rational relationship" to the statute's purpose—reducing medical-malpractice insurance premiums by cutting off long-tail liability. 136 Wn.2d at 147-49. The legislature had made no

findings about the need for the provision, and the materials before it showed a "minuscule number" of long-tail claims, which accounted for "less than .2 percent" of the money paid. *Id.* at 149-50. The Court was thus left to conclude that long-tail claims could not meaningfully affect insurance costs. *Id.*

Unlike the inadequate data in *DeYoung* (and generic rationales in *Bennett*, *supra*, at 3-4), the legislature here enacted the WPLA's statute of repose based on specific findings: (i) product-liability insurers had dramatically increased premiums due to concerns about long-term, open-ended liability exposure; and (ii) a statute of repose based on the UPLA's useful-safe-life approach would add a degree of certainty while preserving claims based on reasonable product use. Final Report 13, 19, 42-43; Laws of 1981, ch. 27 § 1, Preamble. The repose provision thus rests on reasonable grounds, as Division One unanimously concluded.

WSAJF insists the link here is insufficient, WSAJF 6-8; *cf.* Pet. 8-9, but its argument distorts this Court's precedents. The legislature acted on evidence that insurers viewed possible long-tail exposure as "the primary factor influencing rate-setting," and that "an insurer's perception of potential claims, whether substantiated or not, very likely is reflected in rates." Final Report 19. The Committee thus decisively concluded, after analyzing all the evidence, that the "open-ended situation … *affects insurance rates*." *Id.* at 42 (emphasis added).

WSAJF's contention that even *these* reasonable legislative judgments were insufficient invites endless judicial "second-guess[ing]." *Bennett*, 2 Wn.3d at 435. This Court has "soundly rejected" that overbearing approach to reviewing legislation. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 228, 143 P.3d 571 (2006) (criticizing *Lochner v. New York*, 198 U.S. 45 (1905)). The Court should not resurrect it here.

WSAJF also notes that the evidence did not uniformly support the repose provision. WSAJF 8-9, 11-14; *see* Pet. 11. But evidence informing legislative judgments is rarely one-sided. And the Committee considered the evidence WSAJF and petitioners reference—alongside a range of other evidence—and ultimately concluded, quite reasonably, that a repose provision adapted from the UPLA would curb rising premiums while balancing other concerns.

Importantly, the legislature did not have a single-minded focus on reducing premiums. WSAJF 8-9, 12-14; *see* Pet. 11 (similarly overemphasizing "certainty" for insurers). While that was one important goal, it was not the *only* goal. Unlike the statute in *Bennett*, the WPLA's repose provision was enacted as part of a broader, integrated statute governing product liability. Final Report 16-19. As legislation often does, the WPLA and its repose provision struck a balance between competing considerations—

including insurers' need for greater certainty to reduce premiums imposed on product sellers, and claimants' need to recover for reasonable claims. *Id.* at 19-20, 42-44. That balance is supported by extensive findings and by "specific explanations" connecting the Committee's research to the WPLA as ultimately enacted. Op. 27. These legislative judgments are not subject to after-the-fact "'courtroom fact-finding.'" *Bennett*, 2 Wn.3d at 449.

WSAJF cannot credibly attack the *claimant*-friendly features of the statute of repose. WSAJF 7-8; *see* Pet. 11. The legislature made the useful-safe-life presumption rebuttable (rather than implementing a bright-line cutoff after a given number of years), adopted a preponderance-of-the-evidence standard to overcome that presumption (rather than the UPLA's clear-and-convincing-evidence standard), and permitted narrow exceptions to the useful-safe-life rule to ensure the repose provision does not unduly burden meritorious product-liability claims—all

while providing insurers greater certainty to foster affordable premiums for sellers (benefitting consumers) and promote product development. If the legislature had instead adopted a bright-line rule, WSAJF would undoubtedly condemn it as "arbitrary," as some courts have concluded in addressing different statutes. *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 681 (Utah 1985) (analyzing six- and ten-year periods).*

In reality, the position WSAJF (and petitioners) endorse would render *any* statute of repose unconstitutional: A statute with claimant-friendly features supposedly would not serve its stated purposes, while one

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* This Court has refused "'to draw generalizations'" from other courts' decisions, which involve different statutory contexts, different repose periods, different legislative records, and different constitutional provisions. *Bennett*, 2 Wn.3d at 452 (quoting *DeYoung*, 136 Wn.2d at 150 n.4). Besides, a "considerable number of state and federal courts" have "upheld" product-liability statutes of repose against constitutional challenge. *Groch v. Gen. Motors Corp.*, 883 N.E.2d 377, 412 & n.4 (Ohio 2008) (citing cases).

too defendant-friendly supposedly would serve special interests. *Bennett* rejected that Catch-22, "reaffirm[ing] the legislature's broad authority to set time limits for commencing an action." 2 Wn.3d at 435. Division One's decision is fully consistent with *Bennett* and *DeYoung*.

2. WSAJF's policy appeal does not justify review. WSAJF also invokes generic policy concerns related to the "anti-favoritism principle" of the privileges and immunities clause. WSAJF 14. But as discussed, the WPLA's statute of repose contains numerous claimant-friendly features. Final Report 19-20, 43-44. Besides, the anti-favoritism principle does not operate in the abstract to invalidate all legislative distinctions. *Bennett* requires only a nexus between the legislature's purpose and the statute. 2 Wn.3d at 442-43. Division One faithfully applied that test and unanimously concluded that reasonable grounds support the WPLA's statute of repose. Op. 20-29.

To the extent policy considerations are relevant, they favor Division One's decision. If the WPLA's statute of repose violated the privileges and immunities clause, the entire WPLA would fall based on severability principles. Where, as here, "'the constitutional and unconstitutional provisions are so connected … that it could not be believed that the legislature would have passed one without the other,'" *Leonard v. City of Spokane*, 127 Wn.2d 194, 201, 897 P.2d 358 (1995), or where striking the unconstitutional provision "would broaden the statute's application," *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 118, 63 P.3d 779 (2003), the unconstitutional provision cannot be severed, and the entire Act is invalid.

As Judge Dwyer noted, the WPLA's statute of repose is an integral component of the statute as a whole. Concurrence/Dissent 11-15. Given how important affordability was to the legislature, it "defies belief" to think it would have enacted the WPLA without the repose

provision. *Id.* at 14. And the WPLA would clearly have a broader scope without that provision. *See* 2 Shambie Singer, *Sutherland Statutes and Statutory Construction* § 44:8 (8th ed. 2018 & 2023 Supp.) ("Courts regularly find that severing an invalid exception, exemption, or proviso necessarily broadens an act's scope in a way that cannot properly represent legislative intent." (compiling authorities)); *Mt. Hood*, 149 Wn.2d at 118. A decision striking down the statute of repose would thus sweep away the entire WPLA.

III. CONCLUSION

The Court should deny review.

I certify that this answer is in 14-point Georgia font and contains 2499 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 22nd day of August, 2024.

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APPENDIX

WASHINGTON STATE SENATE

SELECT COMMITTEE ON

TORT & PRODUCT LIABILITY REFORM

FINAL REPORT

January, 1981

Olympia, Washington

SENATE SELECT COMMITTEE
ON TORT AND PRODUCT LIABILITY
REFORM

Senator Phil Talmadge, Chairman

Senator Del Bausch
Senator Ted Bottiger
Senator George Clarke
Senator Jeannette Hayner
Senator John Jones
Senator Don Talley

STAFF

William R. Gales
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Gail L. Toraason

FORWARD

The Select Committee on Tort and Product Liability Reform was created at a time when the controversy over proposals in this area was at its peak. The bill introduced in the 1979 legislative session had been vigorously debated and lobbied. The air was thick with charges and countercharges. It was apparent to almost all of the involved parties that the issues raised by the 1979 bill deserved a more focused and thorough examination. Thus the formation of the Select Committee.

Speaking for the members of the Select Committee, it has been a demanding but ultimately worthwhile study. We held numerous public hearings on all aspects of the subject. We solicited information from all parties who had indicated an interest in the subject. To the extent possible we sought the advice of experts both in this state and elsewhere. This report reflects our best judgment on the important issues we had to address.

Special thanks must be given to all those who participated in our study. We clearly could not have developed the information upon which to base our findings without their generous participation.

Phil Talmadge
Chairman

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FORMATION OF SELECT COMMITTEE

The Senate Select Committee on Tort and Product Liability Reform was formed on July 6, 1979, pursuant to the provisions of Senate Resolution 1979-140. The following members were appointed to serve on the Select Committee: Senator Phil Talmadge, Chairman, Senator Del Bausch, Senator Ted Bottiger, Senator George Clarke, Senator Jeannette Hayner, Senator John Jones and Senator Don Talley. The Select Committee was directed to report its findings and recommendations to the Senate prior to the commencement of the 1980 regular session of the Legislature which it did in an interim report dated January 18, 1980. The Select Committee was directed to continue its study through 1980 by Senate Resolution 1980-236. The issuance of this final report is the culmination of the work of the Select Committee over the past year and a half.

HISTORY OF LEGISLATIVE ACTION ON TORT AND PRODUCT LIABILITY REFORM IN WASHINGTON STATE

The issue of tort and product liability reform began gaining momentum at the state level in 1976. During that year, testimony was received by both House and Senate committees, and, in the fall, the Insurance Commissioner-Elect formed a statewide product liability task force. Legislation drafted by the task force (HB 1162/SB 2744) was submitted to both houses of the 45th Legislature in February, 1977. Hearings were held on the legislation in both the House and the Senate, but neither bill was enacted into law.

Three other product liability related bills were introduced in 1977, all more limited in scope than HB 1162/SB 2744. The bills proposed insurance reporting requirements, defined liability

insurance, and revised liability rate setting laws. Also introduced in 1977 were two tort reform bills sponsored by the Judicial Council dealing separately with the issues of contribution among tortfeasors and comparative fault.

Subsequent to the 1977 legislative session, the House Judiciary Committee held interim hearings on the issue of tort reform and product liability. As a result of those hearings, several members of the Committee introduced HB 241 in 1979. This bill dealt with both product liability and general tort reform. The bill received a hearing in the House only. Other related legislation introduced in the House in 1979 included HB 403, dealing with insurance reporting requirements, and HB 843, another comprehensive product liability and tort reform measure.

Product liability legislation introduced in the Senate in 1979 included SB 3073, sponsored by Senator Phil Talmadge, which was modeled after a preliminary draft of the Model Uniform Product Liability Act proposed by the United States Department of Commerce. Also introduced in the Senate were SB 2677 and SB 2875 dealing with contribution among tortfeasors and governmental affirmative defenses.

The primary focus of legislative activity during the 46th legislative session was SB 2333, which could also be characterized as a comprehensive product liability and tort reform measure. The bill received several hearings in both the House and the Senate and was amended substantially by each body. Different versions were approved by the House and Senate, but since the two houses were not able to reach an agreement on the language, the bill did not receive final approval.

As a response to the continuing product liability controversy, the Senate Select Committee on Tort and Product Liability was created.

SELECT COMMITTEE OBJECTIVES

One of the first tasks facing the Select Committee was the development of basic goals and objectives. The Select Committee was aware of the controversy generated by the product liability and tort reform proposal considered in the 1979 session and decided that it was essential to undertake a thorough and objective study of the issues raised by that bill. It felt that the debate on Senate Bill 2333 had been marred by a rash of charges and countercharges concerning the demonstrated need for, and impact of, changes in the tort system proposed by the bill. The Select Committee felt that one of its most important functions would be to serve as a forum for the full and open debate of product liability and tort reform issues.

An important consideration in the development of goals and objectives was the fact that the scope of the Select Committee's inquiry included both product liability reform and tort reform. Because of this it was necessary to separate the issues which affect only product liability law from those which affect tort law in general. This was especially important when the possible ramifications of various changes in the legal system were being considered.

Because of the magnitude of the study, the Select Committee indicated that it would resist any efforts to panic it into recommending legislation. The Select Committee pointed out that it was primarily a study committee set up to examine the merits of various product liability and tort reform proposals. At the completion of its study, it would only recommend legislation which had been demonstrated to be necessary and desirable.

In order to assist it in carrying out its responsibilities under the Senate Resolution, the Select Committee directed its staff to gather information about product liability and tort

reform legislation in other states. Staff was specifically directed to examine the final report and findings of the Federal Interagency Task Force on Product Liability and the work of its successor group, the U.S. Department of Commerce Task Force on Product Liability and Accident Compensation.

The major effort of the Select Committee, however, was directed toward assessing the need for product liability and tort reform in the State of Washington. To that end, it solicited comments from persons with expertise on various subjects included in the study. These persons included legal practitioners, business and insurance industry representatives, government regulators, court administrators and academicians.

As a general approach, the Select Committee determined that in the first phase of the study it would concentrate on the insurance aspects of the problem, specifically to determine the extent of the problem as to the availability and affordability of product liability insurance coverage. The Select Committee would then attempt to determine whether the problem in the insurance area was the result of underwriting practices in the industry or the result of the current state of the tort law. Its findings on these points would be important in determining the kinds of changes in the legal system that would be considered in the second phase of its study.

SUMMARY OF SELECT COMMITTEE ACTIVITIES

Prior to the commencement of public hearings in September, 1979, Senator Talmadge directed staff to survey the larger insurance companies in this state to determine their product liability experience in an effort to find out if a product liability insurance problem existed.

While this survey was being conducted, the Select Committee

held its first public hearing in Seattle on September 8, 1979. The purpose of the hearing was to receive background information on the history of product liability and on recent developments at the federal level. Professor Richard Settle from the University of Puget Sound Law School and Professor Victor E. Schwartz, Chairman of the U.S. Department of Commerce Task Force on Product Liability and Accident Compensation, were the featured speakers. Professor Settle gave an overview of the development of tort law in the area of product liability nationwide. Professor Schwartz's comments generally dealt with efforts at the federal level in dealing with product liability. Specifically, his testimony covered: 1) the conclusions drawn from the Department of Commerce's 18-month interagency study on product liability conducted in 1976-77; 2) proposed legislation at the federal level developed by the Commerce Department entitled "The Product Liability Risk Retention Act of 1979"; and 3) a summary of the preliminary draft of the Department of Commerce's Model Uniform Product Liability Act.

At this meeting, testimony was also received from Ron Bland, President of the Washington State Trial Lawyers Association; Charles Kimbrough, President of the Washington Association of Defense Counsel; and Hugh McGough, also of the Washington Association of Defense Counsel. Their comments reflected the plaintiffs' and defendants' perspective on the issue of product liability respectively.

The second public hearing of the Select Committee was held in Olympia on October 5, 1979. The purpose of this hearing was to present the Select Committee with an overview of the complex process of insurance rate-making procedures both generally and as they related to product liability insurance. Mr. Ed Lazarek and Mr. Bernie Galiley from the Insurance Services Office in San Francisco described the formulae conditions, and data bases utilized by ISO in recommending rates in the property casualty area. Also at this hearing, staff outlined briefly

the questionnaire that was sent to insurance companies to solicit their product liability experience and the number and quality of responses received to date. SAFECO, one of the companies which had provided a fairly complete response, was asked by the Select Committee to explain its response, its rate making procedures, and how it is improving those procedures.

The third public hearing of the Select Committee was held in Seattle on October 20, 1979. The agenda for this hearing included a discussion by Bob Higley of the Insurance Commissioner's Office on regulatory oversight of the rate making process, and staff presentations on: 1) industry responses to the Select Committee's product liability insurance survey; 2) product liability reporting statutes in effect in other states; and 3) pooling and risk retention groups, including a discussion of the proposed Product Liability Risk Retention Act of 1979.

The fourth public hearing, held in Olympia on November 16, 1979, was a staff briefing of the Select Committee on tort aspects of the product liability issue which included a summary of the current state of the law in Washington as well as in other states, and a review of the Model Uniform Product Liability Act proposed by the U.S. Department of Commerce.

The fifth public hearing was held in Olympia on December 7, 1979, for the sole purpose of receiving public testimony on the work of the Select Committee thus far, and on product liability and tort reform in general. Representatives from the following groups presented testimony at this meeting: Seattle Consumer Action Network; Washington State Bar Association, Tort Reform Task Force; Washington State Trial Lawyers Association; and Yarder Manufacturers' Association.

Professor Schwartz returned to Washington State for a hearing on December 29, 1979, in order to answer questions which had arisen on the meaning of certain provisions in the Model Uniform

Product Liability Act.

The seventh public hearing was held on June 27, 1980, after the close of the 1980 regular legislative session. Cleary Cone, Chair of the Washington State Bar Association's Task Force on Product Liability, presented the Select Committee with a first draft of its proposed product liability act. Ron Bland from the Washington State Trial Lawyers Association testified on the Trial Lawyers reaction to the Bar's proposal. The hearing also dealt with the relationship between product liability and the workplace injury. Staff gave a briefing on third party actions under the Industrial Insurance Act and recent efforts to amend that law. Testimony was received from Virginia Bins, Assistant Attorney General representing the Department of Labor and Industries.

At the July 25, 1980 hearing, the Select Committee staff gave an overview of a draft product liability act for Washington. Interested parties were encouraged to review the draft and to testify at an upcoming hearing to be held in the fall. Preliminary comments on the draft were made at this hearing by Pat Long representing PACCAR, Cleary Cone representing the Washington State Bar Association's Tort Reform Task Force, Jan Peterson representing the Washington State Trial Lawyers Association, and Ed Dawson.

The purpose of the hearing held on October 10, 1980, was to solicit public comment on the Select Committee's draft product liability act. Prior to the commencement of testimony, staff explained several amendments of a clarifying nature that had been made to the draft. Testimony was received from the following interested groups: Seattle Consumer Action Network, Safeco Corporation, Association of Washington Business, Independent Business Association, PACCAR, American Insurance Association and Washington State Trial Lawyers Association.

The final hearing of the Select Committee was held on December 19, 1980. Staff summarized revisions which had been

made to the draft product liability act. Testimony on the revisions was also received from interested parties. At the close of the hearing Chairman Talmadge indicated his intent to have the Select Committee introduce the draft, as revised, in the upcoming legislative session.

SELECT COMMITTEE RESOURCES

Interagency Task Force on Product Liability

The Select Committee relied heavily on several national studies in its examination of the product liability issue. By far the most extensive and authoritative examination of the product liability issue was conducted over an 18-month period by the Federal Interagency Task Force on Product Liability. The final report of the Task Force was issued in 1977 and has provided a valuable source of data against which to compare the Select Committee's own findings.

The Task Force identified three principal causes of the product liability problem--product liability insurance rate making procedures, manufacturing practices, and the tort-litigation system. The Task Force concluded that "the product liability problem is based on a confluence of causes and that it will only be resolved if each cause is properly addressed" (Executive Summary for the Final Report of the Federal Interagency Task Force on Product Liability, page 6).

Model Product Liability Legislation

The Department of Commerce developed model legislation for adoption by the states based upon the work of the Federal Interagency Task Force. After extensive public comment on its initial draft, the Commerce Department issued the final version on October 31, 1979. The Model Uniform Product Liability Act, which suggests a variety of changes to many traditional tort law concepts, received careful considera-

tion from the Select Committee.

ISO Closed Claims Survey

In response to the growing concern about rising product liability insurance costs during 1975-76, the Insurance Services Office, an independent insurance industry statistical and rate making organization, conducted a nationwide study of product liability claims closed between July 1, 1976 and March 15, 1977. Twenty-three insurers were asked to contribute information to the study.

While there are a number of concerns with the figures reported in the ISO survey (for example, claims closed without payment are not included and dollar figures were "trended" to allow for future projections), a number of significant facts regarding product liability claims emerged from the ISO's study.

For example, workplace injuries account for 11% of the number of individuals receiving bodily injury payments, but these claims represent 42% of the claims dollars paid. This demonstrates the significance of industrial accidents and suggests the importance of the relationship between a state workers' compensation system and product liability.

The problem of the "long tail" in product liability claims is often cited in support of a statute of repose on product liability claims. The ISO study indicates that injuries accounting for 81% of payments occur within three years of purchase of the product and over 90% within six years. This finding raises questions regarding the need and effectiveness of a statute of repose.

Finally, transaction costs, including litigation expenses, add appreciably to the cost of product liability insurance according to ISO data. As reported by the twenty-three insurers, defense costs amount to 35% of bodily injury payments and 48% of property damage payments.

Activity in Other States

Washington, of course, is not alone in its concern regarding the product liability issue. The Select Committee has attempted to determine the level and direction of product liability and tort reform activity in other states, most of which has occurred over the last three years. Seventeen states have enacted some type of reporting requirements of product liability insurance costs, often in a manner similar to that currently utilized for medical malpractice in Washington. These laws fall into four basic categories of reporting: 1) notice of cancellation, nonrenewal or change in coverage; 2) closed claims; 3) financial/statistical data; and 4) general information.

In 1979, the National Association of Insurance Commissioners adopted a supplementary form relating to product liability insurance to be used in conjunction with the annual statement submitted by all insurance companies to state Insurance Commissioners. Representatives from Washington's Insurance Commissioner's Office have indicated that this new supplemental form will be required of insurance companies doing business in Washington beginning in 1980.

Representatives from ISO have testified that the statistical reporting procedures which ISO requires of its client companies are currently being revised to provide more refined classification details. These new procedures which will require data breakdowns on all types of product liability insurance (manual,(a) rated and commercial multi-peril) should contribute to a more accurate picture of the data upon which premiums--and premium increases--are based.

Nineteen states have adopted some measure of tort reform in response to the product liability issue. Activity has generally been concentrated in seven areas: 1) definition of a product liability action; 2) statutes of limitation/repose; 3) state of the art defense; 4) duty to warn; 5) governmental standards;

6) product modification and alteration; and 7) subsequent design changes.

WASHINGTON STATE BAR ASSOCIATION TORT REFORM TASK FORCE

The State Bar Association's Tort Reform Task Force, Chaired by Cleary Cone, met during this same 1979-80 period. The Task Force developed legislative proposals on product liability and on comparative fault which were carefully considered by the Select Committee. The Select Committee gratefully acknowledges the valuable contributions made by the Task Force, particularly Chairman Cone, during the course of its study.

MAJOR FINDINGS

From its inception, the Select Committee recognized that the controversy surrounding SB 2333 in the 1979 session involved issues which were outside the narrow scope of product liability law. In view of this, the Select Committee in carrying out its mandate considered suggestions for both product liability reform and general tort reform. In doing so it looked at a number of model acts including the Uniform Comparative Fault Act, the Uniform Contribution Among Joint Tortfeasors Act, as well as the Model Uniform Product Liability Act.

In addition, the Select Committee solicited testimony from a broad range of groups and individuals interested in these subjects. Comments, suggestions, proposals and critiques have been received from consumers, manufacturers, retailers, insurers, and the plaintiff and defense bars. The Select Committee also attempted to compile independent data relating to product liability insurance practices, product liability judgments, and proposals for reform in other states.

As a result of this effort over the past eighteen months, the Select Committee offers the following findings:

I. Insurance Practices

As part of its initial inquiry into product liability insurance practices, the Select Committee developed a questionnaire which was sent to eighteen insurance companies offering product liability insurance in Washington. Companies were asked to respond to questions in three broad areas: 1) volume of business, as reflected by the number of policies and premium dollar value of those policies; 2) profitability, as reflected by dollar profit and loss figures and loss/premium ratios; and 3) claims and litigation experience. Information was requested covering the years 1973-1978.

Responses were received from fifteen companies. Many companies chose to respond on a model product liability questionnaire prepared by the National Association of Insurance Commissioners and others who responded on the form submitted by the Select Committee did so only partially. Companies professed a great deal of difficulty in responding to the Committee's questionnaire. Especially troublesome, according to many of the companies, was the request that information be reported for each of the different types of product liability insurance written--monoline, comprehensive general liability and commercial multi-peril. Companies also reported that retrieval of claims and litigation information was a difficult problem, and the Select Committee received very few responses on the questions covering these areas.

Data prior to 1977 was generally not reported, and the figures which were received for the 1973-1976 period were difficult to interpret since the method of compiling information often was not consistent among the various companies responding. Because of the variability which permeated both the manner in which the companies responded and the extent and depth of their responses,

it is difficult to draw meaningful conclusions from the Select Committee questionnaire. A few observations, however, can be made.

The Interagency study and testimony received by the Select Committee from representatives of ISO, support statements made by manufacturers that premiums for product liability insurance skyrocketed between 1974 and 1976, thereby generating what came to be known as the "product liability crisis." The Select Committee study also supports this conclusion. Most of the companies responding to the questionnaire utilized ISO ratemaking, and in 1974-1975 ISO submitted increases in excess of 75% in its rates for bodily injury and property damage. These increases are reflected in premium figures for Washington companies. Of the ten companies responding to question no. 6 (dollar value of policies) eight companies showed dramatic premium increases between 1974 and 1976.

This fact alone, of course, does not address the question of whether or not such increases were justified. Testimony by representatives of ISO indicated that historically the product liability premium had been a minor consideration in computing rates for commercial coverages, but that with the increased judicial activity in the area insurers determined that premium structures did not adequately reflect their risk in the products area. Coupled with the inflationary trend throughout the economy during this period, this perceived inadequacy led to the increases which occurred in every state during this period.

The Select Committee has been unable to independently determine whether or not these considerations provide adequate justification for the increases. The Federal Interagency Task Force in looking at this same question was likewise unable to determine whether the premium increases during this 1973-75 period were justified. It mentioned circumstantial evidence that some insurers appeared to have engaged in "panic pricing" (Executive Summary, page 6).

According to statements of industry representatives and information contained in the Interagency study, product liability losses exceeded premiums generally for all companies during 1973-1975. Responses to the Select Committee questionnaire also tend to indicate that the years prior to 1975 were typically unprofitable in the product lines for responding companies. However, as new rates began to be reflected after 1975, most companies' profitability figures improved greatly, and only two of the eight companies responding to question no. 7 (loss/premium ratios) showed a loss/premium ratio in excess of generally acceptable levels for the years 1977 and 1978.

The response indicated that there did not appear to be a severe problem regarding the availability of product liability insurance in Washington. Rather, the problem was one of affordability. Indicative of this, the MAP-WASH program, a program set up to assist product sellers in obtaining coverage, has received very few requests from individuals unable to secure coverage and has successfully placed all those who sought its assistance.

Because very few companies supplied data for questions 11 and 12 (claims and litigation experience) it is difficult to make any statements as to these items. However, it would appear that by far the greatest munber of product liability claims are closed for amounts under $10,000. The ISO study supports this, having concluded that in Washington during the closed claims study period, the average bodily injury claim was $4,329, not including loss adjustment expenses ($8,458 if trended for severity).

Because of the way product liability insurance is marketed and policy information maintained, it is very difficult to obtain accurate information on all product liability policies. There

is evidence that steps are now being taken, however, by both state regulators and the insurance industry to develop more complete and reliable data retrieval systems to allow greater accuracy in the rate making process. Beginning in 1980, the Insurance Commissioner required that information regarding product liability losses be reported annually for any policy in which the premium for product liability is separately stated. Such a method of reporting will not reflect much of the data for comprehensive or commercial multi-peril policies, since product liability premiums are not separately stated in such policies. Because a substantial amount of product liability insurance is sold in this way, there may be a need for additional reporting in order to obtain a more complete picture of the product liability situation in the future. The Washington State Trial Lawyers' Association has stated that insurance reporting legislation should be enacted prior to the adoption of any tort reform.

II. Product Liability Reform

As an outgrowth of the concerns with the rapid increase in product liability insurance premiums, a number of commentators have expressed the view that because of the national character of product manufacturing and marketing, the product liability area is particularly affected by the lack of uniformity among jurisdictions as to standards and procedures governing recovery.

This was a primary conclusion of the legal study commissioned by the Interagency Task Force on Product Liability which led to the development of a Model Uniform Product Liability Act by the U.S. Department of Commerce Task Force on Product Liability and Accident Compensation.

The Select Committee has used the UPLA as a basis for its consideration of product liability tort reform. To a great extent, the final proposal of the Select Committee closely adheres to its

approaches, if not its precise language, in four key areas. By doing so, the Committee believes its efforts will contribute to the creation of a measure of uniformity in the product liability area.

(a) Single Cause of Action. Historically, one of the most confusing areas in product liability tort law involves the variety of causes of actions--such as negligence, warranty and strict liability--available to the plaintiff seeking recovery for injuries allegedly resulting from a defective product. Testimony before the Select Committee reflected general agreement that the creation of a single cause of action, termed a "product liability claim" in the UPLA, eliminates this confusion and should be adopted.

(b) Standards of Liability for Manufacturers. In the words of the official analysis of Section 104 of the UPLA, "[n]o single product liability issue has generated more controversy than the question of defining the basic standards of responsibility to which product manufacturers are to be held." With its adoption of Section 402(A) of the Restatement of Torts (Second), the Washington court has extended strict liability to manufacturers of defective products, regardless of the nature of the defect. Seattle-First National Bank v. Tabert, 86 Wn. 2d 145 (1975); Teagle v. Fisher and Porter Co., 89 Wn. 2d 149 (1977). The concept of strict liability, with its disregard of evidence of the manufacturer's exercise of care, has generated heated discussion among commentators and practitioners, and concern and confusion regarding the precise nature of the basic elements in the proof and defense of liability has been reflected in testimony before the Select Committee.

Application of strict liability to defects in construction or for breach of warranty has not been seriously challenged before the Select Committee, since, as the drafters of the UPLA concluded, "strict liability for defective construction can be absorbed within the existing liability insurance system...[and] the consumer has the right to expect that a product will live up to the

manufacturer's representations."

The issue of strict liability for design and warning/instruction defects is more difficult. The state supreme court, while stating that the liability in such cases was strict liability, has articulated a test which upon closer analysis involves the balancing of factors more akin to negligence. Seattle-First National Bank v. Tabert, supra; Teagle v. Fisher and Porter Co., supra. It is arguable that what the court has done is create a negligence standard for the determination of whether a design or warning defect exists, which when established results in the imposition of strict liability. However, such a two-pronged analysis has not been clearly articulated and may, in fact, be nothing more than an exercise in semantics.

The continued use of both strict liability and negligence terminology has resulted in what the drafters of the UPLA refer to as "a foggy area that is neither true strict liability nor negligence. The result has been the creation of a wide variety of legal 'formulae', unpredictability for consumers, and instability in the insurance market."

The Washington State Trial Lawyers and representatives of some consumer groups have argued strenuously for the retention of strict liability in all product liability cases, and have at several times asked for a legislative adoption of Section 402(A). Their position is based upon the belief that as between the innocent, unknowing consumer and the manufacturer who is rewarded economically for placing the product into the stream of commerce, the law should protect the consumer from all defects which cause harm, regardless of their nature and over which the consumer has no control. The defense bar, represented primarily by spokesmen from the Association of Washington Business, counters that the imposition of strict liability in design and warning/instruction defect cases so offends our expectations of fairness in the tort law that it cannot be justified on these risk-shifting

grounds.

The Select Committee believes that the current Washington test reflects essentially a negligence standard in design and warning/instruction cases, and agrees with the UPLA that the "application of uncertain strict liability principles in the areas of design and duty to warn places a whole product line at risk; therefore a firmer liability foundation is needed." Recognizing that there is not unanimity among those interested in this issue, the Select Committee nevertheless believes that the adoption of a negligence standard will help create this "firmer liability foundation."

(c) Standards of Liability for Non-Manufacturing Product Sellers. There has been general agreement that the current liability exposure of the "passive" retailer under the chain of distribution is not justified, and that the limited protection similar to that afforded the non-manufacturing product seller by Section 105 of the UPLA should be adopted.

Clearly, a non-manufacturing product seller should be responsible for his own negligent acts, breach of an express warranty, or for any intentional misrepresentation or concealment of information about the product.

The question has been in what situations manufacturing product sellers should continue to have the primary liability of a manufacturer. The Association of Washington Business has argued for limited exposure, while the Washington State Trial Lawyers naturally have asked for language which would maximize the possibility of full recovery. The Select Committee has determined that the possibility of a plaintiff being left without a liable party should be minimized. Therefore, a non-manufacturing product seller should have primary liability if no solvent manufacturer is available or all are judgment-proof. Furthermore, the Select Committee believes that in those instances in which

a non-manufacturing product seller is closely connected to the manufacturer or the manufacturing process or adopts the product as its own, the non-manufacturing product seller should be subject to a manufacturer's liability. Thus, the Select Committee supports the concept formulated in the UPLA and agrees with the language used in the product liability proposal of the Washington Bar Association's Task Force on Tort Reform.

(d) Statutes of Repose/Limitation. Of greatest concern to product insurers is the length of time a product seller is subject to liability for harm resulting from a product defect, and they contend that the potential "long tail" of exposure is the primary factor influencing rate-setting. As a result, insurers have argued for certainty in the length of time of exposure, professing less concern regarding the actual time period selected. The ISO Closed Claim Survey showed that over 97% of product-related incidents occurred within six years of the date the product was purchased. In the capital goods area, 83.5% of all bodily injuries occurred within ten years of the date of manufacture. However, an insurer's perception of potential claims, whether substantiated or not, very likely is reflected in rates.

In order to bring some certainty to the issue of exposure but at the same time reflecting its concern in preserving those claims based upon product use which is reasonable in light of its unique characteristics, the Select Committee has determined that a complete bar after an arbitrary time period is not justified, and has instead adopted the approach taken in the UPLA.

By the adoption of a "useful safe life" concept, Washington joins a growing number of states which have chosen to place some limitation upon the ability to bring a product liability action on older products. The Select Committee approves of the creation of the rebuttable presumption utilized in the UPLA, which may prevent a claim more than twelve years from the date of delivery. Because the Select Committee believes that the

claimant should be given a reasonable opportunity to overcome the presumption, it has chosen to recommend a "preponderance of the evidence" standard, rather than the more difficult "clear and convincing" approach used in the UPLA. In recommending the twelve-year presumption, the Select Committee recognizes that any period of time it selects will be perceived by some as purely arbitrary, and the Washington State Trial Lawyers Association, on some occasions, has argued against any presumption, believing that the concept of the "useful safe life" provides adequate guidance for the trier of fact. The Select Committee believes that the adoption of the lesser standard to overcome the presumption mitigates any harshness the twelve-year presumption may impose upon the claimant.

The Select Committee has carefully selected language relating to the statute of limitation in order to modify the discovery rule announced in Ohler v. Tacoma General Hospital, 92 Wn. 2d 507 (1979). Because the discovery of all the essential elements of the cause of action is, practically speaking, beyond the understanding of the average layperson until he chooses to seek legal counsel, the Ohler rule unjustifiably extends the period during which an action may be brought. In utilizing the language "time of discovery of the harm and its cause," the Select Committee intends to create a more reasonable and meaningful statute of limitations as to product liability claims.

III. Comparative Fault

The policy question before the Select Committee here was whether the comparative principles embodied in our Comparative Negligence Act, Chapter 4.22 RCW, should be applied in all tort actions regardless of the degree of fault involved. The 1973 Comparative Negligence Act was by its terms limited to negligence actions in which contributory negligence on the part of the plaintiff was involved. The primary purpose of the Act was to eliminate the

total bar to recovery which plaintiff's contributory negligence had in the past presented. Instead of completely barring any recovery the Act provided that plaintiff's recovery would be reduced in proportion to the percentage of negligence attributable to the plaintiff.

The 1973 Act, however, did not address those situations in which a degree of fault higher than simple negligence was involved on either side. For example, what would be the result if either the plaintiff or defendant, or both, were guilty of gross negligence, recklessness, or willful and wanton misconduct or the defendant was strictly liable in tort? A literal reading of the statute would seem to limit its application to cases in which the only fault involved was simple negligence (or possibly gross negligence).

A major goal of this tort reform movement has been to arrive at a fairer apportionment of fault in tort actions. There has been growing dissatisfaction with the all-or-nothing recovery rules under the prior law. In view of this, there is considerable support for the position that comparative principles should be applied regardless of the degree of fault involved on either side. This is the position taken in the 1977 Uniform Comparative Fault Act (UCFA) and the Uniform Product Liability Act (UPLA).

The Select Committee has determined that in order to accomplish a fairer apportionment of fault in tort actions the relative fault of all parties to the action should be compared and the plaintiff's recovery reduced by his or her percentage of fault. While it concedes that there may be some conceptual or theoretical difficulties in comparing differing degrees of fault (e.g., comparing the "apples" of contributory negligence with the "oranges" of strict liability, as the argument has often been presented), the Select Committee does not believe that juries will have any practical problem in making such a

comparison and that the fairness to all the parties requires that such a comparison be made.

The Select Committee's position on this issue has been supported by virtually all of the groups participating in the process. It is consistent with the position of the State Bar Association Task Force on Tort Reform as reflected in their draft bill. The only limited opposition has come from the Washington State Trial Lawyers' Association who felt that it should be limited to product liability actions and not applied to all tort actions.

IV. Joint and Several Liability

One of the most, if not the most, controversial issue that has been involved in the legislative consideration of product liability proposals in the past three years has been whether the rule on joint and several liability should be completely or partially abrogated. In this state, joint and several liability attaches where two or more tortfeasors have jointly or concurrently committed acts of negligence resulting in a single, indivisible harm to the injured party. The effect of the imposition of joint and several liability is that each tortfeasor is liable for the entire harm caused and the injured party may sue one or all to obtain full recovery. This rule was unaffected by the enactment of the 1973 Comparative Negligence Act. Seattle-First National Bank v. Shoreline Concrete Co., 91 Wn. 2d 230 (1978).

The product liability bill considered in the 1979 session would have retained joint and several liability only where parties were acting in concert or in a relationship justifying imposition of vicarious liability or where provided by statute or where plaintiff was free of any contributory fault (ESB 2333 §2). This provision, and the bill as a whole, was supported by the Association of Washington Business and

various representatives of the insurance industry.

Any attempt to even partially abrogate the rule of joint and several liability has been strongly opposed by the State Bar Association Task Force, the Washington State Trial Lawyers, and the Seattle Consumer Action Network. The rule, which is clearly designed to facilitate full recovery by the plaintiff for his or her damages, is grounded both in practical and policy considerations. See Seattle-First National Bank v. Shoreline Concrete, supra, at 234-239.

Retention of joint and several liability has been recommended by the drafters of both the Uniform Comparative Fault Act and the Uniform Product Liability Act. Four states have abrogated the rule as part of their comparative negligence act (Vermont, New Hampshire, Nevada and Kansas) and two others will not apply it as to defendants whose percentage of fault is less than plaintiff's contributory fault (Texas and Oregon). The rule, however, continues to be applied in an overwhelming majority of states.

The Select Committee believes that the rule on joint and several liability should continue to be recognized in this state. It concedes that the effect of this rule may be to require a partially at fault defendant to pay more than his or her share of the joint defendants' liability in certain cases. This unfairness should be ameliorated in most cases by the creation of a right of contribution among tortfeasors. In those cases where it is not, the Select Committee feels that a defendant rather than the plaintiff should bear the burden of that unfairness.

V. Contribution Among Joint Tortfeasors

Under current Washington law a jointly and severally liable wrongdoer who pays more than his or her proportionate share of the joint liability may not seek contribution from

another jointly and severally liable wrongdoer. Wenatchee Wenoka Growers Assn. v. Krack Corp., 89 Wn. 2d 847 (1978). Washington, in other words, is one of the minority of jurisdictions in this country which still does not recognize a right of contribution among joint tortfeasors.

The rule denying a right of contribution among joint tortfeasors, which was derived from an 18th century English case, was once almost universally followed in this country. The principal policy argument behind this rule was that the judicial system should not be used by a wrongdoer to seek relief from his or her own wrongdoing. There has been, quite understandably, growing dissatisfaction with the harshness of the rule. It does not seem fair to force one wrongdoer to shoulder the entire liability when another wrongdoer is capable of contributing.

A majority of states have now recognized a right of contribution among joint tortfeasors. Thirty-four have done so through legislation and four by judicial decision. A majority of those enacting legislation have enacted either the 1939 or 1955 version of the Uniform Contribution Among Tortfeasors Act. These uniform acts have been superceded by the 1977 Uniform Comparative Fault Act. The contribution aspects of that Act also served as the basis for the contribution provisions of the Uniform Product Liability Act. The UCFA and UPLA provide for contribution among joint tortfeasors based upon the comparative fault of the tortfeasors. This right may be enforced in the original action or a separate action.

The Select Committee has determined that there should be a right of contribution among joint tortfeasors. There appear to be no persuasive reasons for refusing to recognize such a right. This position has been supported by all of the interest groups throughout the hearing process.

VI. Worker Compensation

The Select Committee considered extensively the relationship between product liability and third party actions under the present worker compensation system during its discussions of the Model Uniform Product Liability Act and during its hearing on June 27, 1980.

The worker compensation system has been described as a compromise between the rights of the employer and the rights of the employee. Employee recovery under the system represents the extent of the employer's liability. The employee, in exchange for relinquishing his common law right to sue his employer, receives a guaranteed sum certain without the expense or delay usually associated with personal injury actions. The employee's recovery from worker compensation is, however, generally less than what a jury or court would find the value to be. The employee, however, is compensated whether or not there is employer fault.

Many workplace injuries involve a product manufactured by a third party and while an employee may not bring an action against his employer, he may seek recovery in addition to that provided by the worker compensation system against the third party that manufactured or sold the piece of equipment on which he was injured. It is this interface between worker compensation and product liability that the Select Committee examined.

In Washington, the interaction of product liability and worker compensation results in an at-fault manufacturer of a workplace product being held jointly and severally liable for the entire amount of the employee's injury. The manufacturer has no right to seek contribution or indemnity from the employer as the employer is protected from third party suits by the worker compensation statute. Employee fault is also not a damage reducing factor in Washington in those third party cases based on strict liability. The Department of Labor and

Industries and self-insured employers are entitled to recover all or a portion of their lien (benefits paid to date) from the third party judgment. In the usual case, where the third party action is brought by the worker, the Department may recover its lien only after payment of the employee's attorney's fees and costs and 25% of the then remaining balance to the employee. Note that the Department can recover its lien only to the extent of remaining funds. The worker, after the Department has been paid its lien, is then entitled to whatever balance remains. The Department is not obligated to pay future benefits until the accrued amount of such benefits equals the remaining balance. Under current law, no determination of employee or employer fault is made.

The Select Committee discussed previous efforts made to amend the third party action statute as well as other states' approaches to dealing with the relationship between product liability and worker compensation. The Select Committee concluded that changes to the worker compensation third party action statute should only be made after a careful analysis of the impact of such changes on the entire worker compensation system. The Select Committee recommends that the Joint Committee on Worker Compensation undertake such a study. The Select Committee will be forwarding a copy of this final report to the Joint Committee and will be available to provide any needed assistance.

DRAFT BILL AND ANALYSIS

SECTION 1. PREAMBLE. Tort reform in this state has for the most part been accomplished in the courts on a case-by-case basis. While this process has resulted in significant progress and the harshness of many common law doctrines has to some extent been ameliorated by decisional law, the legislature has

from time to time felt it necessary to intervene to bring about needed reforms such as those contained in the 1973 comparative negligence act.

The purpose of this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.

Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial innovation and the development of new products. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion in order to deal with these problems.

It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.

ANALYSIS

The preamble states that this legislation should be viewed as a continuation of the Legislature's attempts "to bring about needed reforms" in the tort law, and specifically "to create a fairer and more equitable distribution of liability among parties at fault."

The bill's reforms affect several areas of tort law. Sections 2 through 7 relate specifically to product liability tort law. Throughout the Select Committee's hearings, representatives of product sellers and product liability insurers argued that the current judicially-created tort system fails to fairly allocate liability among those responsible for the harm with the resulting additional costs passed on to consumers in general. At the same time, the Select Committee believes that the right of an individual to recover for injuries resulting from a defective product should not be unduly restricted. The purpose of this bill, then, is "to treat the consuming public, the product seller, the product manufacturer, and the product insurer in a balanced fashion in order to deal with these problems."

SECTION 2. DEFINITIONS. For the purposes of sections 2 through 7 of this amendatory act, unless the context clearly indicates to the contrary:

(1) PRODUCT SELLER. "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products. The term "product seller" does not include:

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

(b) A provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider;

(c) A commercial seller of used products who resells a product after use by a consumer or other product user: PROVIDED,

That when it is resold, the used product is in essentially the same condition as when it was acquired for resale; and

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

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

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product for its sale. A product seller who performs minor assembly of a product in accordance with the design specifications of the claimant or another product seller shall not be deemed a manufacturer for the purposes of section 4(1)(a) of this amendatory act.

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

The "relevant product" under sections 2 through 7 of this amendatory act is that product or its component part or parts,

which gave rise to the product liability claim.

(4) PRODUCT LIABILITY CLAIM. "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.

(5) CLAIMANT. "Claimant" means a person or entity asserting a product liability claim, including a wrongful death action, and, if the claim is asserted through or on behalf of an estate, the term includes claimant's decedent. "Claimant" includes any person or entity that suffers harm. A claim may be asserted under sections 2 through 7 of this amendatory act even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller.

(6) HARM. "Harm" includes any damages recognized by the courts of this state: PROVIDED, That the term "harm" does not include direct or consequential economic loss under Title 62A RCW.

ANALYSIS

The definitions contained in this section relate to the product liability aspects of the bill and are taken substantially from the Uniform Product Liability Act (UPLA) as proposed by the Task Force on Product Liability and Accident Compensation of the U.S. Department of Commerce.

(1) Product Seller. Anyone in the regular chain of commercial distribution, other than the occasional seller, is included within the definition of "product seller." The bill, however, establishes a number of exceptions.

The seller of real property is not included in the definition of "product seller" unless the seller is involved in the mass production and sale of standardized dwellings. Sellers of real property may, of course, be liable under applicable real estate transaction law. Sellers of improvements upon real property are included. For example, the manufacturer of a defective sliding glass door may be liable under this bill for harm proximately resulting from it. In addition, nothing in this bill affects the potential liability of a seller of a dwelling under any implied warranty of habitability recognized by Washington courts.

A provider of professional services is not included, but recovery could be sought under traditional malpractice or other legal theory.

Those who commercially sell used products are not included unless the product is not "in essentially the same condition as when it was acquired for resale." Whether a product is "in essentially the same condition as when it was acquired for resale" is necessarily a factual determination which must be made on a case-by-case basis. If it is determined that the seller of the used product is essentially a "remanufacturer," the seller will be subject to liability under Section 4 of the bill.

(2) Manufacturer. The definition of a manufacturer is a broad one and is intended to cover all those who initiate and carry out the process of production. It includes someone who remanufactures a product or who holds himself out as a manufacturer. Consistent with the policy underlying Section 5 of the bill, a product seller who performs minor assembly in accordance

with the instructions of a manufacturer is not included in the definition as a result of such assembly, and liability may only attach under the provisions of Section 5.

(3) Product. The definition of "product" is intended to be all-inclusive and covers all goods, wares, merchandise, or commodities, and their component parts, capable of delivery for introduction into trade or commerce. A specific exemption is provided for human tissue and organs, including blood. Recovery for harm resulting from their use will be governed by other applicable law. This exemption would not cover artificial organs or other prosthetics.

(4) Product Liability Claim. An essential element in this bill is the consolidation of the various theories under which actions for product liability are brought. The bill creates a single cause of action, termed a "product liability claim," and for purposes of pleading, individual theories of liability need not be pleaded separately as under current law. Because actions based upon fraud, intentional harm, or a violation of the Consumer Protection Act are not included within the definition of a product liability claim, recovery under those theories will continue to be governed by other applicable law.

(5) Claimant. Recovery may be had under this bill by any person or entity which suffers harm, including those not in privity with the product seller. The term encompasses bystanders as well as product users.

(6) Harm. The Select Committee has chosen not to utilize the definition of "harm" contained in the UPLA, and instead has adopted a broad definition allowing for the continued development of the concept through case law. The term does not include direct or consequential economic loss under the Uniform Commercial Code, and recovery for such loss will continue to be governed by the

the provisions of Chapter 62A RCW. Other types of economic loss, such as wage loss, are included in the term "harm" for purposes of this bill.

SECTION 3. SCOPE. (1) The previous existing applicable law of this state on product liability is modified only to the extent set forth in section 2 through 7 of this amendatory act.

(2) Nothing in sections 2 through 7 of this amendatory act shall prevent the recovery of direct or consequential economic loss under Title 62A RCW.

ANALYSIS

The bill does not attempt to address all of the issues which may be involved in product liability litigation. For that reason, the existing law on product liability is superceded only to the extent that it conflicts with the provisions of the bill. This will mean, for example, that the current case law defining the defenses of unreasonable assumption of risk and product misuse will continue to be applicable.

The provisions of the bill will control to the extent they deal with an issue. For example, recovery for failure to provide adequate warnings or instructions under a strict liability theory will no longer be possible since Section 4(1) provides that liability in such case shall be determined under negligence standards. In fact, the standards of liability set forth in Section 4 will be the exclusive grounds for relief as to the kinds of product defects covered by that section.

This section also provides that the recovery of direct or consequential economic loss will continue to be governed by the UCC.

SECTION 4. LIABILITY OF MANUFACTURERS. (1) A product manufacturer is subject to liability to a claimant if the

claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

(a) A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product.

(b) A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions whith the claimant alleges would have been adequate.

(c) A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under a duty to act with regard to issuing warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances.

(2) A product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manu-

facturer's express warranty or to the implied warranties under Title 62A RCW.

(a) A product is not reasonably safe in construction if, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.

(b) A product does not conform to the express warranty of the manufacturer if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue.

(c) Whether or not a product conforms to an implied warranty created under Title 62A RCW shall be determined under that title.

(3) In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

ANALYSIS

This section establishes the standards of liabilities for manufacturers of defective products. Subsection (1) of this section establishes a negligence standard where the harm results from defective design or inadequate warnings or instructions. Subparagraphs (a) and (b) and subsection (3) set out those factors which the trier of fact must consider in determining if liability has been established.

The "consumer expectation" test, enunciated in subsection (3) and currently utilized by the Washington court, was criticized in the comments to Section 104 of the UPLA as taking "subjectivity to its most extreme end." Instead, in design cases, the UPLA

adopts a test which balances the likelihood and seriousness of the harm against the burden to produce a safer product and the effect of such a design on the usefulness of the product. Factors examined under such a balancing test are similar to those suggested by the Washington court in analyzing the consumer expectation test, Seattle-First National Bank v. Tabert, 86 Wn. 2d 145 (1975), and therefore can be harmonized with the consumer expectation test. Thus, both tests are adopted here as relevant considerations which the trier of fact should consider.

Similarly, in cases involving warnings or instructions, the trier of fact is directed to engage in a comparison between the likelihood and seriousness of harm and whether or not adequate warnings or instructions could have been provided. This determination should be made in conjunction with an analysis of the expectations of the ordinary consumer.

A separate subparagraph is devoted to the unique situation where a claimant alleges that harm resulted from the manufacturer's failure to provide adequate warnings or instructions after the product was manufactured. In order to demonstrate that the manufacturer was negligent, a claimant is required to show that the manufacturer learned or should have learned about a product's dangerous condition after it was manufactured and that the manufacturer failed to act in a manner in which a reasonably prudent manufacturer would have acted. The reasonable expectations of the ordinary consumer should also be considered by the trier of fact in this situation. The Select Committee has chosen not to include specific examples of probative evidence which could be used in applying the negligence tests believing that such evidentiary matters were best left to the courts. The decision not to adopt specific language should not be interpreted as necessarily creating a higher or lower duty than that created in the UPLA.

A manufacturer will be held strictly liable where the claimant establishes that the harm proximately resulted from a construction or warranty defect. Again, the act sets out factors which the trier of fact must consider in making such a determination. If the factual requirements contained in subparagraphs (a), (b) or (c) are met, when examined in light of subsection (3), liability attaches, regardless of the care exercised by the manufacturer.

An argument may be made that in a particular factual setting an allegation of a design defect is essentially the same as a breach of implied warranty of merchantability under RCW 62A.2-314, and therefore should be evaluated under a strict liability standard. It is the intent of the Select Committee, however, that while the elements of merchantability may be part of a prima facie showing that a design defect exists, liability for harm resulting from such a defect should be controlled by the negligence standards of subsection (1) of this section.

SECTION 5. LIABILITY OF PRODUCT SELLERS OTHER THAN MANUFACTURERS. (1) Except as provided in subsection (2) of this section, a product seller other than a manufacturer is liable to the claimant only if the claimant's harm was proximately caused by:

(a) The negligence of such product seller; or

(b) Breach of an express warranty made by such product seller; or

(c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.

(2) A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if:

(a) No solvent manufacturer who would be liable to the claimant is subject to service of process under the laws of the claimant's domicile or the state of Washington; or

(b) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against any manufacturer; or

(c) The product seller is a controlled subsidiary of a manufacturer, or the manufacturer is a controlled subsidiary of the product seller; or

(d) The product seller provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a proximate cause of the defect in the product; or

(e) The product was marketed under a trade name or brand name of the product seller.

ANALYSIS

One of the complaints most frequently expressed before the Legislature during the whole course of the product liability discussion over the past few years has been the alleged inequity of holding everyone in the chain of distribution liable for product defects. This section addresses that concern and relieves a non-manufacturing product seller of such liability except in certain limited situations.

If the non-manufacturing product seller was itself negligent, it will bear the burden of liability under the standards governing negligence. Further, if such a product seller expressly warranted that a product is safe, it will be subject to liability under Section 4(2) of the bill; however, no independent liability arises for a breach of an implied warranty, which is more appropriately reserved

for the manufacturer. Finally, there will be liability if the non-manufacturing product seller intentionally misrepresented or concealed information about the product.

The traditional rules of joint and several liability will be applied, however, in certain situations outlined in subsection (2). As to subparagraphs (a) and (b), it is the intent of the Select Committee that liability will be imputed to the non-manufacturing product seller only if the claimant is unable to reach any manufacturer who otherwise might be liable in the particular circumstances addressed in the relevant subparagraph.

SECTION 6. RELEVANCE OF INDUSTRY CUSTOM, TECHNOLOGICAL FEASIBILITY, AND NONGOVERNMENTAL, LEGISLATIVE OR ADMINISTRATIVE REGULATORY STANDARDS. Evidence of custom in the product seller's industry, technological feasibility or that the product was or was not, in compliance with nongovernmental standards or with legislative regulatory standards or administrative regulatory standards, whether relating to design, construction or performance of the product or to warnings or instructions as to its use may be considered by the trier of fact.

ANALYSIS

A particularly confusing and unsettled area of the law in Washington and other jurisdictions is the admissibility of certain types of evidence by plaintiff and defendant in meeting their respective burdens of proof. The drafters of the UPLA attempted to resolve this problem through the creation of a set of complex factual determinations and presumptions. The Select Committee has determined, instead, to rely upon the inherent ability of the trier

of fact to reach a just decision based upon the greatest amount of evidence available. Therefore, a simple rule is established in this section that the trier of fact may consider evidence of industry custom, technnological feasibility, and nongovernmental, legislative or administrative standards.

SECTION 7. LENGTH OF TIME PRODUCT SELLERS ARE SUBJECT TO LIABILITY. (1) USEFUL SAFE LIFE. (a) Except as provided in subsection (1)(b) hereof, a product seller shall not be subject to liability to a claimant for harm under sections 2 through 7 of this amendatory act if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired.

"Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of sections 2 through 7 of this amendatory act, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold. In the case of a product which has been remanufactured by a manufacturer, "time of delivery" means the time of delivery of the remanufactured product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

(b) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life, if:

(i) The product seller has warranted that the product

may be utilized safely for such longer period; or

(ii) The product seller intentionally misrepresents facts about its product, or intentionally conceals information about it, and that conduct was a proximate cause of the claimant's harm; or

(iii) The harm was caused by exposure to a defective product, which exposure first occurred within the useful safe life of the product, even though the harm did not manifest itself until after the useful safe life had expired.

(2) PRESUMPTION REGARDING USEFUL SAFE LIFE. If the harm was caused more than twelve years after the time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by a preponderance of the evidence.

(3) STATUTE OF LIMITATION. Subject to the applicable provisions of chapter 4.16 RCW pertaining to the tolling and extension of any statute of limitation, no claim under sections 2 through 7 of this amendatory act may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause.

ANALYSIS

This section places limitations on the right to bring a product liability action tied both to the length of time between the date of delivery to the first consumer and the date of injury (statute of repose) and the length of time between the date of injury and the commencement of the action (statute of limitations). It is patterned closely after Section 110 of the Uniform Product Liability Act.

Statutes of limitation are familiar features of our legal system. Statutes of repose, on the other hand, are

new concepts developed specifically to deal with problems felt to be peculiar to the product liability area.

Statute of Repose. Product sellers have often expressed concern over the possibility of the imposition of liability based upon an injury caused by an old product. They feel it is difficult to establish the nonexistence of a construction or design defect in a product which may have been manufactured some time in the past. This open-ended situation also affects insurance rates since most product liability insurance is written on a claims-made basis which means that the liability insurer at the time a claim is made is liable regardless of the date of manufacture of the product. Product liability premiums, therefore, must take into account the possibility of claims on products manufactured many years ago.

Of the twenty-six states which have enacted product liability legislation, eighteen have included a statute of repose to limit a claimant's ability to bring an action on older products. The length of time of the statute of repose varies from five to ten years. In some cases, the running of the period is a complete bar to any action while in others it is a rebuttable presumption of nondefectiveness.

The advantage of the statute which sets an absolute cutoff date is fairly obvious. It establishes a date certain after which a claim on a product may not be brought. The problem is that the length of the statute of repose may not bear any relation to the useful life of the product. The reasonable expected life of the product will necessarily vary considerably.

To accommodate this variety of useful expected life, the Select Committee's statute of repose is tied to a useful safe life concept. The useful safe life begins at the time of delivery of the product and extends for the time during which

the product would normally be likely to perform or be stored in a safe manner. The bill does contain a twelve-year presumption on useful safe life. This means that the product is presumed to be beyond its useful safe life if it is more than twelve years old. That presumption, however, may be rebutted by the claimant with the burden of proof being a preponderance of the evidence.

The Select Committee selected a burden of proof to a preponderance of the evidence rather than the UPLA's higher clear, cogent and convincing evidence to equalize the burden as to product sellers and claimants in this section. It will be noted that the burden of proof on a product seller to prove a useful safe life of twelve years or less is also a preponderance of the evidence. Had the UPLA's approach been followed they would have been unequal. The use of a rebuttable twelve-year presumption of usefulness should create a degree of certainty in the law without depriving the claimant of the ability to demonstrate that, in fact, the product was still in a useful condition at the time of the injury.

A significant concept in the useful safe life area is the term "time of delivery". As to new products, it refers to the time of delivery of a product to its first purchaser or lessee who is not engaged in the business of either selling such products or using them as component parts of another product to be sold--in other words, to the first consumer. The bill also addresses the remanufactured product. In those cases where a manufacturer will modify or update a product to such an extent that it can be considered a remanufactured product, the time of delivery runs from the delivery of that remanufactured product to the first consumer.

The draft bill provides for situations where a product

seller may be liable for harm caused beyond a product's useful safe life. The first is if the product seller warranted that the product could be used safely for a longer period of time, in which case the warranted period would establish the statute of repose time period. The second situation is if the seller intentionally misrepresented facts about the product or concealed information and that conduct was a proximate cause of the claimant's harm. There is no good reason to protect a product seller in this situation since his actions have denied the consumer important information which may put him on guard against potential problems presented by older products. The third situation is where the harm was caused by prolonged exposure to defective products. This exception intended mainly for injuries resulting from exposure to radiation, chemicals, minerals and drugs is, however, broad enough to cover other situations where harm is caused by prolonged exposure to products with hidden defects.

Statute of Limitation. Product liability actions must be brought within three years of the date of discovery of the harm and its cause. This discovery rule is intended to modify the discovery rule pronounced in Ohler v. Tacoma General Hospital, 92 Wn. 2d 507 (1979), which stated that the date of discovery meant the discovery of all of the essential elements of the cause of action, including duty, breach, causation, and damages. The concern about the Ohler formulation is that in practical terms it could mean that the statute of limitations would not begin running until the claimant consulted with an attorney since concepts of duty, breach and causation are uniquely legal concepts which a layperson would not ordinarily be expected to appreciate.

A special provision is made so that the time periods of the section do not include the period under which a statute of limitation has been tolled or extended under Chapter 4.16 RCW. This would protect minors during the period of minority and persons under a guardianship, as well as others covered by

that chapter.

SECTION 8. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

ANALYSIS

This is the first of several sections dealing with tort law in general. The study resolutions in 1979 and 1980 clearly directed the Select Committee to consider the need for changes in tort law in general. While the impetus for the formation of the Committee in 1979 was the controversy over the product liability bill considered that session, it is often forgotten that that bill was not limited to product liability law and, in fact, proposed rather substantial changes in tort law in general. This is not to say that the connection between the two subjects is altogether arbitrary. The remaining sections of this bill deal with the subject of comparative fault and contribution among tortfeasors, subjects which are frequently involved in product liability actions.

This section would replace the current comparative negligence statute, RCW 4.22.010, which was enacted in 1973. Prior to the 1973 Act, a plaintiff whose own negligence contributed to the injury was completely barred from recovering any damages against a negligent defendant. In other words a plaintiff who was not at fault could recover all his damages while a plaintiff who was, for example 10% at fault could recover nothing. That Act was intended to correct this all-or-nothing

feature of the law.

The 1973 Act, however, did not address those situations where degrees of fault other than negligence were involved -- degrees of fault such as gross negligence, recklessness, willful and wanton misconduct and strict liability. For example, would the comparative principles be applied if the plaintiff was contributorily negligent but the defendant was reckless?

The courts have answered only a few of these questions. Under two pre-1973 cases, which may still be good law, plaintiff's contributory negligence would not bar or diminish recovery where defendant was guilty of willful and wanton misconduct, Adkisson v. Seattle, 42 Wn. 2d 676 (1953), but plaintiff's contributory willful and wanton misconduct could bar recovery even if the defendant was guilty of the same type of misconduct. Sorensen v. Estate of McDonald, 78 Wn. 2d 103 (1970). More recently in Seay v. Chrysler Corp., 93 Wn. 2d 319 (1980), the court held that the plaintiff's contributory negligence is not a damage reducing factor in a strict liability lawsuit.

This bill essentially extends the comparative principles of the current comparative negligence statute to all tort actions involving contributory fault. The comparative principles will be applied whether or not the contributory fault was a bar or damage reducing factor under the prior law.

Doctrines such as the last clear chance doctrines which were sometimes used to overcome the complete bar of contributory fault are eliminated since contributory fault is no longer a bar. In these cases, the comparative principles would be applied regardless of who might have had to absorb all of the loss under prior law.

SECTION 9. "FAULT" DEFINED. "Fault" includes acts or omissions, including misuse of a product, that are in any

measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under sections 8 through 14 of this amendatory act shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

ANALYSIS

This section defines the key term "fault" which is used in the preceding section on contributory fault, the contribution sections and elsewhere in the bill. It is based upon the Uniform Comparative Fault Act definition with some modifications.

The definition is intended to encompass all degrees of fault in tort actions short of intentionally caused harm. This would include negligence, gross negligence, recklessness, willful and wanton misconduct and strict liability. Additionally it includes misuse of a product, breach of warranty, unreasonable assumption of risk and unreasonable failure to avoid an injury or to mitigate damages. The idea is to permit the trier of fact to consider all the conduct short of what would be considered an intentional tort and make a reduction of the plaintiff's recovery for his or her share. In making its determination the trier of fact may take into consideration both the nature of conduct and the causal relationship between that conduct and the harm. This will mean, for example, that plaintiff's contributory negligence may not reduce recovery as much in a strict liability action as it would in a negligence action.

SECTION 10. Section 2, chapter 138, Laws of 1973 1st ex. sess. and RCW 4.22.020 are each amended to read as follows:

The ((~~negligence~~)) contributory fault of one ((~~marital~~)) spouse shall not be imputed to the other spouse or the minor child of the spouse to ((~~the marriage so as to bar~~)) diminish recovery in an action by the other spouse ((~~to the marriage~~)) or the minor child of the spouse, or his or her legal representative, to recover damages ((~~from a third party~~)) caused by ((~~negligence~~)) fault resulting in death or in injury to the person or property, whether separate or community, of the spouse. In an action brought for wrongful death, the contributory fault of the decedent shall be imputed to the claimant in that action.

ANALYSIS

This section of the draft bill amends the second section of the 1973 Comparative Negligence Act which was designed to abrogate the common law rule imputing the negligence of one spouse to the other so as to bar the latter's action for damages against a third party. The purpose of this amendment is to conform this section to the expansion of the comparative negligence law to cover comparative fault situations.

The amendment also clears up an ambiguity in the original Act as to whether the negligence could not be imputed to "bar" or "diminish" a recovery in an action by the other spouse. The original Act read that negligence could not be imputed to bar recovery which would seem to be a superfluous provision since contributory negligence would no longer be a bar to recovery under the preceding section. The presumed intent of this provision, then, was that negligence could not be imputed to "diminish" recovery and this amendment so provides.

The amendment also makes the section apply to actions for damages to property.

Finally, the amendment does permit imputation of fault in a wrongful death action. This is appropriate since wrongful death actions are in a sense derivative actions and the contributory fault of the decedent spouse should be taken into account in determining the amount of the surviving spouse's recovery.

SECTION 11. NATURE OF LIABILITY. If more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several.

ANALYSIS

This section codifies the current rule on joint and several liability. The rule on joint and several liability has long been recognized and followed in this state. Seattle-First National Bank v. Shoreline Concrete, 91 Wn. 2d 230 (1978). A primary purpose of the tort law is to ensure full recovery for an injured party from parties at fault. The rule of joint and several liability is a key provision in protecting that purpose. The claimant's own fault will affect the total recovery by the operation of the contributory fault reduction principle in Section 8. The claimant's right to recover from any of the jointly and severally liable defendants, however, should be facilitated. Apportionment of liability among defendants will be accomplished through the contribution sections which follow.

SECTION 12. RIGHT OF CONTRIBUTION. (1) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate

action brought for that purpose. The basis for contribution among liable persons is the comparative fault of each such person. However, the court may determine that two or more persons are to be treated as a single person for purposes of contribution.

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

(3) The common law right of indemnity between active and passive tortfeasors is abolished.

ANALYSIS

This section creates a right of contribution among persons who are jointly and severally liable to a claimant. Washington is one of the minority of states which has not abrogated the common law rule denying a right of contribution among multiple tortfeasors. The state supreme court has refused to abandon the rule against contribution on the grounds that the recent cases in which the alternative was presented to the court did not comprehensively address all of the various issues that need to be addressed in establishing a right of contribution. Wenatchee Wenoka Growers Assn. v. Krack, 89 Wn. 2d 847 (1978). This section and the following section provide the rules necessary to guide the court in setting up a procedure.

The Select Committee believes that with the creation of the right to contribution a party defendant will be able to join another party who may be liable for contribution in the original action under current Civil Rule 14, relating to third party practice. This means that a defendant will not be

bound by the plaintiff's choice of defendants. It is in the interests of judicial economy to have all of the liability issues determined in one action. A judge, however, will continue to have authority to require separate trials as to issues or parties where justice requires as under present practice.

This section also essentially eliminates the doctrine of implied indemnity between active and passive tortfeasors. Under current law where the active/passive analysis can be applied, the entire liability can be shifted from the passive tortfeasor to the active tortfeasor. Rufener v. Scott, 46 Wn. 2d 240 (1955); Nelson v. Sponberg, 51 Wn. 2d 37 (1957). The implied indemnity doctrine thus is another form of the "all-or-nothing" rule which is being departed from in this bill which favors comparative fault principles.

A party who settles with the claimant is entitled to seek contribution from other liable parties if the liability of the party against whom contribution is sought has been extinguished and the amount paid in settlement was reasonable at the time of settlement.

SECTION 13. ENFORCEMENT OF CONTRIBUTION. (1) If the comparative fault of the parties to a claim for contribution has been established previously by the court in the original action, a party paying more than that party's equitable share of the obligation, upon motion, may recover judgment for contribution.

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

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

ANALYSIS

This section sets out the procedure for enforcing the right of contribution against another liable party. It addresses both the situation where the comparative fault of the two parties involved has previously been established by the court and where the comparative fault of the two parties has not been previously established. In those cases where it has been established, the parties seeking contribution must commence the contribution action within one year after the judgment which established the comparative fault has been rendered. In those cases where the comparative fault have not already been established, the party may enforce the right of contribution whether or not a judgment has been rendered against the parties seeking contribution or the party against whom contribution is sought. This means that neither party need have been a defendant in the lawsuit brought by the claimant. All that is required to start an action for contribution is that the party must allege that he has paid more than his proportionate share of the fault. The party seeking contribution must have either discharged the common liability within the statute of limitations and commenced an

action for contribution within one year of that payment, or have agreed while the action was pending to discharge that liability and within one year both paid the claimant and commenced this action for contribution.

SECTION 14. EFFECT OF SETTLEMENT AGREEMENT. (1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.

(2) A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

(3) A determination that the amount paid for a release, covenant not to sue, covenant not to enforce judgment, or similar agreement was unreasonable shall not affect the validity of the agreement between the released and releasing persons nor shall any adjustment be made in the amount paid between the parties to the agreement.

ANALYSIS

This section differs from the Uniform Comparative Fault Act in that the final judgment of the claimant is reduced by the amount paid for a release (unless the amount paid was unreasonable at the time the release was granted) instead of the comparative fault of the released party as determined in the lawsuit. This approach was decided upon in order not to discourage parties from settling with claimants. It was a concern of the Select Committee that if a released party could not be guaranteed that he would not be subject to additional liability at some point in the future depending upon some comparative fault apportionment, it would discourage parties from entering into such releases.

The bill does not establish any standards for determining whether the amount paid for the release was reasonable or not. It is felt that the courts can rule on this issue without specific guidance from the Legislature. The reasonableness of the release will depend on various factors including the provable liability of the released parties and the liability limits of the released party's insurance.

There is a legitimate concern that claimants will enter into "sweetheart" releases with certain favored parties. To address this problem, the section requires that the amount paid for the release must be reasonable at the time the release was entered into. Furthermore, it requires parties desiring to enter into such releases to give five days notice to all

other parties of the terms of the release. A special provision allowing the court to shorten that notice period for good cause is included to accommodate eve of trial settlements. The potential released party must also secure court approval that the amount paid for the release was reasonable.

The release granted to one party does not discharge any other parties liable upon the same claim unless the release so provides. Under current Washington law, the release of a concurrent tortfeasor does not release other concurrent tortfeasors unless 1) the claimant intended to release all tortfeasors, or 2) the release constituted a satisfaction of the entire obligation. Callan v. O'Neill, 20 Wn. App. 32 (1978). The release of one joint tortfeasor, however, releases all tortfeasors regardless of an expressed reservation in the release that it shall not apply to other tortfeasors. White Pass Co. v. Saint John, 71 Wn. 2d 156 (1967).

SECTION 15. APPLICABILITY. (1) This amendatory act shall apply to all claims accruing on or after the effective date of this amendatory act.

(2) Notwithstanding subsection (1) of this section, sections 12 and 13 of this amendatory act shall also apply to all actions in which trial on the underlying action has not taken place prior to the effective date of this amendatory act, except that there is no right of contribution in favor of or against any party who has, prior to the effective date of this amendatory act, entered into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with the claimant.

ANALYSIS

In order to avoid the question of retroactive versus

prospective application of the bill, this section clearly states that the bill applies to all claims accruing on or after the effective date of the bill. An exception to this rule is a partial retroactive application in the case of actions for contribution involving actions which have not gone to trial as of the effective date of the bill. In these cases, a right of contribution would still exist except as to a party which has obtained a release prior to the effective date of the bill.

SECTION 16. LEGISLATIVE DIRECTIVE. (1) Sections 2 through 7 of this amendatory act are added to Title 7 RCW as a new chapter thereof.

(2) Sections 8 and 9 and 11 through 15 of this amendatory act are added to chapter 4.22 RCW.

ANALYSIS

The bill will be codified in two different parts of the Revised Code of Washington. Sections 2 through 7 which deal only with the product liability area will be codified in Title 7 which concerns special proceedings and actions. Sections 8 and 9 and 11 through 14 will be codified in Chapter 4.22 RCW which is the current comparative negligence chapter.

SECTION 17. REPEALER. Section 1, chapter 138, Laws of 1973 1st ex. sess. and RCW 4.22.010 are each hereby repealed.

ANALYSIS

Section 8 of the bill will govern the issues dealt with in this repealed section of the 1973 Comparative Negligence Act.

SECTION 18. SEVERABILITY. If any provision of this amendatory act or its application to any person or circumstance

is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

APPENDIXES

Appendix 1 - Senate Resolution 1979-140

Appendix 2 - Senate Resolution 1980-236

Appendix 3 - Select Committee Product Liability Insurance Survey

IN THE LEGISLATURE
of the
STATE OF WASHINGTON

SENATE RESOLUTION

1979 - 140

By Senator Bausch

WHEREAS, There exists significant concern and uncertainties over the way in which the tort system operates in Washington State; and

WHEREAS, Tort actions based on products have unique problems; and

WHEREAS, Uncertainties within the tort system have resulted in increasing insurance costs for product manufacturers, wholesalers, retailers and other parties in the chain of distribution of a product; and

WHEREAS, Proposals for reform to this date have not passed the Legislature;

NOW, THEREFORE, BE IT RESOLVED, That there be established a Select Committee on Tort and Product Liability Reform to study proposals for reform of the tort system and the effects of reform, including but not limited to plaintiff recovery, workers' compensation and insurance costs. This Select Committee shall be appointed by the President of the Senate upon recommendation of the Majority Leader, shall be bipartisan in nature, and shall be composed of members of the Financial Institutions and Insurance, Judiciary and Local Government Committees, and such other members as may be appropriate. The Chairman of the Select Committee shall be appointed by the Majority Leader, and the Committee shall report its findings and recommendations to the Senate prior to the commencement of the next regular session of the Legislature; and

BE IT FURTHER RESOLVED, That the Select Committee on Tort and Product Liability Reform, with the approval of the Senate Committee on Facilities and Operations, shall employ Senate staff and other staff necessary for the completion of the tasks set forth in this Senate resolution.

6/1/79 - REFERRED TO RULES

IN THE LEGISLATURE
of the
STATE OF WASHINGTON

SENATE RESOLUTION

1980-236

By Senators Talmadge, Bausch, Bottiger, Jones, Talley and Clarke

WHEREAS, The Senate Select Committee on Tort and Product Liability Reform was formed on July 6, 1979 pursuant to the provisions of Senate Resolution 1979-40; and

WHEREAS, The Select Committee was directed to study proposals for reform of the tort and insurance systems and their possible ramifications and to report its findings and recommendations to the Senate at the next regular session; and

WHEREAS, The Select Committee has held public hearings, gathered information on issues relevant to its study and solicited data from insurance companies through a questionnaire; and

WHEREAS, The Select Committee has issued an interim report outlining its activities and preliminary findings and recommendations; and

WHEREAS, The Select Committee in its interim report described those areas in which it felt further study was needed before any final recommendation could be made;

NOW, THEREFORE, BE IT RESOLVED, That the Senate Select Committee on Tort and Product Liability Reform, as presently constituted, be directed to continue its study of proposals for reform of the tort and insurance systems and to report its findings and recommendations to the Senate prior to the commencement of the next regular session of the Legislature; and

BE IT FURTHER RESOLVED, That the Select Committee on Tort and Product Liability Reform, with the approval of its Senate Committee on Facilities and Operations, shall employ Senate staff and make such expenditures as are necessary for the completion of the tasks set forth in this resolution.

I, Sid Snyder, Secretary of the Senate,
do hereby certify that this is a true and
correct copy of Senate Resolution No. 236,
adopted by the Senate March 13, 1980.

SID SNYDER
Secretary of the Senate

SENATE SELECT COMMITTEE ON PRODUCT LIABILITY
PRODUCT LIABILITY INSURANCE SURVEY

Name of Company _____

Name and Position of Person Completing the Survey _____

1. If your company is a subsidiary, parent or holding company of or affiliated with any other company providing product liability insurance in any form, please identify that company or those companies and provide the information requested below for each of those companies. _____

2. Is your company currently writing product liability insurance in the State of Washington? _____

3. Has your company written product liability insurance in Washington State during the past six years (1973-1978)? _____

4. In what other states are you presently authorized to issue product liability insurance? _____

5. Has the company withdrawn from any states within the last six years? If so, please identify the state and the year withdrawn. _____

6. What are the total number of policies of all types of product liability insurance written by your company and the total dollar volume of these policies for each of the last six years for each of the following classifications?

		1973	1974	1975	1976	1977	1978
(a) Monoline product liability insurance	#						
	$						
(b) (a)-rated product liability insurance	#						
	$						
(c) Comprehensive general liability insurance	#						
	$						
(d) Commercial multi-peril insurance; and	#						
	$						
(e) Other types of policies with product liability coverage not included in items (a) through (d)	#						
	$						

APPENDIX 3

7. What has been the company's earned premium/incurred loss ratio for all forms of product liability insurance for each of the last six years in each of the classifications identified in Question 6?

	1973	1974	1975	1976	1977	1978
(a) Monoline						
(b) (a)-rated						
(c) Comprehensive general liability						
(d) Commercial multi-peril; and						
(e) Other types of policies with product liability coverage not included in items (a) through (d)						

8. What has been the company's profit or loss for all forms of product liability insurance for each of the last six years for each of the classifications identified in Question 6?

	1973	1974	1975	1976	1977	1978
(a) Monoline						
(b) (a)-rated						
(c) Comprehensive general liability						
(d) Commercial multi-peril; and						
(e) Other types of policies with product liability coverage not included in items (a) through (d)						

9. To what extent does your company utilize rates established by the Insurance Services Offices? If you do not utilize ISO rates, describe your own rating mechanism and the source for the actuarial data that you use.

_____

_____

_____

10. Do you apply the ISO trend factor? If not, how is your trend factor calculated and what is it? Is the trend factor that you use confined to an inflation factor or does it include other factors such as increased settlement payments? What trend factor have you used for each of the last six years, and what are your best estimates as to growth of the trend factor over the next five years? _____

_____

_____

_____

11. Please identify the number of product liability claims you have paid in each of the following amount categories for each of the last six years.

	1973	1974	1975	1976	1977	1978
(a) Above $1 million						
(b) $500,000 to $1 million						
(c) $100,000 to $500,000						
(d) $50,000 to $100,000						
(e) $10,000 to $50,000						
(f) Under $10,000						

12. Please supply information listing, by year, the number of product liability loss actions initiated, the number of such suits won by the plaintiff, the number of out-of-court settlements and the amounts of the settlements, and the number of suits rendered for the defendant.

	1973	1974	1975	1976	1977	1978
(a) Number of actions						
(b) Number of suits won by plaintiff						
(c) Number of out-of-court settlements						
(d) Total amounts of settlements						
(e) Number of suits won by defendant						

13. Are increased premiums directly proportional to greater frequency and higher amounts of claims? Please describe the relationship. _____

14. Over the last six years, what has been the average annual increase per unit of exposure in product liability insurance rates? _____

15. Are there any products for which your company does not provide product liability insurance? _____

16. To what extent is the size of the insured company a factor in the rating process and your company's willingness to insure? _____

17. Would your company object to reporting product liability insurance as a separate line item on its annual statement submitted to the Insurance Commissioner's Office? _____

18. What changes in Washington State law might cause your company to become more active in the product liability insurance market? _____

19. General Comments: _____

Thank you for your cooperation.

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 22nd day of August, 2024, I arranged for service of the foregoing **RESPONDENT'S ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM** via the electronic service per the Stipulated E-Service Agreement to the parties to this action as follows:

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Sara Anderson, Legal Secretary

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