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THE ROLE OF THE JUDGE IN TORT LAW

WHY CREATIVE JUDGING WON'T SAVE THE PRODUCTS LIABILITY SYSTEM

James A. Henderson, Jr.*

Increasingly in recent years, observers have shared the view that the products liability system is failing—not exactly collapsing around our ears, but suffering from extension into areas beyond its competence. Especially in cases involving allegedly defective product designs, courts have encountered difficulties trying to reach results that are consistent with each other and with underlying notions of public policy. Opinions differ concerning both the sources of

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2. The major reason for the difficulties in design and warning cases is the absence of workable standards for determining when liability should be imposed. In cases involving manufacturing defects, the intended designs provide the standards for determining the product defect. But when the designs themselves are attacked by injured plaintiffs, the only standard available is the vague reasonableness standard. Given the complexity of many product design

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these difficulties and their solutions. One recently advanced view contends that many of the problems can be traced to deficiencies in the ways judges have approached the task of judging in these cases. More specifically, it has been suggested that judges have not performed with a sufficient degree of creativity in responding to defendants' motions for directed verdicts in cases involving allegedly inadequate product designs. Although this diagnosis has merit, I am concerned that it may divert attention from more pressing needs for change. In the sections that follow, I shall identify the major source of difficulty in these cases, suggest the implementation of more specific rules and standards as a remedy, and describe the limitations of creative judging as a possible solution.

THE MAJOR SOURCE OF DIFFICULTY IN PRODUCT DESIGN CASES

I first advanced my view of why courts are encountering problems in product design cases ten years ago and have since reiterated it several times. Simply stated, the process of adjudication traditionally relied on in private tort litigation is inherently unsuited to addressing complex, social-planning problems such as "How much product design safety is enough?" on a case-by-case basis. Competent managers can solve product design problems through the exercise of discretion guided by experience. But because the question of "How much safety?" calls also for a value judgment, courts properly refuse to defer completely to design and marketing decisions reached by corporate managers. As a consequence, courts are required to undertake independent review of product design safety decisions to cases, the reasonableness standard is an inadequate guide to decision. See Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531, 1552-53 (1973).

3. My own view is summarized in Henderson, supra note 2. The Interagency Task Force Report identified three major sources of difficulty: the processes of decision whereby product designs are developed by manufacturers; the practices of insurance underwriters; and the apparent inability of courts to develop workable legal standards. See INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, FINAL REPORT I-20 to I-29 (1978).


5. Henderson, supra note 2.


7. The leading case is The T.J. Hooper, 60 F.2d 737 (2d Cir.), cert. denied, 287 U.S. 662 (1932). See also Henderson, supra note 2, at 1556-57.
determine their reasonableness from a social perspective. But while judges and juries may be relied on to apply the proper values, the process of adjudication traditionally employed by courts in tort cases is unsuited to addressing, even by way of ex post review, the social-planning decisions implicit in product design and marketing.

The reasons why adjudication is unsuited to addressing the problem of "How much product safety?" may best be understood by contrasting that decision process with the process employed by managers. When a manager confronts a complex planning problem of this sort, he is likely to begin by reviewing the various elements and the range of possible solutions, reaching tentative conclusions that are subject to being radically altered or abandoned altogether as new considerations emerge. Although a good manager tries to be well informed concerning the relevant facts and may seek advice from others before he acts, the essence of the manager's art is the exercise of gut-level, intuitive discretion in putting the relevant considerations together in a way that best solves the planning problem confronting him. The manager may have rules of thumb that help to guide his decision, but he does not feel bound by them and will discard them when his instincts suggest it is appropriate.

In contrast, both judges and jurors promise under oath to be guided by the law in reaching their decisions. Litigants in private tort litigation are guaranteed an opportunity to explain to both judge and jury how the law, applied to the facts of the case, entitles them to a favorable result as a matter of right. It follows that if litigants are to be given an opportunity to participate in this way in the decision process, the applicable rules of law must organize the various factual elements in the case into a logical structure that allows both decisionmakers and litigants to address them in an orderly sequence, and to resolve each element without the necessity of reconsidering it anew when later elements are considered and resolved. In effect, the rules must address the major policy issues ahead of time, at the rulemaking stage, imposing limits on the range of discretion that

8. See generally Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 369 (1978). I should emphasize that I am referring to the traditional forms of adjudication relied on in private tort litigation. New forms of adjudication have evolved in recent years, mostly in public law areas, with which courts have addressed very open-ended social-planning problems. See generally D. Horowitz, The Courts and Social Policy (1977); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Eisenberg & Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980).
law-appliers may exercise at trial.  

Thus, when the rules of law governing the decision process in a complex product design liability case instruct judges and jurors to determine liability based on whether the design presents unreasonable risks of injury, offering no more guidance than to remind them of the many interrelated and interdependent factors that should be weighed in the complex mix of competing considerations, those decisionmakers face an unhappy choice: They can conscientiously try to do the impossible—that is, to reason their way to the single right result that the law purports to demand they reach—risking mental breakdown in the process; or they can accept the tacit invitation being extended to them to act as managers and exercise their own intuitive discretion. In either event, we are likely to be greeted with inconsistent outcomes, some of which are laughable when viewed objectively, outside the emotional context of a personal injury trial.  

**POSSIBLE SOLUTIONS**

**More Specific Rules and Standards**

If I am correct in my assessment of what has gone wrong in these cases, what is required is not more creative law-applying, but more creative lawmaking—that is, the establishment, either legislatively or judicially, of more specific legal rules and standards that

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9. The objective cannot be to eliminate discretion altogether; such a system would be destructively inflexible. The objective should be to achieve optimal levels of rule specificity. See generally Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257, 258-62 (1974).


11. In a much cited article, Dean Wade advanced seven interdependent factors to be considered in determining the adequacy of product designs. See Wade, *supra* note 10, at 837-38.


13. See, e.g., Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981), discussed in Twerski, *supra* note 4, at 591-95. In that case, the court on appeal admitted that the same design factor found by the jury to be defective in that case might be found by another jury in another case to be necessary to prevent the design from being defective. 630 F.2d at 962. Again, the problems stem from the lack of adequate legal standards and the attempt to decide significant questions of social policy in the highly emotional context of an individual personal injury action.
will help judges and juries reach consistent, sensible results. I have advanced such an alternative approach elsewhere, and will describe it only briefly here. Essentially, I have urged that instead of allowing the outcomes in these cases to depend on whether the judge or jury decides that the defendant's design choices were unreasonable, the plaintiff should be required to show that a reasonable person in the defendant's position would have foreseen the risk to the plaintiff, that an alternative design was technologically feasible at the time of manufacture and available for use by the defendant, that it would have enhanced overall product safety and been cost-effective to adopt, and that its adoption by the defendant would have reduced or avoided the plaintiff's injuries. This approach would replace the open-ended social-policy question presented by the general reasonableness standard with a series of relatively discrete, fact-oriented elements that more readily lend themselves to adjudication.

14. See Henderson, Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform, 56 N.C.L. Rev. 625 (1978). I must confess that my views have changed somewhat in the five years since I first advanced the proposal, and I would make some changes in developing a statutory approach to liability for product design. But I think the central idea is adequately captured in the text following this note.

15. The elements of the plaintiff's case under my proposal demonstrate that the defendant was an efficient cost minimizer—that is, the defendant had (or should have had) information about the relevant risks and was in a position to act effectively on the information. This first element relates to the "defendant had (or should have had) information" aspect. The next three elements relate to the "act effectively" aspect.

16. This element, together with the first, makes it clear that I reject the suggestion that courts should rely on hindsight to impose liability without fault. See generally Henderson, Coping With the Time Dimension in Products Liability, 69 Calif. L. Rev. 919 (1981).

17. The plaintiff should not prevail if the alternative he advances would have increased the sum of social costs of accidents and accident avoidance. An acceptable alternative design may cost more than the design adopted by the defendant as long as the reduction in accident costs achieved by the alternative exceeds the increase in avoidance costs. See infra note 20 and accompanying text.

18. Professor Twerski has observed that this causation requirement places the plaintiff in a "bind" in a product design case. In most instances, the more clearly the plaintiff establishes the "would have prevented injury" element, the more difficult becomes the task of establishing the feasibility of the alternative. And when the alternative is adjusted to ease the problem of showing feasibility, the difficulty of showing causation is increased. See Twerski, supra note 4, at 564.

19. I would be the first to admit that problems would remain. In the context of a complicated design problem, interrelationships among the various elements in the design would resist efforts to separate and "compartmentalize" them. But by requiring the plaintiff to advance a concrete, integrated proposal, the difficulties would be significantly reduced, even if not altogether eliminated. Under present law, the plaintiff is allowed to shift ground as each element is addressed, leaving it to the triers of fact to decide whether the defendant's design was somehow "unreasonably dangerous." In effect, the defendant is asked under existing law to hit multiple moving targets. At the very least, my proposal would reduce the number of targets,
In substance, if not in form, I am proposing a negligence test for design defect cases (in which the manufacturers have not extended express warranties). The plaintiff should be required to show that his loss was avoidable, in whole or part, by an alternative design whose marginal increase in cost, if any, would have been less than the loss that would have been avoided by its adoption. In most cases plaintiffs would advance alternative designs that differed only incrementally from those actually adopted by defendants—the steering column on a particular automobile should have been designed to absorb greater shocks in head-on collisions, for example. But I should make it clear that in appropriate cases the alternative design could be a radically different design, embracing the conclusion that a reasonable manufacturer would not have marketed the product that harmed the plaintiff. Thus, if the product in question were a highly toxic cleaning agent whose formulation could not be altered incrementally without greatly reducing or destroying its cleaning properties—some observers would refer to such a product as "unavoidably unsafe"—the plaintiff would be able to attack the defendant’s decision to distribute the highly toxic agent by arguing that a more cost effective alternative would have been turpentine, or some other altogether different cleaning agent.

I do not pretend that these suggested changes in the law would solve all of the problems in design cases, nor am I oblivious to criticisms based on the substantive compromises they reflect. Thus, in the "unavoidably unsafe product" situation, my approach might make it more difficult for a deserving plaintiff to prevail because it appears to require him to argue that the defendant should have produced and distributed an altogether different sort of product, something which might have been difficult as a practical matter for the defendant to do. Under the existing law in many states, the plaintiff in such a case can simply argue that the defendant’s product ought not to have been distributed regardless of whether or not the

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20. Thus, employing Learned Hand’s well-known formula from United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), the extra costs of precaution (B) implicit in the alternative design must be shown to be less than the expected value of the accident costs thereby avoided (P x L), or "B<PL."

21. See, e.g., Larsen v. General Motors Corp., 391 F.2d 495, 496-97 (8th Cir. 1968).

22. See RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).

23. If the safer, more cost-effective product is altogether different than the product distributed by the defendant, neither the defendant’s production capabilities nor the defendant’s marketing structure is likely to be suited to handling the alternative design.
defendant could have adopted an alternative design.\(^{24}\) Under my approach, the plaintiff would seem to be required to show that the defendant could have substituted a different product. In the "toxic cleaner v. turpentine" hypothetical, for example, my approach would appear to require the plaintiff to argue that a chemical company should have sold turpentine instead of chemicals—admittedly, an intuitively confusing proposition. I believe that I can adjust my approach to reduce difficulties of this sort—for example, by allowing plaintiffs to proceed with a "should not have sold the product at all" argument in appropriate cases—but I acknowledge that they do exist and must be addressed.\(^{25}\)

My proposal may also be criticized for increasing the costs to plaintiffs of bringing actions based on defective product design. By requiring the plaintiff to prove the feasibility of an alternative, I have probably reduced the extent to which plaintiffs can rely on vague, untested generalities from expert witnesses. In response to this criticism I can only observe that some increase in plaintiffs' costs is justified. Certainly such an increase is justified if one views as inappropriate the heavy reliance on such expert testimony under existing law.\(^{26}\)

Before going on to react to recent calls for more creative judging, I should observe that I find it more difficult to see how the rules governing the question of the defendant's failure to warn could be altered to render the cases more adjudicable.\(^{27}\) Indeed, it is not clear that the failure to warn issue presents unmanageably complex, open-ended problems to the same extent as does the issue of unreasonable design.\(^{28}\) Thus, the major source of difficulty in warning cases is not

\(^{24}\) The test is whether a reasonable manufacturer, knowing of the hazards associated with the design, would have marketed the product in the same way as the defendant. See, e.g., Phillips v. Kimwood Mach. Co., 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974). See generally Birnbaum, supra note 10, at 618-31.

\(^{25}\) The exception would have to be carefully worded so as not to undermine the requirement that plaintiffs in most cases be required to show that a safer alternative design was practically and economically feasible. Thus, in order to take advantage of the exception to the general rule a plaintiff would have to demonstrate that, based on what the defendant manufacturer knew or should have known at the time of distribution, the hazards associated with the product so outweighed its benefits that the legislature would have been warranted in banning outright the product's distribution in commerce.

\(^{26}\) For an analysis of the problems of overreliance on expert testimony, see Weinstein, Twerski, Piehler & Donaher, supra note 12, at 450-58.

\(^{27}\) The major reason for my pessimism is that one cannot rely on a requirement of proof of feasibility as a means of sorting out the cases. Alternative warnings are almost always technologically feasible.

\(^{28}\) See generally Henderson, Design Defect Litigation Revisited, 61 CORNELL L. REV.
open-endedness but rather the tendency for courts to play fast and
loose with the requirement that the plaintiff show that the defen-
dant's failure to warn caused the plaintiff's injuries. It follows that
the reform most called for in connection with failure to warn is a
shift in the rules to insist that the plaintiff make a case that his
suggested alternative warning really would have prevented or signifi-
cantly reduced the plaintiff's injuries.

**Calls for More Creative Judging**

*What They Mean.*—Before proceeding to explain why calls for
more creative judging are bound to fall short of their objective, it
will be worthwhile to consider what they mean. At the very least, it
appears that judges are being reminded that their oaths of office in-
clude a commitment to respond to defendants' motions for directed
verdicts conscientiously and to refuse to send to juries cases in which
serious doubts exist regarding whether the defendants could have, or
should have, done anything differently, or whether if they had, it
would have reduced or prevented the plaintiffs' injuries. Viewed in
this manner, calls for creative judging reflect the concern that some
judges may not be performing to their full potential in screening
groundless cases from the jury. The Model Uniform Product Liabil-
ity Act, promulgated in 1979 by the Department of Commerce,
reflects such a concern in its sections dealing with liability for prod-
uct design and failure to warn, which contain hortatory language
admonishing judges to take seriously their responsibility to keep
groundless cases from the jury.

But while some of these calls for more creative judging may
resemble judicial "pep talks," at least one such recent proposal
clearly seeks to provide more in the way of a solution to current
difficulties. Recognizing that these cases frequently present issues
that are beyond judicial competence when approached under a vague
reasonableness standard, Professor Twerski offers a set of ten factors
that will allow judges to decide motions for directed verdicts without
confronting, head on, the intractable issue of unreasonable product

541 (1976).
29. See, e.g., Le Bouef v. Goodyear Tire & Rubber Co., 623 F.2d 985 (5th Cir. 1980);
32. See Model Uniform Product Liability Act § 104(B), (C), 44 Fed. Reg. 62,714,
These factors relate to three basic considerations: first, the relative likelihood that the extrajudicial decision processes that led, ex ante, to a particular feature of design, possessed sufficient integrity to justify judicial deference to the decisions reached by those processes; second, the extent to which an ex post judicial review of the design under general reasonableness principles will require the trier of fact to engage open-endedly in social management; and third, the substantive merits of the plaintiff's claim under the traditional reasonableness standard.

As this brief description of his proposal indicates, Professor Twerksi shifts the focus away from the adequacy of product designs themselves and toward the trustworthiness, from a social perspective, of the extrajudicial processes of decision that led to the adoption of particular product designs. In an earlier proposal, to which I responded, Professor Twerksi suggested that courts should limit their inquiry to the in-house design review processes relied on by defendant manufacturers. In his more recent proposal, such in-house review processes constitute but one of five factors relevant to the assessment of the integrity of extrajudicial decision processes. Thus, in addition to that factor the court is to consider whether consumers had a range of alternative choices in the market in which the product in question was distributed, whether the product was of a type that is subject to governmental safety regulation, whether independent and responsible decisionmakers played a significant role in assessing and utilizing the allegedly defective design, and whether

33. See Twerksi, supra note 4, at 526-27, 550-78.
34. Professor Twerksi does not include the substantive merits as one of his general categories, but at least three of his factors—the feasibility of the suggested alternative, the cost of the alternative, and the strength of the plaintiff's proof of causation, see id. at 527—relate to what I refer to as the “merits.”
35. Twerksi, Weinstein, Donaher & Piehler, supra note 1.
37. The authors suggested that a defendant manufacturer be allowed, but not required, to raise a process defense by proving to the court by a preponderance of the evidence that its product design decision process adequately took into account the interests of those, including the plaintiff, who might be affected by the product. Once the manufacturer succeeded in establishing the adequacy of its design process, the plaintiff would be required to prove the unreasonableness of the design by clear and convincing evidence. Twerksi, Weinstein, Donaher & Piehler, supra note 1, at 374-80.
38. See Twerksi, supra note 4, at 566-67.
39. Id. at 576-78.
40. Id. at 574-75.
risks presented by the design were open and obvious to users and consumers. Based on these factors the court will presumably be able to assess the relative likelihood that the defendant manufacturer's design decisions adequately took into account the relevant social values, including the interests of persons put at risk by the distribution of the product in question.

Having assessed the adequacy of the extrajudicial processes that led to the design and marketing of the product before it, the court is then to assess the potential difficulties likely to be encountered if the court undertakes independent review. Several factors are relevant to this inquiry, including the complexity and open-endedness of the problem presented. After this second inquiry has been completed, the court is to consider it in light of the results of the first. If on the one hand the substantive issues presented in the case are very difficult to adjudicate, and if on the other the five-factors assessment strongly suggests that the extrajudicial decision processes that produced the design adequately took into account the important social values, then the judge should direct a verdict for the defendant even if it can be said under the more traditional test for directed verdicts that "reasonable minds could differ" regarding the adequacy of the design of the product.

It is not clear what role, if any, is to be played in Professor Twerski's approach by the third consideration, in which the court assesses the substantive merits of the plaintiff's claim—that is, by the court's assessment of the unreasonableness of the product design alleged to be defective. He cannot be asking the court to direct a verdict only when it concludes that reasonable minds cannot differ on that issue, for that is precisely the open-ended issue that he concedes at the outset courts cannot adequately address. And yet, he includes at least three factors in his set of ten that clearly relate to the substantive issue of the reasonableness of the design: the practical feasibility of the alternative design urged by the plaintiff; the strength of the plaintiff's case on causation; and the cost-effectiveness of the plaintiff's suggested alternative design.

On balance, it appears that he would have the court include its

41. Id. at 567-73.
42. Id. at 551-53.
43. See id. at 525-26.
44. Id. at 556-58.
45. Id. at 562-64.
46. Id. at 573-74.
assessment of the reasonableness of the product design in the mix of other considerations, and have that assessment count for the defendant not only when the design appears to have been reasonable but also when the question of reasonableness is a close question. Thus, Professor Twerski seems to be saying that if the first two clusters of considerations point in the direction of granting the defendant's motion for a directed verdict, the court should deny the motion only when the product design seems rather clearly to be unreasonably hazardous. Viewed in this manner, the first two clusters of factors, when favorable to the defendant, support a presumption of nondefectiveness that the plaintiff can rebut only by making a clear case the other way.

Why More Creative Judging Won't Solve the Problem.—I will concede at the outset that part of the problem in the area of products liability may be traced to poor performances by judges at both the trial and appellate levels. Judges are only human, after all, and some of them undoubtedly lack the skills necessary to perform the difficult tasks assigned to them. The situation may even be getting worse rather than better. The population of judges has grown in recent years. And the gap between the salaries paid to judges and the incomes earned by competent, successful lawyers has increased steadily. These factors may be combining to reduce the quality of judging in products liability cases. Continuing education programs for judges help to counterbalance the erosion of quality to some ex-

47. I think this is what he means to capture in his second factor, the "close risk-utility proof." See id. at 553-56.

48. I should make clear that he nowhere speaks explicitly in terms of rebuttable presumptions, or raising the plaintiff's burden of proof. I may have been influenced by his earlier "process defense" article which more clearly spoke in these terms. See Twerski, Weinstein, Donaher & Piehler, supra note 1. But I think I have fairly characterized his more recent proposal.


tent,\textsuperscript{61} as do innovative approaches to the selection and appointment of judges.\textsuperscript{62} But it may well be that an erosion in quality continues to occur and is contributing to some extent to the present difficulties.

My problem with the "pep talk" dimensions of calls for more creative judging is that they do not address the sources of the assumed deficiency in the quality of judging. For any such deficiency to be corrected, two steps must be taken: (1) traditional methods of judicial selection must be replaced with methods emphasizing quality rather than political loyalty;\textsuperscript{63} and (2) the judiciary must be supplied with the resources necessary to attract and retain capable members of the bar.\textsuperscript{64} Until these steps are taken, if deficiencies in the quality of judging exist they will continue to contribute to the difficulties being experienced in the products liability area notwithstanding hortatory efforts aimed at inspiring judges to do better.

Of course, it would be unfair to equate Professor Twerski's thoughtful proposal with a "pep talk." It goes considerably beyond that particular art form. What remains to be considered is whether supplying judges with the clusters of factors he describes would render these product design and warning cases more adjudicable. Professor Twerski suggests that his analysis would permit courts to occupy a "middle ground" between the vague reasonableness standard, which he rejects for the same reasons I do, and more specific liability rules, which he rejects as unduly restrictive of the judicial decision process.\textsuperscript{65} My problem is that I do not believe his suggestion would insulate courts from having to address the sorts of open-ended planning problems for which adjudication is not suited.

Certainly, Professor Twerski's proposal would not reduce these


\textsuperscript{54} See Costikyan, \textit{supra} note 50.

\textsuperscript{55} "The legislative effort [to render the product liability system workable] will remain ineffectual and at times irrational because the law of torts cannot be effectively legislated. There are too many nuances that require the touch of a common law judge." Twerski, \textit{supra} note 4, at 595.
problems in the majority of cases in which motions for directed verdicts are not granted. In cases tried to juries, presumably the liability issues would be resolved on the basis of a general reasonableness standard. In such cases, how would the evidence regarding the range of consumer choice, relevant to the judges' decisions on the directed verdict motions, be made relevant to the issues of reasonable design? Would the jury be excused from hearing such evidence? And even if trials could be arranged so as to reduce these sources of potential confusion, juries, and lawyers arguing to juries, would confront the same highly polycentric problems they currently confront under existing law. It follows that in a majority of instances (that is, in all cases in which directed verdicts are not called for), Professor Twerski's approach will not, by hypothesis, reduce the process difficulties and may actually exacerbate them by introducing two different legal standards for liability in the same controversy.

To be sure, under Professor Twerski's approach the focus of attention for the judge in deciding whether to grant a defendant's motion for a directed verdict would no longer be on the design of the product, but rather on the design of the decision processes that led to the product. But in either event the court would be required to assess the adequacy of design. Although the designs of decision processes present different issues from those presented by the designs of the products themselves, the issues presented are no less complex or open-ended. Moreover, the judgmental tasks under Professor Twerski's proposed approach might be even more difficult than are the tasks confronting judges under existing law, given his additional requirement that the court must weigh its factors-based assessment of extrajudicial decision processes against assessments of both the difficulties likely to be encountered upon reviewing the adequacy of the product design, and the reasonableness of the design.57

These considerations lead me to conclude that Professor Twerski's proposal is, after all, premised on a tacit recognition that judges are acting as managers rather than as adjudicators in these cases, and therefore, that his proposal aims at making them better managers. He is not simply exhorting judges to do better as managers, but he is telling them, in some detail, how to accomplish that goal.

In reacting to Professor Twerski's proposal I want to make it

57. Under Professor Twerski's proposal, the inquiry would expand to include not only the product design and design review process but also the range of choice available to consumers in the relevant markets. Twerski, supra note 4, at 566-67.
clear that I have no quarrel with him on the substance of his analysis—I think he has got it right when he describes the factors that bear on the likelihood that the extrajudicial decision process can be trusted to reach socially proper design and marketing decisions. Moreover, I am reasonably sure that he has identified the factors that will help make judges better managers. Indeed, I will go so far as to admit that his analysis has enhanced my own understanding of an area of tort law that I had supposed I understood fairly well. My problem with his proposal is that I am not ready to accede to the idea of replacing the adjudicatory model with a management model in these cases, involving as it does a tacit denial of the rights of litigants effectively to participate in the substantive decision process. I will concede that in certain important respects trial judges have traditionally performed management functions even in the context of formal adjudication of private disputes. Thus, judges traditionally have acted as managers in conducting the procedural and evidentiary aspects of trials. It will be observed, however, that the legal system explicitly purports to delegate large amounts of discretion to trial judges in these areas.

The reasons for giving judges substantial leeway in conducting the procedural and evidentiary aspects of the trial are largely reasons of necessity—more formal, specific rules of decision would be impossible to derive and apply. I appreciate that I may appear to be inconsistent in adopting here the argument that I reject in connection with the substantive issue of liability—that is, that more specific rules would be too difficult to derive and too costly to apply. But I believe the question of optimal rule specificity can only be answered in light of the factors in a given context. In the course of a trial of average complexity there may be hundreds of procedural and evidentiary issues presented, many of which cannot be anticipated ahead of time, and none of which affects the defendant beyond its significance in the particular trial. Thus, to avoid unacceptably large costs in terms of delay and redundancy, the judge must be allowed to manage each situation under relatively vague guidelines. Moreover, it is

58. Professor Twerski nowhere advocates that litigants be denied access to the legal process. Indeed, he hopes that his approach will render their involvement more meaningful. But if I am right concerning the inherent nonjusticiability of the issues he would have courts address, then litigants would be denied any meaningful opportunity to argue for favorable results as a matter of right.

unlikely that any single evidentiary or procedural ruling will be dis-positive of the outcome. In contrast, the question of the social acceptability of the defendant's design is the central issue on which liability turns, and its resolution has important repercussions beyond the confines of the single case. Therefore, I do not believe I am inconsistent when I applaud the vagueness of the legal rules guiding many procedural and evidentiary decisions, and deplore the vagueness of the rules determining liability.

Thus, even conceding that judges have traditionally exercised managerial discretion in the ways just described, Professor Twerski's proposal goes considerably beyond that tradition. His ten factors relate directly to the substantive issues in these cases, not merely to matters of evidence or procedure. In reaching substantive decisions in private tort litigation, judges are supposed to be guided primarily by the law, not by instinct and intuition. Admittedly the distinction here is one of degree rather than of kind—a residuum of discretion inheres in any system of substantive rules. But I cannot accept the explicitness with which this "better judicial managers" approach departs from what I view to be the traditional and proper role for judges in private tort litigation.

If I am correct in my assessment of Professor Twerski's proposal, then its adoption by courts should at best bring about only limited improvement in the consistency and quality of outcomes in these cases. Some improvement might occur, to the extent that his analysis succeeds in making judges better managers. But as long as they engage primarily in management rather than adjudication, the results reached can never be adequately sensible or consistent. Building on Professor Twerski's terminology, what I believe is called for is more creative "high-level lawmaking," whether by legislatures or by courts, aimed at working out rules of decision that will see us through in the long run. By opting for improvements in what I would term "middle-level lawmaking," Professor Twerski may have struck

60. In effect, the costs of minor inconsistencies are lower because they have less effect on the outcome. Moreover, they may tend to "even out" in the long run, dampening even further any negative effects of errors in judgment. See generally J. Maguire, supra note 59, at 3.

61. See generally Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 661-69 (1958).

62. Again, I am focusing throughout this discussion on traditional forms of adjudication. See supra note 8.

63. See Twerski, supra note 4, at 529.

64. Courts might work out standards of sufficient specificity, but legislatures are more likely to do so.
something of a Faustian bargain—he may have given up the opportunity for long-run solutions to the products liability problem in return for short-run marginal improvements.

CONCLUSION

I began this essay by summarizing my views of why judges are struggling to reach sensible, consistent results in cases involving allegedly defective product designs and warnings, and ended by commenting critically on Professor Twerski's provocative suggestion that judges in general can and should do a better job in these cases in responding to defendants' motions for directed verdicts. The key to solving the products liability problem is to understand that although judges in tort cases traditionally and properly have performed management functions in connection with certain aspects of their judging, they should act primarily as adjudicators and not as managers in connection with the central issues of substance. Efforts to make them better managers of these issues give too much away by conceding, at the outset, that management is an appropriate function for courts to serve in products liability cases. If judges are going to reach sensible, consistent decisions in responding to motions for directed verdicts in cases involving allegedly defective product designs, they must have more adequate—that is, somewhat more specific—legal rules with which to sort out the worthy cases from the unworthy.