2A:58C-1 to 2A:58C-7

LEGISLATIVE HISTORY CHECKLIST
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"Product Liability"

NJSA: 2A:58C-1 to 2A:58C-7

LAWS OF: 1987 **CHAPTER:** 197

BILL NO: S2805

SPONSOR(S): Lesniak

DATE INTRODUCED: November 17, 1986

COMMITTEE: **ASSEMBLY:** Insurance

SENATE: Judiciary

AMENDED DURING PASSAGE: Yes Senate Committee substitute enacted.

DATE OF PASSAGE: **ASSEMBLY:** June 25, 1987

SENATE: June 8, 1987

DATE OF APPROVAL: July 22, 1987

FOLLOWING STATEMENTS ARE ATTACHED IF AVAILABLE:
SPONSOR STATEMENT: Yes

COMMITTEE STATEMENT: **ASSEMBLY:** Yes

SENATE: Yes

FISCAL NOTE: No

VETO MESSAGE: No

MESSAGE ON SIGNING: Yes

FOLLOWING WERE PRINTED:
REPORTS: No
HEARINGS: No

See newspaper clipping file, "N.J.-consumer protection - 1986 and 1987" in New Jersey Reference Department.

Selected Law Journal Articles:

Grayzel,"New development in product liability"	120 N.J.L.J.509(1987)
Sherman,"Faulty products liability bill revised again"	119 N.J.L.J.580(1987)
Cheever,"N.J. Senate moves to nullify O'Brien"	119 N.J.L.J.1079(1987)
"Defective product liability bill advances"	119 N.J.L.J.1126(1987)
Gugig,"Letter to the editor..."	120 N.J.L.J.4(1987)
Kean signs product law"	120 N.J.L.J.238(1987)
Grier,"1987 Products Liability Act"	121 N.J.L.J.233(1988)

KBG:pp

CHAPTER 197 LAWS OF N.J. 1987
APPROVED 7-22-87

SENATE COMMITTEE SUBSTITUTE FOR

SENATE, No. 2805

STATE OF NEW JERSEY

ADOPTED: April 23, 1987

AN ACT concerning product liability and punitive damages.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. a. The Legislature finds that there is an urgent need for remedial legislation to establish clear rules with respect to certain matters relating to actions for damages for harm caused by products, including certain principles under which liability is imposed and the standards and procedures for the award of punitive damages. This act is not intended to codify all issues relating to product liability, but only to deal with matters that require clarification. The Legislature further finds that such sponsors' or committee statements that may be adopted or included in the legislative history of this act shall be consulted in the interpretation and construction of this act.

b. As used in this act:

(1) "Claimant" means any person who brings a product liability action, and if such an action is brought through or on behalf of an estate, the term includes the person's decedent, or if an action is brought through or on behalf of a minor, the term includes the person's parent or guardian.

(2) "Harm" means (a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph.

(3) "Product liability action" means any claim or action brought by a claimant for harm caused by a product, irrespective of the

theory underlying the claim, except actions for harm caused by breach of an express warranty.

(4) "Environmental tort action" means a civil action seeking damages for harm where the cause of the harm is exposure to toxic chemicals or substances, but does not mean actions involving drugs or products intended for personal consumption or use.

2. A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.

3. a. In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:

(1) At the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product; or

(2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended, except that this paragraph shall not apply to industrial machinery or other equipment used in the workplace and it is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product; or

(3) The harm was caused by an unavoidably unsafe aspect of the product and the product was accompanied by an adequate warning or instruction as defined in section 4 of this act.

b. The provisions of paragraph (1) of subsection a. of this section shall not apply if the court, on the basis of clear and convincing evidence, makes all of the following determinations:

(1) The product is egregiously unsafe or ultra-hazardous;

(2) The ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks,

or the product poses a risk of serious injury to persons other than the user or consumer; and

(3) The product has little or no usefulness.

c. No provision of subsection a. of this section is intended to establish any rule, or alter any existing rule, with respect to the burden of proof.

4. In any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction. An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician. If the warning or instruction given in connection with a drug or device or food or food additive has been approved or prescribed by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U. S. C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U. S. C. § 201 et seq., a rebuttable presumption shall arise that the warning or instruction is adequate. For purposes of this section, the terms "drug", "device", "food", and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

5. a. Punitive damages may be awarded to the claimant only if the claimant proves, by a preponderance of the evidence, that the harm suffered was the result of the product manufacturer's or seller's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of the safety of product users, consumers, or others who foreseeably might be harmed by the product. For the purposes of this section "actual malice" means an intentional wrongdoing in the sense of an evil-minded act, and "wanton and willful disregard" means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such action or omission. Punitive damages shall not be awarded in the absence of an award of compensatory damages.

b. The trier of fact shall first determine whether compensatory damages are to be awarded. Evidence relevant only to punitive damages shall not be admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether punitive damages are to be awarded. In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

(1) The likelihood at the relevant time that serious harm would arise from the tortfeasor's conduct;

(2) The tortfeasor's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the tortfeasor's conduct;

(3) The conduct of the tortfeasor upon learning that its initial conduct would likely cause harm; and

(4) The duration of the conduct or any concealment of it by the tortfeasor.

c. Punitive damages shall not be awarded if a drug or device or food or food additive which caused the claimant's harm was subject to premarket approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U. S. C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U. S. C. § 201 et seq. and was approved or licensed; or is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations. However, where the product manufacturer knowingly withheld or misrepresented information required to be submitted under the agency's regulations, which information was material and relevant to the harm in question, punitive damages may be awarded. For purposes of this subsection, the terms "drug", "device", "food", and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

d. If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:

(1) All relevant evidence relating to the factors set forth in subsection b. of this section;

(2) The profitability of the misconduct to the tortfeasor;

(3) When the misconduct was terminated; and

(4) The financial condition of the tortfeasor.

6. The provisions of this act shall not apply to any environmental tort action.

7. Except as otherwise expressly provided in this act, no provision of this act is intended to establish any rule, or alter any existing rule, with respect to the burden of proof in a product liability action.

8. This act shall take effect immediately except that provisions of this act that establish new rules with respect to the burden of proof or the imposition of liability in product liability actions shall apply only to product liability actions filed on or after the date of enactment.

TORT LIABILITY AND MALPRACTICE

Clarifies issues in products liability action.

SENATE, No. 2805

STATE OF NEW JERSEY

INTRODUCED NOVEMBER 17, 1986

By Senator LESNIAK

Referred to Committee on Judiciary

AN ACT concerning product liability and punitive damages.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. a. A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm (1) deviated in a material way from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or (2) failed to contain adequate warnings or instructions, or (3) was designed in a defective manner.

b. In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:

(1) At the time the product left the control of the manufacturer, a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the usefulness or intended function of the product was not available; or

(2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended; or

(3) The harm was caused by an unavoidably unsafe aspect of the product and the product was accompanied by an adequate warning or instruction as defined in subsection c. of this section or as provided in subsection d. of this section.

c. In any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction. An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician. A presumption shall arise that a warning or instruction is adequate if it conforms to the requirements of a federal or state statute or the conditions of approval of a product by a federal or state agency.

d. In a product liability action brought against a manufacturer or seller for harm allegedly caused by a failure to give a warning or instruction, the manufacturer or seller shall not be liable unless the claimant proves by the preponderance of the evidence that, at the time the product left the control of the manufacturer, the manufacturer or seller knew or should have known of the danger that caused the claimant's harm. Nothing in this subsection shall affect the duty of a manufacturer or seller to warn of dangers it discovers, or reasonably should discover, after the product leaves its control.

e. For the purposes of this section:

(1) "Claimant" means any person who brings a product liability action, and if such an action is brought through or on behalf of an estate, the term includes the claimant's decedent, or if an action is brought through or on behalf of a minor, the term includes the claimant's parent or guardian;

(2) "Harm" means (a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in this paragraph.

(3) "Product liability action" means any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.

2. a. Punitive damages may be awarded to the claimant only if the claimant proves, by clear and convincing evidence, that the harm suffered was the result of the product manufacturer's or seller's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of the safety of product users, consumers or others, who foreseeably might be harmed by the product. For the purposes of this section "actual malice" means an intentional wrongdoing, in the sense of an evil-minded act, and "wanton and willful disregard" means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission. Punitive damages may not be awarded in the absence of an award of compensatory damages.

b. The trier of fact shall first determine whether compensatory damages are to be awarded. Evidence relevant only to punitive damages shall not be admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether punitive damages are to be awarded. In determining whether punitive damages are to be awarded, the trier of fact shall consider:

(1) The likelihood at the relevant time that serious harm would arise from the tortfeasor's conduct;

(2) The tortfeasor's awareness of the likelihood that the serious harm at issue would arise from the tortfeasor's conduct;

(3) The conduct of the tortfeasor upon learning that its initial conduct would likely cause harm; and

(4) The duration of the conduct or any concealment of it by the tortfeasor.

c. Punitive damages shall not be awarded where a drug or device or food or food additive which caused the claimant's harm was subject to pre-market approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U. S. C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U. S. C. § 201 et seq. and was approved or licensed; or is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations. However, where the product manufacturer knowingly, and with reckless indifference to the consequences, withheld from or misrepresented to the agency, in contravention of the agency's regulations, information material and relevant to the harm in question, punitive damages may be awarded.

For purposes of this subsection, the terms: "drug," "device," "food," and "food additive" have the meanings defined in the "Federal Food, Drug and Cosmetic Act".

d. If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of those damages. In making that determination, the court shall consider all relevant evidence, including, but not limited to, the following:

(1) All relevant evidence relating to the factors set forth in subsection b. of this section;

(2) The profitability of the misconduct to the tortfeasor;

(3) Whether the misconduct has been terminated;

(4) The financial condition of the tortfeasor;

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

(6) The aggregate effect of punishment upon the ability of the tortfeasor to pay damages for economic and non-economic loss in pending or future claims involving persons similarly situated to the claimant.

3. The provisions of this act shall not apply to any environmental tort action. For the purposes of this section, "environmental tort action" means a civil action seeking damages for personal injuries or death where the cause of the damages is the discharge of hazardous or toxic substances into the air or water of the State or onto the lands from which it might flow into waters.

4. This act shall take effect immediately.

SPONSOR'S

STATEMENT

Section 1 contains provisions dealing with actions for damages for harm caused by products. The section is intended to establish clear rules with respect to specific matters as to which the decisions of the courts in New Jersey have created uncertainty, while preserving the concept that manufacturers may be held strictly liable for harm caused by products that are defective. The provisions of section 1 are not intended to codify all issues relating to product liability, but only to deal with matters that require clarification. The section does not, for example, affect existing statutory and common law rules concerning contributory negligence and comparative fault or other defenses not expressly addressed by this legislation.

Subsection a. of section 1 identifies the theories under which a manufacturer or seller may be held liable for harm caused by a product. These comprise manufacturing defects, warning defects, and design defects. Except as modified by the provisions of section 1, the elements of these causes of action are to be determined according to the existing common law of the State.

Subsection b. of section 1 clarifies certain matters relating to liability for harm caused by an alleged design defect.

Paragraph (1) of subsection b. of section 1 provides that a manufacturer or seller is not liable if at the time the product left the manufacturer's control there was not available a practical and feasible alternative design that would have prevented the harm without substantially impairing the usefulness or intended function of the product. Under recent decisions of the New Jersey courts, it is clear that evidence concerning the availability of alternative designs (sometimes referred to as the "state of the art") is relevant in determining whether a product is defective in design, but it is unclear what effect is to be given to a determination that no safer alternative design was feasible when a product was manufactured. This provision makes clear that such a determination precludes liability in a design-defect case.

In an extraordinary case, a court may conclude that the state-of-the-art defense provided for by paragraph (1) of subsection b. of section 1 will not be available if all of the following determinations are made: (1) that a product is egregiously unsafe or ultra-hazardous; (2) that the ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer; and (3) that the product has little or no utility. It is intended that such a finding would be made only in genuinely extraordinary cases—for example, in the case of a deadly toy marketed for use by young children, or of a product marketed for use in dangerous criminal activities.

Paragraph (2) of subsection b. of section 1 applies to products whose characteristics are known to the ordinary consumer. It provides that such a product is not defective in design if harm results from an inherent characteristic of the product that is known to the ordinary person who uses or consumes it with the knowledge common to the class of persons for whom the product is intended. This provision, which adopts the rule established by comment *i* to section 402A of the American Law Institute's *Restatement (Second) of Torts*, recognizes that there are many common

products, such as foods and other consumer products, whose use necessarily involves some risk of harm. For example, use of butter may conceivably affect cholesterol levels in the arteries and be linked to heart disease, but the product is not for this reason "defective." This "consumer expectations" test has been recognized by the New Jersey courts. *See O'Brien* v. *Muskin Corp.*, 94 N. J. 169 (1983); *Suter* v. *San Angelo Foundry & Machine Company*, 81 N. J. 150 (1979); *Whitehead* v. *St. Joe Lead Co., Inc.*, 729 F.2d 238 (3d Cir. 1984). The rule is intended to apply to familiar consumer products of the kind identified in comment *i* to section 402A of the *Restatement (Second) of Torts*; it is not intended to apply to other products, such as industrial chemicals or machinery encountered in the workplace.

Paragraph (3) of subsection b. of section 1 provides that a manufacturer or seller is not liable for a design defect if harm results from an unavoidably unsafe aspect of a product and the product was accompanied by an adequate warning or instruction, as provided in subsections c. and d. of section 1. This provision is based on comment *k* to section 402A of the *Restatement (Second) of Torts* and is intended to be applied principally in cases involving prescription pharmaceuticals and vaccines. The use of such products ordinarily entails some risk of side effects, and it is intended that such products shall not be found "defective" if they are properly manufactured and are accompanied by proper warnings or instructions.

Subsection c. of section 1 provides a defense in warning-defect cases if an adequate warning is given. The subsection contains a general definition of an adequate warning and a special definition for warnings that accompany prescription drugs, as to which information is provided to physicians. The subsection establishes a presumption that a warning or instruction is adequate if it conforms to the requirements of a federal or state statute or the conditions of approval of a product by a federal or State agency.

Subsection d. of section 1 establishes a requirement that, in a warning-defect case, the claimant prove that at the time the product left the control of the manufacturer, the manufacturer or seller knew or should have known of the danger that caused the claimant's harm. The provision does not affect existing law as to a manufacturer or seller's duty to issue post-manufacturing warnings concerning dangers that are discovered after a product leaves the manufacturer's control.

Subsection e. of section 1 contains definitions of the terms "claimant," "harm," and "product liability action." These defini-

tions establish the scope of section 1, which is intended to apply to all actions for harm caused by products, except actions for harm caused by breach of an express warranty.

Section 2 provides that punitive damages should only be awarded where a wrongdoer's conduct is especially egregious. To award punitive damages there must be a finding of "actual malice which is nothing more or less than intentional wrongdoing — an evil-minded act" or "an act accompanied by wanton and willful disregard of the rights of another". *Enright* v. *LuBow*, 202 N. J. Super. 58 (App. Div. 1985). Punitive damages are not awarded for "mere inadvertence, mistake, errors of judgment and the like". *Id.* There must also be "a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences" in order to recover punitive damages. *Berg* v. *Reaction Motors Div.*, 37 N. J. 396 (1962); *Fischer* v. *Johns-Manville Corp.*, 103 N. J. 643 (1986); *Nappe* v. *Anchelewitz, Barr, Ansell & Bonello*, 97 N. J. 37 (1984).

Subsection a. of section 2 requires proof of the above factors by clear and convincing evidence before punitive damages may be awarded in a product liability case. It also provides that punitive damages may not be awarded in the absence of an award of compensatory damages.

Subsection b. of section 2 provides that the trier of the fact, in a separate proceeding from that dealing with compensatory damages, shall detemine whether punitive damages are to be awarded after considering the four factors set forth in subsection 2.b. The trier of fact may consider additional factors since the four are not intended to be exclusive.

Subsection c. of section 2 provides that drugs, devices, food, and food additives which have received pre-market approval or are licensed by the Federal Food and Drug Administration ("FDA") shall not be subject to punitive damages claims except where the manufacturers knowingly withheld or misrepresented material information to the FDA in reckless disregard of the consequences of such conduct.

Subsection d. of section 2 provides that the court shall determine the amount of punitive damage once the trier of fact determines that punitive damages should be awarded. In determining this amount the court shall consider the six non-exclusive factors set forth in this subsection.

Section 3 states that the provisions of this legislation do not apply to environmental tort actions. The section includes a definition of the term "environmental tort action" that is intended to

encompass actions involving pollution of the ambient air and of streams and other bodies of water, "dumping" of toxic wastes, and similar activities ordinarily regarded as environmental torts.

TORT LIABILITY AND MALPRACTICE

Clarifies issues of proof in certain products liability actions and provides for punitive damages in certain cases.

SENATE JUDICIARY COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR

SENATE, No. 2805

STATE OF NEW JERSEY

DATED: MARCH 23, 1987

Subsection a. of section 1 sets forth a declaration of legislative purpose. The act is intended as a remedial measure to clarify certain matters pertaining to the rules governing actions for harm caused by products and to establish statutory standards and procedures for the imposition of punitive damages.

Subsection b. of section 1 contains definitions of the terms "claimant," "harm," and "product liability action" and "environmental tort action." These definitions establish the scope of the act, which is intended to apply to all actions for harm caused by products, except actions for harm caused by breach of an express warranty.

Sections 2 through 4 contain provisions dealing with actions for damages for harm caused by products. These sections are intended to establish clear rules with respect to specific matters as to which the decisions of the courts in New Jersey have created uncertainty, while reserving the concept that manufacturers may be held strictly liable for harm caused by products that are defective. The provisions of sections 2 through 4 are not intended to codify all issues relating to product liability, but only to deal with matters that require clarification. These sections do not, for example, affect existing statutory and common law rules concerning contributory negligence and comparative fault or other matters not expressly addressed by this legislation. In particular, sections 2 through 4 are not intended to affect the holding in *Suter v. San Angelo Foundry & Machine Company*, 81 N. J. 150 (1979), with respect to the application of the principle of comparative fault in cases involving workplace injuries.

Section 2 identifies the theories under which a manufacturer or seller may be held liable for harm caused by a product. These comprise manufacturing defects, warning defects, and design defects. Except as modified by the provisions of sections 3 and 4, the elements of these causes of action are to be determined according to the existing common law of the State.

Section 3 clarifies certain matters relating to liability for harm caused by an alleged design defect. Paragraph (1) of subsection a.

of section 3 provides that a manufacturer or seller is not liable if at the time the product left the manufacturer's control there was not available a practical and feasible alternative design that would have prevented the harm without substantially impairing the usefulness or intended function of the product. Under recent decisions of the New Jersey courts, it is clear that evidence concerning the availability of alternative designs (sometimes referred to as the "state of the art") is relevant in determining whether a product is defective in design, but it is unclear what effect is to be given to a determination that no safer alternative design was feasible when a product was manufactured. This provision makes clear that such a determination precludes liability in a design-defect case not falling within the exception provided for in subsection b. of section 3.

Paragraph (2) of subsection a. of section 3 applies to products whose characteristics are known to the ordinary consumer. It provides that such a product is not defective in design if harm results from an inherent characteristic of the product that is known to the ordinary person who uses or consumes it with the knowledge common to the class of persons for whom the product is intended. This provision, which adopts the rule established by comment *i* to section 402A of the American Law Institute's *Restatement (Second) of Torts*, recognizes that there are many common products, such as foods and other consumer products, whose use necessarily involves some risk of harm. For example, use of butter may conceivably affect cholesterol levels in the arteries and be linked to heart disease, but the product is not for this reason "defective." This "consumer expectations" test has been recognized by the New Jersey courts. *See O'Brien v. Muskin Corp.*, 94 N. J. 169 (1983), *Suter v. San Angelo Foundry & Machine Company*, 81 N. J. 150 (1979), *Whitehead v. St. Joe Lead Co., Inc.*, 729 F. 2d 238 (3d Cir. 1984). This rule is intended to apply to familiar consumer products of the kind identified in comment *i* to section 402A of the *Restatement (Second) of Torts*. It is not intended to apply to other products, such as machinery or other equipment encountered in the workplace. Similarly, it is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the products, because such dangers are not "inherent."

Paragraph (3) of subsection a. of section 3 provides that a manufacturer or seller is not liable for a design defect if harm results from an unavoidably unsafe aspect of a product and the product was accompanied by an adequate warning or instruction, as provided in section 4 of the act. This provision is based on comment *k* to section 402A of the *Restatement (Second) of Torts* and is intended to be applied

principally in cases involving prescription pharmaceuticals and vaccines. The use of such products ordinarily entails some risk of side effects, and it is intended that such products shall not be found "defective" if they are properly manufactured and are accompanied by proper warnings or instructions.

Subsection b. of section 3 establishes a limited exception to the provisions of paragraph (1) of subsection a. concerning compliance with the state of the art. In an extraordinary case, a court may conclude that the state-of-the-art provision does not apply if the court makes all of the following determinations: (1) that a product is egregiously unsafe or ultrahazardous; (2) that the ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer; and (3) that the product has little or no usefulness. It is intended that such a finding would be made only in genuinely extraordinary cases—for example, in the case of a deadly toy marketed for use by young children, or of a product marketed for use in dangerous criminal activities.

Section 4 provides that a manufacturer or seller is not liable in a warning-defect case if an adequate warning is given when the product has left the control of the manufacturer or seller or, in the case of dangers discovered after the product has left control, if an adequate warning is then given by the manufacturer or seller. The subsection contains a general definition of an adequate warning and a special definition for warnings that accompany prescription drugs, since, in the case of prescription drugs, the warning is owed to the physician. The subsection establishes a presumption that a warning or instruction is adequate on drug or food products if the warning has been approved or prescribed by the Food and Drug Administration.

Section 5 provides that punitive damages should only be awarded where a wrongdoer's conduct is especially egregious. To award punitive damages there must be a finding of "actual malice which is nothing more or less than intentional wrongdoing—an evil-minded act" or "an act accompanied by wanton and willful disregard of the rights of another." *Enright v. LuBow*, 202 N. J. Super. 58 (App. Div. 1985). Punitive damages are not awarded for "mere inadvertance, mistake, errors of judgment and the like." *Id* There must also be "a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences" in order to recover punitive damages. *Berg v. Reaction Motors Div.*, 37 N. J. 396 (1962); *Fischer v. Johns-Manville Corp.*, 103 N. J. 643 (1986): *Nappe v. Anchelewitz, Barr, Ansell & Bonello*, 97 N. J. 37 (1984).

Subsection a. of section 5 requires proof of the above factors by a preponderance of the evidence before punitive damages may be awarded in a product liability case. It also provides that punitive damages may not be awarded in the absence of an award of compensatory damages.

Subsection b. of section 5 provides that the trier of fact, in a separate proceeding from that dealing with compensatory damages, shall determine whether punitive damages are to be awarded after considering the four factors set forth in this subsection. The trier of fact may consider additional factors since the four are not intended to be exclusive.

Subsection c. of section 5 provides that drugs, devices, food and food additives which have received pre-market approval or are licensed by the Federal Food and Drug Administration ("FDA") shall not be subject to punitive damage claims except where the manufacturers knowingly withheld or misrepresented material information required to be submitted to the FDA.

Subsection d. of section 5 provides that once the trier of fact determines that punitive damages should be awarded, it shall then determine the amount of punitive damages. In determining this amount the court shall consider the four non-exclusive factors set forth in this subsection.

Section 6 states that the provisions of this legislation do not apply to environmental tort actions.

Section 7 states that, except as otherwise expressly provided, the act is not intended to establish any rule or alter any existing rule, with respect to the burden of proof in a product liability action.

Section 8 provides that the bill will take effect immediately but that the provisions of the act which establish new rules with respect to the burden of proof or the imposition of liability in product liability actions shall apply only to actions filed on or after the effective date.

ASSEMBLY INSURANCE COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR

SENATE, No. 2805

STATE OF NEW JERSEY

DATED: JUNE 22, 1987

Subsection a. of section 1 of the bill sets forth a declaration of legislative purpose. The act is intended as a remedial measure to clarify certain matters pertaining to the rules governing actions for harm caused by products and to establish statutory standards and procedures for the imposition of punitive damages.

Subsection b. of section 1 contains definitions of the terms "claimant," "harm," and "product liability action." These definitions establish the scope of the act, which is intended to apply to all actions for harm caused by products, except actions for harm caused by breach of an express warranty.

Subsection b. also contains a definition of the term "environmental tort action." Under the provisions of section 6, such actions are excluded from this act. It is intended that the act will not apply to actions for damages for harm resulting from environmental or occupational exposure to toxic chemicals or substances. The act is, however, intended to apply to all other actions involving product-related harm, including harm caused by chemicals or substances that are contained in drugs or products intended for personal consumption or use—that is, traditional consumer products such as foods, beverages, cosmetics, household appliances, and other articles intended for personal consumption or use.

Sections 2-4 contain provisions dealing with actions for damages for harm caused by products. These sections are intended to establish clear rules with respect to specific matters as to which the decisions of the courts in New Jersey have created uncertainty, while preserving the concept that manufacturers may be held strictly liable for harm caused by products that are defective. The provisions of section 2-4 are not intended to codify all issues relating to product liability, but only to deal with matters that require clarification. These sections do not, for example, affect existing statutory and common law rules concerning contributory negligence and comparative fault or other matters

not expressly addressed by this legislation. In particular, sections 2-4 are not intended to affect the holding in *Suter v. San Angelo Foundry & Machine Company*, 81 N. J. 150 (1979), with respect to the application of the principle of comparative fault in cases involving workplace injuries.

Section 2 identifies the theories under which a manufacturer or seller may be held liable for harm caused by a product. These comprise manufacturing defects, warning defects, and design defects. Except as modified by the provisions of sections 3 and 4, the elements of these causes of action are to be determined according to the existing common law of the State.

Section 3 clarifies certain matters relating to liability for harm caused by an alleged design defect. Paragraph (1) of subsection a. of section 3 provides that a manufacturer or seller is not liable if at the time the product left the manufacturer's control there was not available a practical and feasible alternative design that would have prevented the harm without substantially impairing the usefulness or intended function of the product. Under recent decisions of the New Jersey courts, it is clear that evidence concerning the availability of alternative designs (sometimes referred to as the "state of the art") is relevant in determining whether a product is defective in design, but it is unclear what effect is to be given to a determination that no safer alternative design was feasible when a product was manufactured. This provision makes clear that such a determination precludes liability in a design-defect case not falling within the exception provided for in subsection 3. b.

Paragraph (2) of subsection a. of section 3 applies to products whose characteristics are known to the ordinary consumer. It provides that such a product is not defective in design if harm results from an inherent characteristic of the product that is known to the ordinary person who uses or consumes it with the knowledge common to the class of persons for whom the product is intended. This provision, which adopts the rule established by comment *i* to the American Law Institute's *Restatement, Second, Torts* § *402*, recognizes that there are many common products, such as foods and other consumer products, whose use necessarily involves some risk of harm. For example, use of butter may conceivably affect cholesterol levels in the arteries and be linked to heart disease, but the product is not for this reason "defective." This "consumer expectations" test has been recognized by the New Jersey courts. *See O'Brien v. Muskin Corp.*, 94 N. J. 169 (1983); *Suter v. San Angelo Foundry & Machine Company*, 81 N. J. 150 (1979); *Cepeda v. Cumberland Engineering Co., Inc.*, 76 N. J. 152

(1978); *Whitehead v. St. Joe Lead Co., Inc.*, 729 F. 2nd 238 (3d Cir. 1984). This rule is intended to apply to familiar consumer products of the kind identified in comment *i* to *Restatement, Second, Torts* § *402A*. It is not intended to apply to other products, such machinery encountered in the workplace. Similarly, it is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the products, because such dangers are not "inherent."

Paragraph (3) of subsection a. of section 3 provides that a manufacturer or seller is not liable for a design defect if harm results from an unavoidably unsafe aspect of a product and the product was accompanied by an adequate warning or instruction, as provided in section 4 of the act. This provision is based on comment *k* to *Restatement, Second, Torts* § *402A* and is intended to be applied principally in cases involving prescription pharmaceuticals and vaccines. The use of such products ordinarily entails some risk of side effects, and it is intended that such products shall not be found "defective" if they are properly manufactured and are accompanied by proper warnings or instructions.

Subsection b. of section 3 establishes a limited exception to the provisions of paragraph (1) of subsection a. concerning compliance with the state of the art. In an extraordinary case, a court may conclude that the state-of-the-art provision does not apply if the court makes all of the following determinations: (1) that a product is egregiously unsafe or ultrahazardous; (2) that the ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer; and (3) that the product has little or no usefulness. It is intended that such a finding would be made only in genuinely extraordinary cases—for example, in the case of a deadly toy marked for use by young children, or of a product marketed for use in dangerous criminal activities.

Section 4 provides that a manufacturer or seller is not liable in a warning-defect case if an adequate warning is given. The section contains a general definition of an adequate warning and a special definition for warnings that accompany prescription drugs, since, in the case of prescription drugs, the warning is owed to the physician. The section establishes a rebuttable presumption that a warning or instruction given in connection with a drug, device, food, or food additive is adequate if the warning has been approved or prescribed by the federal Food and Drug Administration ("FDA") under applicable federal statutes.

Section 5 provides that punitive damages should only be awarded where a wrongdoer's conduct is especially egregious. To award punitive damages there must be a finding of "actual malice which is nothing more or less than intentional wrong-doing—an evil-minded act" or "an act accompanied by wanton and willful disregard of the rights of another." *Enright v. Lubow*, 202 N. J. Super. 58 (App. Div. 1985). Punitive damages are not awarded for "mere inadvertence, mistake, errors of judgment and the like." *Id.* There must also be "a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences" in order to recover punitive damages. *Berg v. Reaction Motors Div.*, 37 N. J. 396 (1962); *Fischer v. Johns-Manville Corp.*, 103 N. J. 643 (1986); *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 97 N. J. 37 (1984).

Subsection a. of section 5 requires proof of the above factors by a preponderance of the evidence before punitive damages may be awarded in a product liability case. It also provides that punitive damages may not be awarded in the absence of an award of compensatory damages.

Subsection b. of section 5 provides that the trier of fact, in a separate proceeding from that dealing with compensatory damages, shall determine whether punitive damages are to be awarded after considering the four factors set forth in subsection b. of section 5. The trier of fact may consider additional factors since the four are not intended to be exclusive.

Subsection c. of section 5 provides that drugs, devices, food and food additives which have received premarket approval or are licensed or regulated by the "FDA" shall not be subject to punitive damage claims except where the manufacturers knowingly withheld or misrepresented material information required to be submitted to the FDA.

Subsection d. of section 5 provides that the trier of fact shall determine the amount of punitive damages once the trier of fact determines that punitive damages should be awarded. In determining this amount the trier of fact shall consider the four non-exclusive factors set forth in this subsection.

Section 6 states that the provisions of this bill do not apply to environmental tort actions. The term "environmental tort action" is defined in paragraph (4) of subsection b. of section 1.

Section 7 states that, except as otherwise expressly provided, the act is not intended to establish any rule, or alter any existing rule, with respect to the burden of proof in a product liability action.

Section 8 provides that the act shall take effect immediately, except that provisions of the act that establish new rules with respect to the burden of proof or the imposition of liability in product liability actions shall apply only to actions filed on or after the date of enactment. This provision is appropriate because certain provisions of the act simply codify the existing common law of the State, which should continue to apply in pending cases as well as new cases. For example, section 2 states that the burden is on the claimant in a product liability action to prove by a preponderance of the evidence that the product is defective. This is the rule under the existing common law. Similarly, the New Jersey courts have adopted certain provisions of the commentary to the American Law Institute's *Restatement, Second, Torts* (*e. q.*, comments *i* and *k* to section 402A) that are codified in this act. The New Jersey Supreme Court has also established standards for the award of punitive damages and factors to be considered in determining whether to award such damages, which are codified in section 5 of the bill. Certain other provisions of the act, however, establish new rules for product liability actions. For example, section 4 establishes a rebuttable presumption that warnings or instructions for certain products are adequate if they are approved or prescribed by the federal Food and Drug Administration, and subsection c. of section 5 establishes a defense against punitive damages for certain products that are regulated by the FDA. It is intended that such new rules apply to cases filed on or after the date of enactment.

OFFICE OF THE GOVERNOR
NEWS RELEASE

CN-001 **TRENTON, N.J. 08625**

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Release: THUR., JULY 23, 1987

Governor Thomas H. Kean today signed legislation to codify and clarity the State's products liability case law and more clearly define a defective or improperly designed product.

The legislation, S-2805, was sponsored by Senator Raymond Lesniak, D-Union.

This bill is an effort to place into the State's laws standards for the courts to use in legal actions seeking damages for injuries suffered as a result of using a product claimed to be defective.

New Jersey currently has no such legislation and courts have developed and used a body of case law built up over the years in declining liability cases.

"This legislation responds to the well documented need for the establishment of clear rules regarding legal actions seeking damages for harm caused by products," Kean said. "It does not totally supplant existing case law because I am convinced that legislation of such a comprehensive nature should come from the United States Congress and be made applicable equally to all states."

"Rather this bill is designed to bring some sense of order and clarity to products liability cases within New Jersey," he added. "It brings a sense of fairness to the system as well, with protections for both manufacturers, and consumers."

- more -

The bill adopts many of the standards of recent case law concerning the assessment of punitive damages against a product manufacturer. It requires proof that the manufacturer engaged in malicious conduct showing a willful disregard for the safety of consumers in the manufacture of the product.

The legislation establishes split proceedings in products liability cases, one to deal with compensatory damages and one to deal with punitive damages.

The bill contains a provision that a manufacturer cannot be held liable for a design defect if the product is designed in the safest possible manner and is not ultra-hazardous.

It also creates a defense for manufacturers against a charge of inadequate warning, provided the manufacturer furnishes proof that the warning was required or approved by the Food and Drug Administration (FDA) and that all standards set by the FDA were met.

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