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NOTES

CLASS ACTION IN A PRODUCTS LIABILITY CONTEXT: THE PREDOMINATION REQUIREMENT AND CAUSE-IN-FACT

"‘[C]ause-in-fact’ . . . is in the end a functional concept designed to achieve human goals."1

If followed in other jurisdictions, a recent development in New York law places the validity of a products liability class action in serious jeopardy. Section 901(a) of the New York Civil Practice Law and Rules (CPLR)2 requires that for a class to be certified "questions of law or fact common to the class . . . [must] predominate over any questions affecting only individual members."3 In Rosenfeld v. A.H. Robins Co.,4 the appellate division held that this

2. N.Y. CIV. PRAc. LAW § 901(a) (McKinney 1976). Section 901(a) provides:
   a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
      1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
      2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
      3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
      4. the representative parties will fairly and adequately protect the interests of the class; and
      5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
3. Id. § 901(a)(2). Such a “predomination requirement” exists in the Federal Rules of Civil Procedure, Fed. R. Civ. P. 23(b)(3), and in most state class action statutes, see, e.g., CAL. CIV. CODE § 1781(b)(2) (West 1973); DEL. CT. CH. R. 23(b)(3); OHIO R. CIV. P. 23(B)(3).
4. 63 A.D.2d 11, 407 N.Y.S.2d 196 (2d Dep't), appeal dismissed, 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d 374 (1978). Motion by plaintiff-appellant for leave to appeal to the court of appeals pursuant to N.Y. CIV. PRAc. LAW § 5602(b)(1) (McKinney 1978), was granted by the Second Department on September 7, 1978. N.Y.L.J., Sept. 13, 1978, at 14, col. 1. However, the court of appeals dismissed the appeal on the grounds that: (1) The decision below was a discretionary one and, therefore, the question certified by the appellate division’s permissive appeal did not
predomination requirement could be satisfied only in those cases in
which the issue of cause-in-fact is capable of resolution on a
classwide basis. The court further suggested that in almost all
products cases cause-in-fact must be resolved on an individual, not
a classwide basis. Thus, Rosenfeld implies that class action is
seldom appropriate in a products liability suit.

This Note suggests that the issue of cause-in-fact need not
prevent satisfaction of the predomination requirement in most
instances, and that consequently products liability class actions
ordinarily should be possible. First, a general approach to the
predomination requirement is summarized. This approach is then
applied to both strict liability and breach of warranty causes of ac-
tion, paying special attention to the issue of whether cause-in-fact
can be established on a classwide basis. Finally, the propriety of a
class action with respect to only particular issues in a products
case, pursuant to section 906(1) of the CPLR, is discussed.

I. ROSENFELD V. A.H. ROBINS CO.

Rosenfeld involved a manufacturer’s liability for injuries alleg-
edly caused by its product, an intrauterine device (IUD) known as

present “a question of law decisive of the determination of the Ap-
pellate Division,” as required by N.Y. Civ. PRAC. LAW § 5713 (McKinney 1978), and
(2) the appeal taken as a matter of right pursuant to N.Y. Civ. PRAC. LAW § 5601(a)
(McKinney 1978) was improper because denial of class certification is not a final
determination within the meaning of the New York Constitution. Rosenfeld v. A.H.
1; Newman, Review of Class Actions by Court of Appeals, N.Y.L.J., Feb. 15, 1979,
at 1, col. 1. “The upshot of this procedural history is that the Appellate Division may
effectively be the ‘court of last resort’ regarding the preliminary issue of class certifi-
cation until the full merits of the case are finally determined.” Hoenig, supra, at 3,
col. 2.

5. See 63 A.D.2d at 16, 407 N.Y.S.2d at 199.

6. See id. at 15-16, 407 N.Y.S.2d at 198-99. The sole exception appears to be
mass accident cases where there is indisputably a common cause-in-fact. See id.

7. Class actions in other substantive areas of the law may also be jeopardized
by this development. See Wojciechowski v. Republic Steel Corp., 67 A.D.2d 830, 413
N.Y.S.2d 70 (4th Dep’t 1979) (class certification denied, in part because whether dust
from defendant’s plant cause-in-fact of plaintiffs’ property damage held to be ques-
tion requiring individual determinations) (citing Rosenfeld v. A.H. Robins Co., 63
A.D.2d 11, 407 N.Y.S.2d 196 (2d Dep’t), appeal dismissed, 46 N.Y.2d 731, 385 N.E.
2d 1301, 413 N.Y.S.2d 374 (1978)).

8. N.Y. Civ. PRAC. LAW § 906(1) (McKinney 1976). Section 906 provides:
“When appropriate, (1) an action may be brought or maintained as a class action with
respect to particular issues, or (2) a class may be divided into subclasses and each
subclass treated as a class. The provisions of this article shall then be construed and
applied accordingly.” Id. § 906. See FED. R. CIV. P. 23(c)(4).
the Dalkon Shield. The plaintiff, Doris Rosenfeld, purchased a Dalkon Shield and had it implanted by her gynecologist. Several years later she was hospitalized and treated for uterine infection, uterine abscessing, and related bleeding. She alleged that these injuries resulted from the IUD and that such injuries necessitated a hysterectomy. Further, she alleged that the shield was defectively designed and that the defendant breached certain express and implied warranties with regard to it. The suit was brought by Rosenfeld individually and as a representative party of the class of all those similarly situated. Plaintiff predicated the manufacturer's liability on four distinct legal theories: (1) Strict liability, (2) breach of express warranty, (3) breach of implied warranty of


10. Id. at 12, 16. Plaintiff alleged three design defects: (1) the device was defectively molded of an overrigid substance which had "an inherent and latent dangerous tendency to cause a shearing between the endometrium and the chorion-amnion"; (2) the device tended to erode causing perforation of the uterine wall; (3) the unique design of "a single tail with bundled monofilaments ... enclosed within a thin plastic sheath" resulted in the aggregation of harmful bacteria and consequent infections. Plaintiff's Bill of Particulars at A118-19 app., Rosenfeld v. A.H. Robins Co., No. 77-3794 (Nassau County Ct. Nov. 30, 1977) (citations omitted), aff'd, 63 A.D.2d 11, 407 N.Y.S.2d 196 (2d Dep't), appeal dismissed, 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d 374 (1978).

11. As part of its marketing program, Robins advertised intensively in medical journals. Plaintiff alleged that Robins misrepresented the IUD's safety and suitability in these advertisements and in its catalogues. Plaintiff's Amended Verified Complaint, supra note 9, at 10-11, 13-15.

12. Plaintiff sought certification of the following limited class:
   All patients of gynecologists or of clinics under the supervision of gynecologists within the State of New York in whom Defendant's IUD's were implanted, during the time period June 12, 1970 (the date on which ROBINS acquired the patents on the IUD at issue) through June 28, 1974 (the date upon which Defendant first withdrew the subject IUD from public marketing) and which patients' IUD's malfunctioned, failed, or operated in such a manner, during the time period June 12, 1970 through November 23, 1976 (the date of service of Plaintiff's Complaint), so as to require their hospitalization for treatment of maladies or other physical manifestations which had as symptoms thereof all forms of pelvic infection, uterine abscessing and/or perforation, and related or incidental hemorrhaging.

Id. at 5-6.


merchantability,\textsuperscript{15} and (4) negligence.\textsuperscript{16}

The appellate division affirmed the order of special term\textsuperscript{17} denying class certification because the section 901(a)(2) requirement that common elements predominate had not been met.\textsuperscript{18} The court distinguished the issue of damages from the issue of liability: They held that it was not the need for individual determination of damages that prevented common elements from predominating,\textsuperscript{19} but the need for individual determination of liability.\textsuperscript{20} The appellate division found that in Rosenfeld classwide resolution of liability was impossible because proof of causation required individual determinations.\textsuperscript{21} With respect to the strict liability claim, the court held that each class member would have to prove individually that the defect(s) in the Dalkon Shield was the cause-in-fact of her injuries.\textsuperscript{22} With respect to the breach of warranty claim, each member would have to prove individually that she had detrimentally relied on the false representations.\textsuperscript{23} Whether phrased in terms of cause-in-fact or reliance, the fundamental focus of the court’s concern was identical: The causal link between conduct of the defendant and injury suffered by a class member had to be established on an individual basis. Therefore, liability was not capable of classwide resolution.

\textsuperscript{16} Brief of Plaintiff-Appellant, \textit{supra} note 13, at 3.
\textsuperscript{18} Although special term indicated that the § 901(a)(5) requirement of superiority, N.Y. Civ. Prac. Law § 901(a)(5) (McKinney 1976), was also unsatisfied, Rosenfeld v. A.H. Robins Co., No. 77-3794, slip op. at 2-3 (Nassau County Ct. Nov. 30, 1977), aff’d, 63 A.D.2d 11, 407 N.Y.S.2d 196 (2d Dep’t), appeal dismissed, 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d 374 (1978), this requirement was not discussed by the appellate division. In any event, it is preferable to view the superiority requirement, which encompasses considerations of judicial economy, or administrative costs, as part of the predominance requirement, rather than as a separate criterion. \textit{See Developments in the Law—Class Actions}, 89 Harv. L. Rev. 1318, 1498-1504 (1976) [hereinafter cited as \textit{Class Actions}]. \textit{See notes} 36, 64 & 141 \textit{infra} for discussion of the judicial economy criterion.
\textsuperscript{19} 63 A.D.2d at 16, 407 N.Y.S.2d at 199.
\textsuperscript{20} \textit{Id}.
\textsuperscript{21} \textit{Id}.
\textsuperscript{22} \textit{Id}. According to the court, “[t]he injuries may have resulted from a variety of factors completely unrelated to the use of the Dalkon Shield, including, perhaps, the peculiarities of her individual physique or the negligent conduct of the user or her physician.” \textit{Id}. at 17, 407 N.Y.S.2d at 199 (emphasis in original).
\textsuperscript{23} \textit{Id}. at 16, 18-20, 407 N.Y.S.2d at 199-201. The statute of limitations and contributory negligence are other issues mentioned by the court requiring individual determination. \textit{Id}. at 16-17, 407 N.Y.S.2d at 199.
The appellate division also considered permitting class action with respect to only particular issues, referred to as "partial class action." Though this mechanism is permitted under section 906(1), 24 the court held that its use in Rosenfeld would be improper 25 for two reasons: First, those factual issues that could be determined on a class basis 26 were "thoroughly intertwined with those which must be determined individually," 27 and, second, "the judicial economy to be reaped and the advantages for litigants of a partial class action [were] relatively small." 28

The Rosenfeld decision is likely to have significant repercussions. If the court's rationale is followed, its practical effect will be to restrict severely the use of class action suits in products liability causes of action. However, products cases are often extremely expensive undertakings; victims with legal injuries of less than $25,000 find that the substantial fixed litigation costs pose an insurmountable barrier to effective prosecution of their claims on an individual basis. 29 Thus, the ultimate result of Rosenfeld may be that innumerable consumers who suffer significant personal injury as a result of a defective product will be denied a viable judicial remedy.

These potentially far-reaching effects justify a careful review of the predominance requirement in the context of a products liability case. Few courts have taken an approach to this requirement beyond that of a "rough pragmatism." 30 Predomination is determined on no more than a belief that a "goodly proportion of what

24. For the text of § 906(1), see note 8 supra.
25. 63 A.D.2d at 20, 407 N.Y.S.2d at 201.
26. These include: "(1) the existence of a defect or defects in the Dalkon Shield, (2) the nature of the representations and warranties made with respect to the device and (3) whether the warranties and representations were false." Id. at 16, 407 N.Y.S.2d at 199.
27. Id. at 20, 407 N.Y.S.2d at 201.
28. Id.
appears to be the overall dispute” is or is not capable of classwide determination. A more refined analysis is needed and a primary object of this Note is to provide one.

II. GENERAL APPROACH TO THE PREDOMINATION REQUIREMENT: A SUBSTANTIVE THEORY OF CLASS ACTIONS

The issue of predomination cannot be properly analyzed outside the context of some general theory of the class suit. Of the theories commonly advanced, a compelling argument has been made that the “substantive theory” provides the most satisfactory approach to the contemporary class action suit. The substantive theory maintains as its basic premise that the most significant function of contemporary class actions is to open courts to claims not ordinarily litigated because they are not economically feasible. This function is achieved by “aggregating substantially similar claims, thereby prorating the cost of litigation among numerous litigants.” The increased access to courts made possible by the class suit is itself justified, according to the substantive approach, because it promotes full realization of substantive policy objectives underlying the claims sought to be enforced in the class suit.

From the perspective of the substantive theory, predomination of common elements of law or fact is not, in itself, a criterion for class certification; rather, it is a conclusion that other criteria have been met. At the first level of analysis, the question is whether certifying the class furthers all of the policies underlying the substantive law upon which that claim is based. This inquiry, which may be termed the “substantive compatibility analysis,” is subdivided because there are two types of policies—remedial and

31. Landers, supra note 30, at 862.
32. In deciding the predomination question, methods of handling the remaining individual questions and the effect of these methods on substantive policies have received little attention. See id.
33. See Class Actions, supra note 18, at 1330.
34. Id. at 1331.
35. See id. at 1329-72 (isolating and comparing three theories of class action suits).
36. Id. at 1353-54. See Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941). It is this premise which suggests the error of using judicial economy as an independent criterion for determining class certification. If without class actions there will be no litigation, judicial economy will always operate to bar class actions. See Class Actions, supra note 18, at 1505.
37. Class Actions, supra note 18, at 1322.
38. Id. at 1359.
39. See id.
structural—that must be taken into account. Remedial policies concern the overall purposes served by the law authorizing the cause of action. Among these are deterring wrongful conduct, compensating injured persons, and forcing disgorgement of unjust enrichment. Structural policies center on the separate elements of a cause of action and on the method by which required elements may be proved. Sometimes a particular element of a cause of action can be established by a general mode of proof—such as statistical data—which is not dependent on the particular circumstances of each class member, but rather is applicable to all class members alike. At other times only a specific mode of proof, that is, proof necessitating separate inquiry into the situation of each class member, is appropriate. If the elements of a cause of action are all capable of being proved by general modes of proof, then class action is compatible with structural policies.

The substantive propriety of a class suit turns not only on the compatibility of class procedures with the remedial and structural policies of the particular cause of action but also on the effect of class action on the interaction between the two types of substantive policies.

If this analysis of the compatibility of class action procedures with the substantive policies of the underlying cause of action leads to the conclusion that the two are fully compatible, then it should be found that common questions of law or fact do predominate over individual questions. However, if full substantive compatibility does not exist, common questions may, nevertheless, be found to predominate after proceeding to a second-level analysis—the “substantive predomination analysis.”

The primary consideration of substantive predomination analysis is whether a class action will achieve a fair balance among the social values sought to be advanced by the substantive law on which the cause of action is based. Even though substantive compatibility in a particular case is lacking because the achievement of

40. Id. at 1360.
41. Id.
42. Id.
43. Id. at 1361-65. For discussion of the interaction of structural and remedial policies, see text accompanying notes 116-124 infra.
44. When full substantive compatibility does not exist it is usually for the reason that individual modes of proof are required to establish certain elements of the cause of action. See Class Actions, supra note 18, at 1360.
45. See id. at 1505, 1511-12.
one of the policy objectives of the cause of action is impaired by a class suit, it may be that the value(s) associated with that objective ought, in fairness, to remain to some extent unsatisfied in order to promote other values more deserving of judicial protection. The value(s) whose realization is hindered by allowing the class action suit must be weighed against the value(s) whose realization is advanced. If permitting the class action achieves a fair balance among the social values underlying the claim upon which the suit is brought, the class suit is "substantively fair," and the predominance requirement should be considered satisfied.

III. THE SUBSTANTIVE APPROACH IN A PRODUCTS LIABILITY CONTEXT

Resolving the predominance issue in a products liability context requires, first, an analysis of the remedial policies of products liability causes of action to ascertain if these policies are furthered by class suits. Second, it requires an analysis of structural policies to ascertain whether general modes of proof suffice for each element of the cause of action. Third, it requires an analysis of the interaction between these remedial and structural policies. After considering substantive compatibility, there follows an examination of substantive predominance. The structural policy analysis of the substantive compatibility section focuses on cause-in-fact. A primary aim is to demonstrate that this element is capable of being established by general modes of proof.

A. Substantive Compatibility

1. Remedial Policies: Protection Against Defective Products and Defective Communications.—In the products liability context, remedial policies focus on two distinct concerns: Defective and unreasonably dangerous products, and misrepresentations or omissions in communications about a product. The defective-product/defective-communication distinction is helpful in revealing


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significant remedial policy nuances that are of crucial importance for structural policy goals.

(a) Remedial Policies and the Defective-Product Concern.—Broadly speaking, the primary purposes of products liability law are compensation and deterrence. The goals are (1) to compensate individuals for personal injury or loss of property resulting from a defective product, thereby reducing social dislocations resulting from this type of accident, and (2) to deter manufacturers and retailers, by means of an economic incentive, from introducing such products into the marketplace, thereby reducing the number and severity of accidents.

Compensation and deterrence goals can be further analyzed. Compensation, the reduction of societal costs resulting from accidents, can be achieved by loss spreading and by wealth distribution (the "deep pocket" method). There is loss spreading in products cases because injury burdens are spread, in the form of higher prices, among all purchasers of a product. There is wealth distribution because from among a group of parties who are potentially liable, that party best able to pay is selected.

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48. See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring); G. Calabresi, The Costs of Accidents 26-27 (1970); Calabresi, supra note 1, at 73; Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs, 78 Harv. L. Rev. 713, 713 (1965). See generally, Whitford, Strict Products Liability and the Automobile Industry: Much Ado About Nothing, 1968 Wisc. L. Rev. 83, 92-93. According to Professor Calabresi, the principal goals of any system of accident law are, first, to be just, and, second, to reduce the costs of accidents. G. Calabresi, supra, at 25. Calabresi divides the second goal into three subgoals: (1) Primary reduction of accident costs, the reduction of the number and severity of accidents, referred to in this Note as deterrence, (2) secondary reduction of accident costs, the reduction of societal costs resulting from accidents, referred to in this Note as compensation, and (3) tertiary reduction of accident costs, the reduction of administrative costs incurred in our treatment of accidents. Id. at 26-31.


51. G. Calabresi, supra note 48, at 39-41; Calabresi, supra note 48, at 714. See generally G. Calabresi, supra note 48, at 36-67; Calabresi, supra note 1, at 73-77.

52. See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); Restatement (Second) of Torts § 402A, comment c at 349 (1965); Whitford, supra note 48, at 93.

Deterrence, the reduction of the number and severity of accidents, can be achieved by "collective deterrence,"54 "market deterrence,"55 or a mixed system.56 Each type of deterrence represents a method of "creating incentives so that people will avoid those future injuries worth avoiding and thus achieve an optimal trade-off between safety and injury in a world where safety is not a free good, and hence injury is not a total bad."57 Under collective deterrence the optimal trade-offs are achieved by society's collective determination of which acts, activities, or products are too dangerous to be permitted. Market deterrence, in contrast, leaves the determination to "an infinity of atomistic, individual market decisions."58

In products liability the injury costs of an unreasonably dangerous product are allocated to the activity of manufacturing it, and it is left to the market mechanism to decide if the activity is worthwhile despite its injury costs.59 For example, if after increasing the price of a product to include the costs of injuries attributed to its use, the product can still be marketed at an accept-

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44. See generally G. CALABRESI, supra note 48, at 95-113; Calabresi, supra note 1, at 78-84.
45. See generally G. CALABRESI, supra note 48, at 68-94; Calabresi, supra note 1, at 84-91.
46. See generally G. CALABRESI, supra note 48, at 113-29.
47. Calabresi, supra note 1, at 77 (footnote omitted).
48. Id. at 84.
49. Although there is an aspect of collective deterrence as well as market deterrence in products cases, see G. CALABRESI, supra note 48, at 95 ("[W]henever accident costs are valued in relation to which activity causes them, a collective decision is implied . . . ."); for convenience, products liability is treated in this Note as predominately a system of market deterrence. If it were to be treated as a system of collective deterrence, a parallel argument could be made. Indeed, the argument would be stronger.

It should be noted that products liability, as a system of market deterrence, can be criticized for failing to achieve optimal deterrence. See generally G. CALABRESI, supra note 48, at 244-65. This is in part because it fails to allocate costs in all instances to the "cheapest cost avoider"—to that party who can most effectively choose whether avoidance is cheaper than bearing injury costs. See generally id. at 135-73. Nevertheless, as between manufacturers of unreasonably dangerous products that cause injury and consumers of those products, manufacturers are likely to be the cheapest cost avoiders. Calabresi & Bass, Right Approach, Wrong Implications: A Critique of McKeen on Products Liability, 38 U. Chi. L. REV. 74, 87-88 (1970). See generally G. CALABRESI, supra note 48, at 136-39. Moreover, to the extent that we are concerned with secondary reduction of accident costs, it is advisable in a close case to choose the manufacturer rather than the consumer as the cheapest cost avoider. Calabresi & Bass, supra, at 89-90.
able profit, the manufacturer can be expected to do so. Alternatively, adding injury costs to the cost of production may price the product out of the market. Of course, if it ultimately is cheaper to introduce a safety device than to pay for injuries resulting from the same product without a safety device, the manufacturer can be expected to make a safer product. In this manner market deterrence promotes both greater product safety and increased consumer protection. Obviously, for market deterrence to be effective the price of the product must accurately reflect its total injury costs.

These remedial policies are furthered by class actions. Because the cost of individualized litigation prevents "[c]ountless meritorious products liability complaints," allowing injured persons access to courts through the less expensive class procedures means that they will have an opportunity to receive compensation which would otherwise be denied them. And, on the assumption that those who suffer injury from defective products are not likely to be better loss spreaders or to have deeper pockets than manufacturers or retailers, societal costs of accidents will be reduced. Thus, class actions advance the compensation goal of products liability law.

Permitting class actions will also increase market deterrence since class procedures enable injury costs allocated to manufacturing and retailing activities to reflect more accurately those costs that should be so allocated. In the absence of class action, the expense of individual litigation enables manufacturers to escape responsibility for those injuries that are caused by their unreasonably dangerous products but are too minor to make individual litigation feasible. This means that these injury costs are not allocated to the appropriate activity, and market deterrence is correspondingly weakened. In contrast class actions will force manufacturers to include all relevant injury costs in determining the optimal trade-off between safety and injury, instead of only those serious enough to warrant litigation on a case-by-case basis. Market deterrence will

60. See Calabresi, supra note 48, at 717-18. "A manufacturer is free to employ a process even if it occasionally kills or maims if he is able to show that consumers want his product badly enough to enable him to compensate those he injures and still make a profit." Id. at 717.

61. Note, supra note 29, at 229. See generally sources cited note 29 supra and accompanying text.

62. See Note, supra note 29, at 248.

be correspondingly strengthened, and product safety and consumer protection will be correspondingly promoted.64

(b) Remedial Policies and the Defective-Communication Concern.—Remedial policy goals relating to defective communications vary with each of three subcategories. These subcategories are breach of express warranty, breach of implied warranty of merchantability,65 and failure to warn.66

Arguably, in holding a manufacture liable for breach of express warranty the objective is to protect the reasonable expectations of consumers rather than to deter manufacturers from making affirmations about their products that may turn out to be false. As long as the reasonable expectations of a particular plaintiff-consumer are not defeated, the argument goes, there is no reason to restrict representations made to the public concerning the character or quality of the product. Yet others insist that false representations constitute a “fraud on the market” and that the goal of a breach of express warranty action is, in large part, to deter such fraud.68

64. For the sake of simplicity, discussion of the goal of justice and the subgoal of reduction of administrative costs, see note 48 supra, is omitted from text. On the premise that class actions open courts to claims not otherwise litigated, see note 36 supra and accompanying text, administrative costs are increased by these actions. Yet, this increase must be balanced against the decrease in the primary and secondary costs of accidents that also occurs. With respect to the goal of justice, it could be argued that a successful class action places injury costs on those parties who benefit most from the activity that is a primary cause of those costs. Thus class action is fairer than procedures that leave the costs on innocent victims. See Whitford, supra note 48, at 92-93.


In contrast to the considerations involved in an express warranty, those involved in an implied warranty of merchantability have little to do with the expectations of the individual consumer. Theoretically, a warranty is implied "because the manufacturer holds himself out as being skilled in the construction of his products and as being able to manufacture them without latent defects in materials or workmanship." But whether a particular consumer, much less a third party, expects the product to be without defects, i.e., "fit for its ordinary uses," is irrelevant. The real purpose of the implied warranty is not protection of expectations but prevention of and compensation for injuries caused by unreasonably dangerous products.

The policy objectives of the failure-to-warn category are more complex. In some cases warnings are required to decrease the inherent risk of injury. Since a failure to warn in these cases may
make the product unreasonably dangerous, the goals of the cause of action are the same as in any defective-product case. In other instances warnings are required not to make the product reasonably safe but to enable the consumer to make an intelligent decision whether to use the product.\textsuperscript{74} The harm that the cause of action protects against in these instances is not injury from a defective product but deprivation of the consumer's interest in making a choice based on full disclosure of all risk-potential information.\textsuperscript{75} The remedial policy goal behind a failure-to-warn case is thus either product safety or informed consent, depending on the type of warning at issue.

Class actions further the remedial policies associated with defective communications in the same manner and to the same extent that they further the remedial policies associated with defective products.\textsuperscript{76} On the assumption that many who now suffer injuries caused by defective communications are prevented from obtaining recovery by the high cost of litigation, it follows that the less expensive class action procedures would enable them to receive compensation and, in so doing, would allocate the cost of injury to the appropriate activity.

2. Structural Policies: Reliance and Cause-in-Fact.—The elements required to make out a case in products liability differ depending upon whether the action is based on breach of warranty, strict liability, or negligence. But regardless of the theory upon which suit is brought, full substantive compatibility of class action with the structural policies of products liability law is achieved only if each element of the cause of action is capable of demonstration by general modes of proof. This Note, however, does not examine all elements of products liability causes of action. Rather, it focuses on the cause-in-fact element. The thesis of this section is thus: Where the substantive law imposes an obligation on plaintiffs to prove that a product or communication defect is the cause-in-fact of their injury, that obligation can ordinarily be met by general modes of proof.


\textsuperscript{75} See Davis v. Wyeth Labs., Inc., 399 F.2d 121, 129 (9th Cir. 1968) (polio vaccine marketable only if accompanied by "full disclosure of the existence and the extent of the risk involved"); Twerski, Weinstein, Donaher & Piehler, supra note 67, at 519; Twerski, supra note 74, at 46.

\textsuperscript{76} See generally text accompanying notes 61-64 supra.
In general, whether a particular element should be required for a cause of action and, if required, whether it can be appropriately established by a general mode of proof depend upon whether, on balance, the underlying policy objectives of the cause of action would be advanced. What follows is an application of this general statement to the elements of reliance and cause-in-fact.

(a) The Reliance Element.—In a cause of action involving a defective communication, reliance is the surrogate for cause-in-fact. Whether the plaintiff should be required to prove that the misrepresentation or omission was actually relied upon and, if so, whether reliance can be established by general modes of proof are determined only by referring to the remedial policy goals of the particular category of defective communication involved. For example, to the extent that a breach of express warranty action has as its predominate and overriding objective protection of actual consumer expectations and compensation for their defeat, courts may justifiably insist that actual reliance on the misrepresentation be established and that it be established only by individual modes of proof. However, if the goal of protecting the integrity of the marketplace is viewed as more important than protecting buyers' expectations, courts should be less strict in their approach to the reliance element. General methods of proof would be proper in order to realize the more important policy goal at stake.

It is for just such reasons that the reliance requirement has been relaxed in private actions under federal securities laws. In these cases courts have held that a major policy objective of the cause of action is to protect the integrity of the marketplace by deterring the artificial inflation of securities prices caused by material misrepresentations. It is argued that although a purchaser on

77. See Class Actions, supra note 18, at 1506-11.
78. For discussion of these remedial policy goals, see text accompanying notes 65-76 supra.
80. See, e.g., Blackie v. Barrack, 524 F.2d 891, 907 (9th Cir. 1975); Reeder v. Mastercraft Elecs. Corp., 363 F. Supp. 574, 581 (S.D.N.Y. 1973); Siegel v. Realty Eq. uities Corp., 54 F.R.D. 420, 425 (S.D.N.Y. 1972). In general, the erosion of the reliance element is a result of courts' concern with not only compensating those injured by securities law violations but also enhancing the prescriptive effect of the regulation itself. While interest in deterrence does not always justify using general modes of proof of the reliance element, use of these modes to establish reliance is particularly appropriate in two instances: (1) To deter fraud effected through an impersonal market; and (2) to deter fraud based on nondisclosure. Note, The Reliance
the stock exchange may not be aware of or directly rely on a specific false representation, it may nevertheless artificially inflate the price of the security. Inflation results whenever others purchase in reliance on the false information, since these additional sales drive the price of the stock upward. As a result of both the courts' recognition of this market impact and the policy objective of preventing it, specific modes of proof are not required. Rather, cause-in-fact may be established by "proof that the deception influenced only enough individuals to have produced the adverse effect." This, in turn, can be established by proof that the deception was material, i.e., that a reasonable investor would attach importance to the misrepresentation.

In the context of express warranties for products, as in the case of securities fraud, significant misrepresentations can adversely affect the market. For example, if a seller falsely affirms through mass advertising that a product will last for ten years, in comparison with similar products that can last for only five, and if many, though not all, consumers rely on that affirmation in purchasing the product, the producer is able to charge a higher

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81. In Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), the court held:
A purchaser on the stock exchanges may be either unaware of a specific false representation, or may not directly rely on it; he may purchase because of a favorable price trend, price earnings ratio, or some other factor. Nevertheless, he relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price, and thus indirectly on the truth of the representations underlying the stock price—whether he is aware of it or not, the price he pays reflects material misrepresentations.

Id. at 907.

82. See, e.g., Reeder v. Mastercraft Elecs. Corp., 363 F. Supp. 574 (S.D.N.Y. 1973) (since misrepresentation affected market, and damage to plaintiffs occurred due to dealings in market, reliance presumed if misrepresentation material).

83. Reliance Requirement in Private 10b-5 Actions, supra note 80, at 593.


price than could have been charged if the true facts had been generally known. In such a case even a purchaser who did not personally rely on the false affirmation will have paid the inflated price that resulted from the fact that others relied on it.

Preventing such fraud on the market should be viewed as a main goal of breach of warranty actions. To further this goal, it is appropriate to forego individual proof of reliance and to permit reliance to be shown by proof that the misrepresentation is material, i.e., that the affirmation is such that a reasonable consumer would rely on it in purchasing the product. Indeed, courts have been receptive to general modes of proof of this element in both common law fraud actions and express warranty actions.\(^6\)

Breach of an implied warranty of merchantability presents an instructive contrast. In these cases individual proof of reliance is never required.\(^7\) The defeated expectation that the product is fit for ordinary purposes, though perhaps part of the harm, is not a major concern. Nor is the concern the fraud on the market engendered by widespread expectations of merchantability. Rather, the concern is to keep from the market products that are not fit for the ordinary purposes for which they are used and thereby to protect buyers and third parties from injury.\(^8\) In light of this goal, whether a particular purchaser in fact relied on the implied warranty is inconsequential. Courts have thus effectively abandoned the reliance requirement and now presume that all consumers rely on the merchantability of products on the market.\(^9\)

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\(^7\) See, e.g., Vitro Corp. of America v. Texas Vitrified Supply Co., 71 N.M. 95, 106, 376 P.2d 41, 49 (1962); J. White & R. Summers, supra note 65, § 9-6, at 286. Cf. U.C.C. § 2-315 (buyer must, in fact, rely on seller's skill or judgment in order for implied warranty of fitness for particular purpose to apply); J. White & R. Summers, supra note 65, § 9-9.

\(^8\) See note 72 supra.

\(^9\) See Escoa v. Coca Cola Bottling Co., 24 Cal. 2d 453, 464-65, 150 P.2d 436, 443 (1944) (Traynor, J., concurring). Cf. Blackie v. Barrack, 524 F.2d 891, 907 (9th Cir. 1975) (buyer of securities "relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price"). See generally Green, Strict Liability, supra note 47, at 1190; Whitford, supra note 48, at 93 n.36.
The failure-to-warn cases are different from the warranty cases because there is no affirmative misrepresentation, express or implied. Instead, there is a nondisclosure. Since reliance typically requires both belief in the truth of the misrepresentation and action based on that belief, and since in the case of nondisclosure nothing has been affirmatively represented, to demand proof of reliance "would require the plaintiff to demonstrate that he had in mind the converse of the omitted facts, which would be virtually impossible to demonstrate in most cases." To require plaintiff to prove reliance when it cannot be proved obviously frustrates the policy objectives behind requiring a warning in the first place. It seems reasonable, therefore, that such proof should be unnecessary.

The courts have adopted this approach. Where the failure to warn increases the risk of injury, proof of reliance—in the strict sense of having in mind the converse of the omitted fact—is not required; plaintiff is, however, required to prove causation by showing that had the risk been known he or she would not have exposed himself or herself to it. Recognizing that this, too, is difficult to prove, courts have dealt with the problem by permitting general modes of proof. Plaintiff either is given the benefit of a rebuttable presumption that the consumer would have read a required warning had it been given and acted so as to minimize the risks, or is allowed to establish cause-in-fact by using the reason-

92. Securities fraud actions again offer a useful parallel. Recognizing the difficulty of proving reliance in nondisclosure cases and the importance of the policies frustrated by insisting on proof that a specific individual relied on the omission, courts permit reliance to be established by general modes of proof. Specifically, reliance is presumed where the nondisclosure is deemed material, i.e., where a reasonable investor might have considered the information important in making his or her decision to purchase the stock. See, e.g., Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974); Reeder v. Mastercraft Elecs. Corp., 363 F. Supp. 574 (S.D.N.Y. 1973). See generally Reliance Requirement in Private 10b-5 Actions, supra note 80, at 590-92.
93. See, e.g., Reyes v. Wyeth Labs., 498 F.2d 1284 (5th Cir. 1974); Cunningham v. Charles Pfizer & Co., 532 F.2d 1377 (Oklahoma. 1974); Technical Chem. Co. v. Jacobs, 480 S.W.2d 602 (Tex. 1972). Cf. List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir. 1965) (causation in securities fraud dependent upon "whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact").
94. E.g., Reyes v. Wyeth Labs., 498 F.2d 1284, 1281 (5th Cir. 1974); Cunning-
ably prudent person standard (Would a reasonably prudent person, knowing of the risk, have exposed himself or herself to it?).\textsuperscript{95}

Where the manufacturer's liability for failure to warn is based not on the increased risk of injury created but on the consumer's interest in informed consent,\textsuperscript{96} policy considerations warrant abandonment of the causation element altogether. This is because the goal in informed consent cases is not to prevent injury caused by nondisclosure but rather to prevent the nondisclosure itself—the denial of the individual's right to make an informed choice. As Professor Twerski has observed, in failure-to-warn cases that belong more to the law of "informed consent" than to the law of products liability,

once the informational dimension is found lacking, it becomes possible to impose liability without wrenching over the impossibly difficult causation issue. The issue in battery is not whether but for the failure to warn the plaintiff would not have taken the drug; but rather, whether plaintiff was subjected to an unconsented touching. If the defendant failed to adequately inform plaintiff, then the administration of the drug was a battery on the part of the drug manufacturer, and consequently the causation issue need not be pursued.\textsuperscript{97}

In sum, with respect to the various types of defective communications in products liability, the element of reliance either should not be required, or, if it is, should be permitted to be established by general modes of proof. Indeed, only in the case of express warranties could the necessity for individual determinations of reliance be plausibly advocated, and there only by narrowly viewing the remedial policy goals involved.

\textit{(b) The Cause-in-Fact Element}.—It has been well argued that the requirement of causation in torts is explained not by compensation goals of cost spreading and wealth distribution but only by

\textsuperscript{95} E.g., Canterbury v. Spence, 464 F.2d 772, 791 (D.C. Cir. 1972); Cobbs v. Grant, 8 Cal. 3d 229, 245, 502 P.2d 1, 11-12, 104 Cal. Rptr. 505, 515-16 (1972); Cunningham v. Charles Pfizer & Co., 532 P.2d 1377, 1382 (Okla. 1974).

\textsuperscript{96} See text accompanying notes 74 & 75 supra.

goals of collective and market deterrence. Specifically, the cause-in-fact element is needed with respect to market deterrence in order to allocate injury costs to a particular activity and thereby to permit determination of a trade-off between safety and injury. If optimal deterrence is to be obtained, it is essential that the allocation of specific injury costs to specific activities create appropriate incentives "to avoid injuries worth avoiding and not avoid those injuries that are too costly to eliminate." An allocation is accurate when all those injury costs that are relevant to the choice between injury and safety—and only those costs—are allocated to the activity in question.

The legal principle of but-for causation is one useful way of assuring accurate allocations of injury costs. Under this principle allocation of the cost of an injury to a particular activity is proper if and only if it can be shown that the injury would not have occurred but for that activity. However, though thus justified in functional terms, the but-for principle is often rigidly applied by courts as if it were an absolute and goal-neutral requirement.

In addition, the test has been criticized as more confusing than clarifying, and as focusing the inquiry on an issue that is not only different from and more difficult than cause-in-fact but which may even be unresolvable. By precluding allocation of in-

98. Calabresi, supra note 1, at 73-90.
99. See id. at 84-87. Cause-in-fact also has a role in determining the "cheapest cost avoider." Id. at 84; G. CALABRESI, supra note 48, at 140. For discussion of this concept, see note 59 supra.
100. Calabresi, supra note 1, at 86.
102. See W. PROSSER, supra note 90, § 41, at 237-39; Malone, Ruminations on Cause-In-Fact, 9 STAN. L. Rev. 60, 65 (1956).
103. See Klemme, supra note 101, at 162-65.
jury costs when the activity was a significant but not a sine qua non cause of injury, the but-for test frustrates the policy goal it is intended to advance. Recognition of this problem has led courts in certain instances to reject the but-for test as the way to achieve accurate allocation of injury costs.

As an alternative to the but-for test these courts have employed the "substantial factor" test. When the latter is used as the measure of cause-in-fact, a defendant's conduct is regarded as the cause of the damage, though the same loss may have occurred without it. It is enough to show that defendant's conduct substantially increased the risk of the type of harm suffered. Some commentators find even the substantial factor test too restrictive. They would require plaintiff to show only that defendant's conduct contributed to the victim's injury. In either case it is "doubtful whether blind adherence to the requirement that the victim prove a but for relationship [always] serves the purposes of market deterrence."

Not only may the but-for requirement thus be abandoned, but it is questionable whether case-by-case determination of the cause-in-fact of every injury is the most efficient way of allocating injury

105. For one court's recognition that the but-for requirement can prevent a proper allocation, see Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 775 n.20, 478 P.2d 465, 477 n.20, 91 Cal. Rptr. 745, 757 n.20 (1970).

106. See, e.g., Michie v. Great Lakes Steel, 495 F.2d 213 (6th Cir.), cert. denied, 419 U.S. 997 (1975) (group of polluters held liable, though harm attributable to each could not be shown); Basko v. Sterling Drug, Inc., 416 F.2d 417, 429 (2d Cir. 1969) (but-for test "will not work . . . in the situation where two independent forces concur to produce a result which either of them alone would have produced"); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (impossible to determine which of two negligent defendants but-for cause of plaintiff's injury; both liable); Anderson v. Minneapolis, St. P. & S. St. M. Ry., 146 Minn. 430, 179 N.W. 45 (1920) (joint liability where fire set by engine of one railroad company united with fire set by engine of another company, though either fire alone would have destroyed plaintiff's property). See W. PROSSER, supra note 90, § 41, at 239-41; Malone, supra note 102, at 88-97.

107. Owen, supra note 85, at 779. See, e.g., Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970) (failure to provide lifeguard "greatly enhanced" chances of drowning); Reynolds v. Texas & Pac. Ry., 37 La. Ann. 694 (1885) (failure to light stairway greatly multiplied chances of accident to plaintiff). See generally F. HARPER & F. JAMES, supra note 72, § 28.7. This concept of causation is sometimes referred to as "causal linkage." Owen, supra note 85, at 779. "[T]he concept of causal linkage between acts and activities and injuries is no more than an expression of empirically based belief that the act or activity in question will, if repeated in the future, increase the likelihood that the injury under consideration will also occur." Calabresi, supra note 1, at 72.

108. E.g., Green, supra note 104, at 557.

costs. Allocating costs on a more general basis may be just as accurate and far less expensive than the case-by-case approach. 110

Once it is realized that accurate allocation of injury costs is possible without proof that an activity was the sine qua non cause of injury—or even a substantial factor in each particular case—new avenues to reach the goal of optimal deterrence are opened. Use of general modes of proof to establish cause-in-fact is one possibility. For instance, a victim might be allowed to establish that a defective product was the cause-in-fact of his or her injury by offering as evidence reliable scientific studies indicating a high correlation between injury of the type suffered and the defective product. 111

Use of general modes of proof with respect to cause-in-fact would be particularly appropriate if it were impossible to ascertain what weight to assign each factor that contributes to an individual's injury. For example, the degree to which a contracted disease was caused by a defective drug—as opposed to other factors having nothing to do with the defective drug, e.g., other drugs or poor diet—may be impossible to determine on an individual basis. 112 Yet, the study of many persons over an extended period of time may provide a reliable conclusion that in any given instance

110. Calabresi, supra note 1, at 86. Cf. Landers, supra note 30, at 867-68 (classwide calculation of damages may be more accurate than amount computed from individual determinations). See generally G. CALABRESI, supra note 48, at 202-03, 258-59. See also id. at 251, 255-58.

111. See, e.g., Development, Mass Accidents/Diseases, 4 CLASS ACT. REP. 127, 128 (1975). Use of statistical evidence would not be novel. This type of evidence has become commonly accepted in tort law for determining cause-in-fact on an individual basis. See, e.g., Kallenberg v. Beth Israel Hosp., 45 A.D.2d 177, 357 N.Y.S.2d 508 (1st Dep't 1974) (medical testimony that if properly treated, plaintiff would have had 20% to 40% chance of survival); Hamil v. Bashline, 224 Pa. Super. 407, 307 A.2d 57 (Super. Ct. 1973) (medical testimony that 75% chance plaintiff would have survived if had received proper and prompt treatment). Moreover, "[r]eliance on statistical methods of proof is common in discrimination suits." Note, Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 HARV. L. REV. 387, 387 (1975). In particular, statistical inference in an employment discrimination class action can be used "to determine, by observing the outcomes of an employer's decisions, the factors causing them." Id. at 394 (emphasis added).

112. See Askeland v. A.H. Robins Co., No. 330633, slip op. at 7-8 (Cal. Super. Ct. Feb. 7, 1978). "I couldn't tell what instigated the PID [pelvic inflammatory disease] in this patient, whether it was the IUD or it was other factors before, I have no way of discerning or determining. I do know she did have PID, and I do feel that the IUD, whatever type they are, promulgated such infections." Id. (emphasis added) (quoting medical expert). Compare id. with text accompanying notes 90-95 supra (when proof on an individual basis is difficult or impossible, general modes of proof allowed).
there is a ninety-percent probability the injury was caused by the defective product. In such a case, to require individual modes of proof would result in plaintiff's failure to carry the burden of production on the causation issue; consequently the injury cost would not be allocated to the defective product. This would occur even though a ninety-percent probability that the defective drug was indeed the cause of the injury seems to warrant allocation of costs to that product. Moreover, even if the burden of production on the causation question could be met on an individual basis, a more accurate determination of cause might be a determination based on statistical proof encompassing a multitude of cases.\footnote{113}

The accuracy of general modes of proof in fulfilling the allocative function would be higher still if use of such modes were accompanied by use of comparative cause-in-fact.\footnote{114} Then, statistical proof that a product has a ninety-percent probability of causing the injury in question would result in only ninety percent, rather than all, of the relevant\footnote{115} injury costs being allocated to the product. If all appropriate cases were litigated, this would result in ninety percent of all relevant injury costs being allocated to the defective product, exactly the percentage that should be allocated under market deterrence principles.

In sum, cause-in-fact can be established in many cases by general modes of proof. In these cases there \textit{can} be full compatibility between class actions and the structural policy goals of products liability law.

\footnote{113}{See S. Barker, \textit{The Elements of Logic} 221 (1965); I. Copi, \textit{Introduction to Logic} 327, 421-32 (3d ed. 1968). \textit{See generally S. Barker, supra, at 212-72; I. Copi, supra, at 322-72.}} Resolution of cause-in-fact is affected by several “extraneous” factors. These include the physical appearance of the individual plaintiff, the quality of the individual plaintiff's counsel, and the sympathies and idiosyncrasies of different juries and judges. The operation of extraneous factors in each individual case affects the overall allocation of injury costs. If cause-in-fact is resolved on a classwide basis, the influence of these factors is restricted and the resulting allocation may well be more accurate.

\footnote{114}{See Daly v. General Motors Corp., 20 Cal. 3d 725, 731-43, 575 P.2d 1162, 1165-73, 144 Cal. Rptr. 380, 383-91 (1978) (comparative principles held to apply in strict liability actions); Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 848-50 (N.H. 1978) (principle of comparative causation applied in strict liability case); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 352 (Tex. 1977) (plaintiff's recovery in products liability action limited “to that portion of his damages equal to the percentage of the cause contributed by the product defect”); Twerski, \textit{supra} note 104, at 413-14; Twerski, \textit{The Use and Abuse of Comparative Negligence in Products Liability}, 10 Ind. L. Rev. 797, 819-29 (1977).}}

\footnote{115}{See note 63 supra.
3. Interaction of Remedial and Structural Policies.—Although it is reasonable to use general modes of proof in a products liability cause of action, the danger exists, especially in a class action, that this will impede achievement of the underlying remedial policies.\textsuperscript{116} Some plaintiffs who did not rely upon an express warranty or who would have exposed themselves to the risk of injury even had a warning been given, as well as some plaintiffs whose injury may not have been substantially related to the defective product involved, will recover where otherwise they would not. The result is overdeterrence: Injury costs are allocated to an activity when they should not be. The threat of overdeterrence, in turn, may cause manufacturers to protect themselves by refraining not only from socially inefficient activity but also from activity that is socially desirable.

This risk of overdeterrence, however, may be less significant than the risk of underdeterrence that would arise if individualized proof of causation is required. Not only would injury costs of those plaintiffs who cannot meet the more individualized standards fail to be allocated to the manufacturing activity, but so would the costs of plaintiffs who could have met the standards but were prevented from doing so because of the high costs involved in individual litigation.\textsuperscript{117}

Moreover, there are ways courts can protect against overdeterrence. First, they can use the causation question in an “accordion-like fashion,” being strict or liberal in letting the causation question go to the jury depending upon the policy factors involved.\textsuperscript{118} If the product in question is of low social utility, courts should show little patience with efforts of defendants to question the sufficiency of proof on cause-in-fact and need not worry about overdeterrence. For example, if studies show a seventy-percent likelihood that a product caused the injuries allegedly connected with its use, that could be deemed sufficient to allocate the injury costs to production of the product. On the other hand, if the product is of high social utility, it would be appropriate to weigh the possibility of overdeterrence more carefully and as a result to

\textsuperscript{116} Cf. Posner, \textit{A Theory of Negligence}, 1 J. LEGAL STUD. 29, 48 (1972) (overcompensation or undercompensation occurs when “average figure” standard used for determination of damages). \textit{But see} Landers, \textit{supra} note 30, at 868-69.

\textsuperscript{117} Cf. \textit{Reliance Requirement in Private 10b-5 Actions}, \textit{supra} note 80, at 590-91 (risk of overcompensation in private action under rule 10b-5 less significant than risk of undercompensation that arises if proof of reliance required).

\textsuperscript{118} Twerski, \textit{supra} note 104, at 410. \textit{See} Malone, \textit{supra} note 102, at 72-88.
require a showing that the causal connection be of an eighty- or even ninety-percent likelihood.\footnote{119}

In addition to the social utility of the product, a policy factor to be considered is the moral culpability or blameworthiness of the defendant. If the manufacturer intentionally or recklessly misrepresents the facts or markets an unreasonably dangerous product, the causal link required to establish cause-in-fact should be less definite than if the manufacturer is merely negligent.\footnote{120}

Second, overdeterrence could be reduced by allowing defendants to produce individualized evidence to show that the generalized proof does not apply to a particular class member—that the defendant’s activity was not a substantial factor in causing injury to this class member,\footnote{121} or that this member did not rely on the manufacturer’s misrepresentation.\footnote{122} Such an individual could be excluded from the class,\footnote{123} or, alternatively, his or her damage award could be correspondingly reduced.\footnote{124}

**B. Substantive Predomination**

In the preceding sections, it is shown that in many instances substantive policy goals of a products liability cause of action, both remedial and structural, are fully compatible with class action procedures. If full compatibility exists, the predomination requirement is satisfied and, all other section 901(a) requirements being met, the class should be certified. The absence of full compatibility, however, does not necessarily imply that a class action suit is inappropriate. It only indicates the need to proceed to a second level of analysis, the objective of which is to determine whether class procedures are fair in light of the overall policy goals and values underlying the substantive law upon which the cause of action is based.

As an example of this level of analysis, consider a case in which the conclusion of a first-level analysis is that cause-in-fact re-
quires individualized modes of proof in order to ensure accurate allocation of injury costs to the manufacturer. Class modes of procedure are not, by hypothesis, fully compatible with the structural policies of products liability law. Class action might be substantively fair, nevertheless, for it might be the procedural arrangement most likely to achieve the best overall balance of the social goals and values underlying the substantive law of products liability. And if class action would be substantively fair, the predomination requirement is satisfied.

A conclusion that class action is substantively fair despite a prior decision that individual determinations of cause-in-fact are required is a decision that the value(s) associated with cause-in-fact ought to remain to some extent unsatisfied in order to promote other values of the cause of action more deserving of judicial protection. The value sought to be furthered by the cause-in-fact element is accurate allocation of injury costs. In the present context the assumption is that the most accurate allocation is achieved by individualized proof of cause-in-fact. Accuracy of allocation, however, is capable of being satisfied, at least to some extent, by use of general modes of proof. The fairness of using these general modes, even at the loss of some accuracy in allocation of injury costs, depends upon four factors: (1) The existence of competing values, the achievement of which is at stake in the class certification decision; (2) the importance of these other values relative to the value of accurate allocation; (3) the extent to which these other values are impaired in the absence of class suit; and (4) the extent to which accuracy is impaired if injury costs are allocated on the basis of general modes of proof. If values equal to or of greater importance than accurate allocation are realized only by class action, and if general modes of proof do not seriously impair the accuracy of the injury cost allocation, class action is substantively fair.

One of the other values to be considered in this balancing test is the value of complete compensation. This is achieved if and only if every consumer or third party whose injury is caused by the defective product is fully compensated. Yet it is the nature of products liability cases that without a class suit compensation is largely incomplete. Therefore, if compensation for injury is considered a

125. For a brief definition of accurate allocation of injury costs, see text following note 100 supra.
126. See text accompanying note 29 supra. In some instances, however, compensation can be increased by methods other than class action. See Hall v. Coburn
value equal to or of greater importance than accurate allocation of injury costs, and if reliable general modes of proof are available for determining cause-in-fact, then these modes should be used even though such a cost allocation is, by hypothesis, less accurate than it would be with individualized modes of proof. Yielding some precision in allocating injury costs to provide complete compensation produces an overall result that is substantively fair.127 Trade-offs of this kind are nothing new to the law of torts.128

Thus, although use of general modes of proof would reduce the weight given to the value of accuracy of injury cost allocation, it would further the overall goals of the cause of action by making classwide determination of cause-in-fact and, consequently class certification, possible. Cause-in-fact—by hypothesis, an individual question—is transformed into a general question for the purpose of achieving substantive fairness.129

In those cases in which the cause-in-fact issue cannot be trans-

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127. Substantive predomination analysis does not imply judicial modification of the elements of a cause of action by application of the procedural rules governing class actions. Rather, what is proposed is judicial flexibility in setting standards of modes of proof so as best to achieve the underlying policy goals of the relevant substantive law. Thus understood, substantive predomination analysis is not subject to the criticism that, as applied to federal courts, it violates the Rules Enabling Act, 28 U.S.C. § 2072 (1976). See generally Landers, supra note 30, at 849-50; Ross, Rule 23(b) Class Actions—A Matter of "Practice and Procedure" or "Substantive Right?", 27 ETHEY L. J. 247 (1978); Class Actions, supra note 18, at 1358-59; The Impact of Class Actions, supra note 80, at 337.

128. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), provides a well-known example. Plaintiff suffered serious injury from a shot fired by one of two negligent defendants. An accurate allocation of costs would require that damages be assessed only against that defendant whose shot actually caused the injury. Since this could not be determined, the court held that defendants, each of whom was negligent, were jointly liable to plaintiff. Thus precision in allocation of injury costs was foregone so that the cost of the accident would be borne by negligent defendants rather than an innocent plaintiff. Accord, Basko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). The court in Summers emphasized that each defendant would have the opportunity to absolve himself: The burden was on the wrongdoers to increase the accuracy of the allocation. 33 Cal. 2d at 88-89, 199 P.2d at 4-5. Accord, Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); Payne v. Gamble Stores, Inc., 202 Minn. 462, 279 N.W. 257 (1938). The approach suggested in this Note is in agreement with such a shift in the burden of proof. See text accompanying notes 121-124 supra.

129. See generally Landers, supra note 30, at 865-74.
formed into a general question, individual determinations are unavoidable. However, the need for individual determination of one or more of the required elements of the cause of action does not necessarily preclude satisfaction of the predominance requirement. Under the New York class action statute, so long as the element in question can be proved by some procedural method other than a full evidentiary hearing, common elements may still predominate.\(^1\) For example, to resolve the issue of damages many authorities advocate using a variety of techniques—including reference to masters, motions for summary judgment, and administrative processing of individual claims—that are compatible with substantive policy goals, and that make determination on an individual basis less burdensome than a full evidentiary hearing.\(^1\) Conceivably, determination of cause-in-fact is susceptible to some similar form of mechanical resolution.\(^1\)

Use of any such method must, of course, be justified on grounds of substantive fairness. Therefore any proposed method must be shown to further the overall policy goals of products liabil-

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130. Where a full evidentiary hearing is required for certain issues, there is no reason to treat the matter as a plenary class action, because the New York statute expressly provides for “partial class actions.” N.Y. Civ. Prac. Law § 906 (McKinney 1976). See generally text accompanying notes 137-147 infra. There is little, if any, practical difference between a § 906 partial class action and a § 901 plenary class action in which certain issues are severed for individualized adjudication. Under the § 906 procedure, however, the class representative is spared the additional burden of showing that common questions of law and fact predominate. N.Y. Civ. Prac. Law §§ 901, 906 (McKinney 1976). See notes 2, 3 & 8 supra.

131. See Landers, supra note 30, at 874-79; Class Actions, supra note 18, at 1517-26. An excellent suggestion is that the court first identify the modes of procedure that make possible the most expeditious litigation of the class action; second, determine if the most manageable procedures are compatible with the values reflected in the cause of action; and only then answer the predominance question. Id. at 1504, 1511.

132. Perhaps a master could be used. Perhaps the class representative could move for a directed verdict for any absent class member who furnished both an affidavit containing pertinent information needed to establish causation and, in addition, supporting documentation. See Landers, supra note 30, at 876-79. For example, assume the only possible causes of injury X to be drugs A, B and C. The class member could furnish an affidavit that only drug A—the one alleged to be defective—was ingested during the time period in question. The class member could also be required to offer a statement and documentation by the attending physician that only drug A had been prescribed, and by the relevant pharmacist that only drug A had been sold to him or her. Perhaps, even where other possible causes could not be definitely ruled out, unqualified expert statements by the physicians involved that the defective product was a substantial factor in the injury would suffice to establish, prima facie, cause-in-fact. The directed verdict should be granted to any class member who supplied the documentation, unless the defendant filed a counter-affidavit that raised a material issue of fact.
it law. Accordingly, the costs of these altered procedures would need to be considered. If, for example, attorneys' fees and administrative costs so depleted the recovery fund that relief to class members would be insignificant, the compensation goal would be thwarted, and the substantive fairness of the class suit would be correspondingly reduced. However, even in this situation, class action may still be justified as furthering deterrence goals. Inasmuch as the injury costs would be allocated to the class opponent-manufacturer, the manufacturer would be induced to lower these costs by making the product reasonably safe.

The outcome of the substantive predomination analysis thus may be that even though cause-in-fact requires individualized modes of proof, defeating substantive compatibility requirements, common elements nevertheless predominate on the basis of substantive fairness. This outcome is warranted by a finding that resolution of cause-in-fact by general modes of proof or altered procedural methods is substantively fair.

IV. PARTIAL CLASS ACTIONS

If substantive predomination, in addition to substantive compatibility, is found wanting, plenary class certification pursuant to section 901 of the CPLR is precluded; still the question of partial class action pursuant to section 906(1) of the CPLR remains. This section provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.”

The problem, of course, is how to unpack the phrase “when appropriate.” In keeping with the general approach of a substantive


134. It should be noted that most class suits are settled prior to trial. Thus minor doubt about the viability of general modes of proof or altered procedures should not prevent class certification, for these methods will rarely be used. Landers, supra note 30, at 880. See generally Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968) (any error should be made in favor of maintaining class action in securities law context).


136. In addition, the court always should consider the possibility of reshaping the class pursuant to N.Y. Civ. Prac. Law § 906(2) (McKinney 1976). See Fed. R. Civ. P. 23(e)(4)(B).

theory of class actions, a key criterion should be whether the poli-
cies underlying the cause of action are furthered by class modes of
procedure with respect to the particular issue sought to be main-
tained as a class action. With this as the initial test, it is obvious
that any issue that prevented plenary class certification on grounds
of substantive incompatibility must be eliminated as a candidate for
partial class action.

Assuming that the issues of causation and damages were ruled
out as failing this initial requirement, the issue of product defect
would still remain. Does the determination of this issue for the en-
tire class further the remedial and structural policy goals of a prod-
ucts liability cause of action?

Remedial policy goals are clearly advanced. The high cost of
litigation, which serves to frustrate compensation and market de-
terrence, is largely a result of the expense required to demonstrate
the existence and nature of a defective product or communication.
As Justice Shapiro observes in his dissenting opinion in Rosenfeld:

\[\text{Proving the product's defect and the misleading nature of the}
\text{accompanying literature would require sophisticated proof which}
\text{might well be beyond the financial means of any individual}
\text{plaintiff.}
\]

... It cannot be denied that if defendant were to concede
that the shield was defective and that its literature did not suffi-
ciently warn of the dangers, that the cost of litigation that would
be borne by each injured user of the shield would then be enor-
mously decreased.\[\text{138}\]

138. 63 A.D.2d at 33, 34, 407 N.Y.S.2d at 210 (Shapiro, J., dissenting). \text{But see id. at 20, 407 N.Y.S.2d at 201-02. }\text{See also id. at 32, 407 N.Y.S.2d at 209 (Shapiro, J.,
dissenting); Brief of Plaintiff-Appellant, supra note 13, at 16.}\text{Justice Gulotta's argument that benefit to class members would be small is based in part on the availability}
of consolidated federal pretrial proceedings. In his opinion, class action in this in-
stance would not increase compensation. However, that the cost of proving product
defect is less than if there had been no federal proceedings does not mean that there
would be no increase of compensation through use of class modes of procedure. Justice
Gulotta also mentions collateral estoppel as an alternative means of increasing
compensation—it would eliminate the expense of relitigating the defect issue. Yet, as
he himself recognized, it is uncertain whether collateral estoppel could successfully
be invoked in many multiple claimant situations. \text{Id., 407 N.Y.S.2d at 202.}

Although the New York courts have abandoned the requirement of "mutuality of
estoppel," \text{see B.R. De Witt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278}
N.Y.S.2d 596 (1967); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298
N.Y.S.2d 955 (1969), the courts scrutinize any situation where collateral estoppel is
asserted by a person who was neither a party, nor in privity with a party to the origi-
nal case, especially in a situation—inherent in products liability—where there are
multiple claimants. \text{See Vincent v. Thompson, 50 A.D.2d 211, 377 N.Y.S.2d 118 (2d}
Dep't 1975). \text{See generally Winters v. Lavine, 574 F.2d 46, 58 n.14 (2d Cir. 1978);}
Structural policy goals likewise are furthered, since whether the product is defective appears amenable to general modes of proof. Yet the argument of Justice Gulotta, writing for the majority in *Rosenfeld*, is in effect that the defect issue fails to meet structural policy goals. More precisely, he argues that those issues that could be resolved “on a class basis”—including (1) the nature of the representations and warranties made with respect to the product, (2) whether the warranties and representations are false, and (3) the existence of product defect—are “thoroughly intertwined with those which must be determined individually.” The odd result is that those issues professed by Justice Gulotta to be resolvable on a class basis are nevertheless held by him to be inappropriate issues for partial class action.

Regrettably, Justice Gulotta did not explain how the issues were “thoroughly intertwined,” and one can only speculate that

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Rosenberg, *Collateral Estoppel in New York*, 44 St. John's L. Rev. 165, 185-95 (1969); Annot., 31 A.L.R.3d 1044 (1970). In any case, in order to assert successfully collateral estoppel, “[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and . . . there must have been a full and fair opportunity to contest the decision now said to be controlling.” *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969). Factors weighed in a determination whether the “full and fair opportunity” test has been met include: (1) Size of the claim in the prior litigation, (2) prejudice because of the forum of the earlier action, (3) the availability of new evidence, (4) influence in the earlier action of extraneous factors such as sympathy or prejudice, (5) competence and experience of the original counsel, (6) difference in the applicable law, and (7) foreseeability of future litigation. *See Winters v. Lavine*, 574 F.2d 46, 58 n.14 (2d Cir. 1978); *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 961 (1969). Products cases that warrant class certification are precisely those that involve relatively small claims. Therefore, even if the other criteria are satisfied, it may be that the claim involved is too small to satisfy the “full and fair opportunity” test, which in turn makes application of collateral estoppel inappropriate.

Even in cases where collateral estoppel is permitted, compensation is increased by class action. With the use of collateral estoppel there are additional costs involved in the resolution, in each case, of the collateral estoppel issue. Further costs will be incurred in situations in which the defect issue is litigated repeatedly before a plaintiff is successful. Most important, it is the premise of the substantive theory of class action that no individual claimant has sustained injury sufficiently extensive to warrant the expense associated with being the first to litigate the defect issue. If individual litigation is in the first instance unfeasible, there will be no decision that the defendant can be estopped from denying in subsequent cases.

139. 63 A.D.2d at 16, 407 N.Y.S.2d at 199.
140. *Id.*
141. *Id.* at 20, 407 N.Y.S.2d at 201. Also mentioned was the issue of judicial economy, *see id.*, but on the substantive theory judicial economy—administrative cost—is not a separate criterion, but rather must be considered in relation to all the substantive goals of the cause of action. *See* notes 18, 36 & 64 *supra.*
with regard to the product-defect issue he had in mind something like misuse of product. The argument would be that evidence of an individual plaintiff’s misuse of the product may be used to disprove the allegation that the product is defective. Hence the product, although defective with regard to one plaintiff, may be reasonably safe with regard to another.\(^{142}\) If this is Justice Gulotta’s concern, then he has placed undue emphasis on the particular product’s use in determining, through risk-utility analysis, whether a product is unreasonably dangerous. While the immediate use of the product and the particular injury are what trigger inquiry into whether the product is unreasonably dangerous, that inquiry encompasses the total design of the product and risks other than the one suffered by the particular plaintiff.\(^{143}\)

Regardless of what the Rosenfeld court had in mind, it has been forcefully argued by a distinguished group of engineers and law professors that a comprehensive product description, divorced from the atmosphere of the injury-creating event and unobscured by the causation question, should be “the cornerstone of the product liability trial.”\(^{144}\) They propose for all products cases a seriated trial “in which the product is first tried before the jury on the question of whether or not the product itself, apart from any considerations arising from the injury-producing event, is defective and unreasonably dangerous.”\(^{145}\) Though there may be cases in which “the issues of defect, technical causation, and causation in fact are inextricably intertwined technically,”\(^{146}\) there is no reason to believe that this is usually the case. Nor does it mean that the product-defect issue cannot be severed from the legal-cause evidence, which, in contrast to the defect evidence, “focuses upon the whole panoply of events linking product failure to injury.”\(^{147}\)

In short, contrary to the opinion of Justice Gulotta, the product-defect issue is substantively compatible with class action procedures. It is not “thoroughly intertwined” with those issues that must be determined individually, and therefore general modes of proof are appropriate. In addition, remedial goals of compensa-

\(^{142}\) See, e.g., General Motors Corp. v. Hopkins, 548 S.W.2d 344, 349 (Tex. 1977).

\(^{143}\) Twerski, supra note 104, at 418.


\(^{145}\) Id. at 446.

\(^{146}\) Id. at 448 (emphasis added).

\(^{147}\) Id.
tion and market deterrence are furthered by class treatment of this particular issue. It follows that the issue meets the appropriateness standard of section 906 and is, therefore, suitable for partial class action.

V. CONCLUSION

This Note outlines an overall approach to the predomination requirement in a products liability context. The approach needs to be fleshed out by application to a variety of product-accident situations. Further, the analysis needs to be expanded. For example, the approach to tort law in this Note has been predominately an economic one. What are the consequences for the substantive theory of class action if a moral conception of liability is more strongly relied on? And, under either model, how would the proximate cause issue be analyzed?

This analysis does, however, provide a first step toward justifying class certification in most products liability cases. It suggests that classwide resolution of cause-in-fact is permissible in light of the goals sought to be achieved by products liability law. If classwide resolution of this issue is allowed, a major obstacle toward satisfying the predomination requirement is removed.

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148. For discussion of the importance of considering the particular product-accident situation in order to achieve optimal resource allocation, see Calabresi & Bass, supra note 59, at 83-87.

149. For example, moral considerations would have been more strongly relied on if products liability had been viewed in this Note as predominately a system of collective deterrence. See G. CALABRESI, supra note 48, at 100-02. For the position that the purpose of liability rules should be to achieve justice between the parties and not maximum social utility, see Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537 (1972).

150. For discussion of the role of proximate cause in achieving tort goals, see Calabresi, supra note 1.