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# PRODUCTS LIABILITY "REFORM": A HAZARD TO CONSUMERS

ANITA JOHNSON†

Private personal injury lawsuits can help to control exposure to unsafe products in addition to compensating injured consumers and workers. Court decisions in these suits have played an active role in developing manufacturers' legal duties to the public and in providing incentives for manufacturers to improve products and thereby avert future litigable injuries.<sup>1</sup> Products liability litigation has developed legal duties independent of, and frequently more stringent than, those imposed on manufacturers by government regulatory agencies. For example, courts have required safe containers for chemicals when agencies have been inactive. A series of cases in which consumers were injured by exploding cans of Drano caused the manufacturer to switch from screw-on caps to flip-top caps that provide a safety release at a certain degree of pressure.<sup>2</sup> In fact, the common law of products liability has been active beyond both the agencies and industry itself in evolving behavior standards for new technology.<sup>3</sup>

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1. See *Cushing v. Rodman*, 82 F.2d 864, 869 (D.C. Cir. 1936); Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966); Prosser, *Assault on the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119-23 (1960).

2. *Capers v. Drackett Prods. Co.*, 1 Civ. No. 33591 (Cal. Ct. App., filed Aug. 28, 1975), discussed in *Impact on Product Liability: Hearings Before the Senate Select Comm. on Small Business*, 94th Cong., 2d Sess. 1626-29 (1976) (statement of Thomas Lambert, Jr.) [hereinafter cited as *Impact on Product Liability*]; *Moore v. Jewel Tea Co.*, 116 Ill. App. 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 288, 263 N.E.2d 103 (1970). Case law is replete with further examples. In *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967), the manufacturer of a steam vaporizer advertised as "tip-proof" was held liable for \$150,000 to a three-year-old girl who was badly burned by scalding water when the vaporizer tipped over. Thereafter, the vaporizer was redesigned with a screw-top cap and automatic shut-off. *Impact on Product Liability*, *supra* at 1613.

Label information required by courts has also been clearer and more detailed than that required by regulatory agencies. For example, poisonous pesticides have been required to be labelled with a skull and crossbones so that illiterate workers could appreciate the extent of the danger. *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965); *Gonzalez v. Virginia-Carolina Chem. Co.*, 239 F. Supp. 567 (E.D.S.C. 1965). Drug manufacturers have been required to inform consumers of vaccines dispensed in public clinics of the benefits and risks of the vaccine although neither the Food and Drug Administration nor state agencies so required. *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

3. See generally Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 462-63 (1974).

In recent years, manufacturers have been charged dramatically increased fees for product liability insurance. Some manufacturers have testified during the last eighteen months that they may have to go out of business because of their high insurance rates.<sup>4</sup> Insurance companies have claimed that there is a products liability "crisis" and that it is caused by the products liability legal system. They have demanded immediate legislative protection for manufacturers' interests in lawsuits.<sup>5</sup> They have claimed that pro-consumer products liability legal doctrines result in unfair harassment of business by injured persons<sup>6</sup> and that opportunistic consumers and money-hungry lawyers are gaining windfall wealth from responsible manufacturers. They have followed these claims with nationwide advertising campaigns for products liability "reform."<sup>7</sup>

In response to these initiatives, the Interagency Task Force on Product Liability was formed in April 1976 under the direction of the United States Department of Commerce. Its purpose was to investigate the allegations of manufacturers and insurers, and to consider their proposals for lowering insurance costs. The Task Force concluded that there was not a "crisis" in products liability insurance—that is, no large sector of manufacturers was unable to obtain insurance and the increased cost of insurance had made no substantial impact on the price of many products.<sup>8</sup> It downplayed the role of products liability doctrines in raising insurance rates,<sup>9</sup> and pointed to factors causing the insurance rate increases that have received little attention from

4. See, e.g., note 6 *infra*.

5. See, e.g., Wall St. J., Dec. 9, 1976, at 15 (advertisement).

6. See *Swine Flu Immunization Program: Supplemental Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 84-85 (1976) (statement of Leslie Cheek, Vice President, American Insurance Association (trade association of insurance companies)).

Men have lost their jobs and their businesses because of the passion of the judicial system to compensate an injured person by attaching liability, however remote the justification.

What we are experiencing in the area of tort/liability insurance is the psychology of entitlement gone wild. There is neither rhyme nor reason to much of what is now happening in the courts of our land. We have developed a system whereby the lawyers and a minority of claimants reap the money and the insurance companies reap the blame. Clearly it is a problem and a crisis that demands solution.

*Id.* at 85 (quoting an unnamed board chairman of "one of the Nation's largest insurers").

7. See, e.g., NEWSWEEK, Nov. 7, 1977, at 17; TIME, Nov. 21, 1977, at 27; TIME, Sept. 12, 1977, at 1; U.S. NEWS & WORLD REPORT, Sept. 12, 1977, at 64; Washington Post, Oct. 24, 1977, at A33, col. 3-7.

8. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, BRIEFING REPORT 2 (Jan. 1977). The task force reported that even in the industries most affected by an increase in products liability insurance "that cost has accounted for less than 1% as a percentage of sales." *Id.* at 40.

9. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, DRAFT FINAL REPORT I-20 (Oct. 14, 1977) [hereinafter cited as FINAL REPORT]. However, the report also suggested some modifications in legal doctrines, such as procedures for determination of punitive damages, *id.* at VII-63, and modification of the collateral source rule in strict liability cases, *id.* at VII-60, and advised consideration of other changes, such as comparative fault assessments, *id.* at VII-42 to -44, and sole source remedies in workplace injuries, *id.* at VII-85.

industry. First, insurance company ratemaking procedures are based on subjective considerations rather than an objective data bases, so that a few horror stories circulated in the industry drive rates up.<sup>10</sup> A legal study commissioned by the Task Force found that, in the absence of statistical or scientific ratesetting methodology in the insurance industry, perceptions that the law is confused or inequitable will cause price increases even though "a close technical examination shows that [the law] is not."<sup>11</sup> Second, the study found that insurance rates have risen because some manufacturers are producing unreasonably unsafe products.<sup>12</sup>

The legal study also examined the relationship of state products liability doctrines to the size and number of judgments in those states.<sup>13</sup> While many have assumed that the liberalization of products liability doctrines has fostered an increase in the number of suits, the evidence uncovered by the legal study was mixed. California had the most favorable doctrines, the highest awards and one of the more favorable ratios of judgments for plaintiffs, but did not have a significant increase in lawsuits filed.<sup>14</sup> On the other hand, New Jersey, another state in the "forefront of [the] liberalization,"<sup>15</sup> showed the greatest percentage increase in litigation of all the states sampled.<sup>16</sup>

The study concluded that "none of the [doctrines] in the existing tort law appears significant enough individually or in combination to be directly responsible for the alleged product liability insurance problem."<sup>17</sup> Moreover, it found from looking at all the evidence that there was no relationship

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10. "All of the evidence reviewed by the Task Force confirms suspicions . . . that some insurers engaged in 'panic pricing.'" *Id.* at I-19. The report found that the insurance industry does not have a significant amount of data on products liability cases. *Id.* at I-18, -19.

11. 3 THE RESEARCH GROUP, INC., FINAL REPORT OF THE LEGAL STUDY 128 (Interagency Task Force on Product Liability, Jan. 1977).

12. FINAL REPORT, *supra* note 9, at I-20. "[A] number of manufacturers . . . do not have planned product liability loss prevention programs in the basic areas of design research and quality control." *Id.* Others "do not provide adequate instruction about the dangers that may spring from their products." *Id.* at I-21.

13. Eight states were chosen to present a balance of industrial and nonindustrial economies and a variety of legal doctrines in force. They were Arizona, California, Illinois, New Jersey, New York, Pennsylvania, Texas and Wisconsin. 1 THE RESEARCH GROUP, INC., *supra* note 11, at 15-16.

14. 3 *id.* at 100. Texas, the sample state with the highest pro-plaintiff ratio and the second highest average award, also only experienced a "modest increase in litigation." *Id.* See also note 17 *infra*.

15. 3 THE RESEARCH GROUP, INC., *supra* note 11, at 99-100.

16. *Id.* at 100.

17. *Id.* at 99-100; *accord, id.* at 118. The study also noted that while products liability litigation had increased, comparing 1965-1970 to 1971-1976, ranging from a 16% increase in California to a 211% increase in New Jersey, *id.* at 93, the proportion of products liability cases to total civil cases remained extremely small. 1 *id.* at 15. In Connecticut, for example, products liability accounted for only 5% of the new civil case load; in federal courts, 2.8%. 3 *id.* at 36. The legal study also pointed out that inflation of medical costs used to compute damages had skyrocketed in recent years. *Id.* at 130. In context, the increase in cases was deemed undramatic.

between the pro-consumer products liability doctrines and the size and volume of judgments.<sup>18</sup>

In spite of the fact that a relationship between products liability legal doctrines and expensive insurance premiums has not been shown—and, in fact, that the evidence is to the contrary—substantial alterations of legal doctrines in favor of manufacturing interests continue to be promoted. The proposed alterations discussed below would seriously diminish industry incentives to produce safe products, with the likely result that consumers would endure many more preventable and unreasonable injuries.

### I. STATE OF THE ART AS AN ABSOLUTE DEFENSE

Bills have been introduced in a number of states to make the "state of the art" an absolute defense in a products liability suit.<sup>19</sup> These bills provide an absolute defense for any design or manufacturing process if it is used by manufacturers other than the defendant. The Pennsylvania bill reads:

In any product liability action, it shall be an absolute defense to such action that the product conformed with generally recognized and prevailing standards, designs, or methods of testing or manufacturing of the state of the art in existence at the time the manufacturer of the final product parted with its possession and control or sold it, whichever occurred last. When there are two or more possible product standards, designs or methods of testing or manufacturing in customary use, in the defendant's trade or business or in allied or similar trades or businesses [*sic*] shall be treated as being in compliance with the state of the art.<sup>20</sup>

The American Insurance Association goes further, stating that an absolute defense should be available when the defendant's design "is supported by any substantial body of actual practice, no matter what the dominant or preferred opinion."<sup>21</sup>

These state of the art defenses are being actively promoted by insurance company lobbyists and manufacturers' groups in state legislatures. If they

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18. [T]he volume and size of damage awards in all probability cannot be considered the direct cause of the alleged insurance problem. Thus, remedies reducing claims or limiting recovery amounts, even if such could be considered equitable to the plaintiff, could have only a marginal impact on defusing the claimed insurance problem.

3 *id.* at 131-32.

19. *E.g.*, S. 2353, 45th N.D. Legis. (1977); S. 527, Pa. Legis., 1977 Sess.; S. 431, Wis. Legis., 1977-1979 Biennial Sess. (1977).

20. S. 527, Pa. Legis., 1977 Sess. "When there are two or more possible product designs, the adoption of any design in substantial use in the defendant's or allied or similar trades or business will be treated as being in compliance with the state of the art." H. 1162, 45th Wash. Legis., 1st Extraordinary Sess. (1977).

21. AMERICAN INSURANCE ASSOCIATION, PRODUCT LIABILITY LEGISLATIVE PACKAGE: STATUTES DESIGNED TO IMPROVE THE FAIRNESS AND ADMINISTRATION OF PRODUCT LIABILITY LAW 24 (Revised Draft, Mar. 1977).

are passed, manufacturers' legal obligations to consumers will be determined, in essence, by manufacturers rather than the courts. Judgments as to the proper injury prevention measures to be incorporated into products will be left to manufacturers alone.

This scheme is a far cry from the standard of reasonable care currently accepted by the courts: that which was feasible and reasonable under available technology and the state of scientific knowledge when the product was manufactured.<sup>22</sup> Under this traditional rule, industry custom does not conclusively establish whether the defendant took reasonable care or whether the product was "defective." The courts can decide that an entire industry engages in unreasonably careless practices. *The T. J. Hooper*<sup>23</sup> is the classic case in point. In that case the court found a tugboat operator liable for the loss of cargo in a storm. The master of the tug testified that he would have gone back to shore if he had heard weather reports, but the tugboat, like most others in that area, did not have a radio receiver. The opinion in the case, written by Judge Learned Hand, concludes as follows:

Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. . . . But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. . . . We hold the tugs [unseaworthy] therefore because had they been properly equipped, they would have got the Arlington reports. The injury was a direct consequence of this unseaworthiness.<sup>24</sup>

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22. *E.g.*, *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1182 & n.16, 1184 & n.24 (5th Cir. 1971).

23. 60 F.2d 737 (2d Cir. 1932).

24. *Id.* at 740 (citations omitted). In *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972), the court acknowledged that it was the custom of the power punch press business to sell presses without safety guards on the expectation that safety guards would be added by the purchasers. *Id.* at 411, 290 A.2d at 285. It held, however, that it was a question for the trier of fact whether the manufacturer of this specific press should have installed safety devices. *Id.* at 410-11, 290 A.2d at 285-86. Other examples are *Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851, 860 n.7 (8th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Texaco, Inc. v. Lirette*, 410 F.2d 1064, 1066 (5th Cir. 1969); *Ford Motor Co. v. Thomas*, 285 Ala. 214, 231 So. 2d 88 (1970); *Jones v.*

Industry custom is, of course, an important element of a due care defense even though it is not conclusive.<sup>25</sup> Evidence of such custom is most persuasive when the defendant's practices are superior to his competitors',<sup>26</sup> but manufacturers frequently introduce evidence that their behavior was no worse than their competitors'.<sup>27</sup> Industry custom can be introduced in the form of formal standards set by voluntary standard-setting organizations<sup>28</sup> or of voluntary government standards.<sup>29</sup>

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Hutchinson Mfg., Inc., 502 S.W.2d 66, 70 (Ky. 1973); *Hill v. Husky Briquetting, Inc.*, 54 Mich. App. 17, 220 N.W.2d 37, *aff'd*, 393 Mich. 136, 223 N.W.2d 290 (1974); *Wellenheider v. Rader*, 49 N.J. 1, 227 A.2d 329 (1967).

25. 4 THE RESEARCH GROUP, INC., *supra* note 11, at 101.

26. In *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176 (5th Cir. 1971), the court, in rejecting plaintiff's claim that a meat grinder was defectively designed, noted that Hobart was "the pioneer in the use of safety devices in the meat grinder industry," *id.* at 1184, and that whereas Hobart's meat grinder had had a safety guard, none of its competitors' models manufactured in the same year did, *id.* at 1185.

27. *E.g.*, *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1086 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), in which liability rested upon whether the manufacturer's product should have contained warnings to workers about the danger of inhaling asbestos and whether the manufacturer should have known more than he did about the possibility of asbestos inhalation causing asbestosis and mesothelioma, which are, respectively, disabling and fatal lung diseases. In its defense, the manufacturer argued that no other manufacturers of asbestos products had warned those at risk and no other manufacturers had conducted scientific health studies of their workers. In *Moschkau v. Sears, Roebuck & Co.*, 282 F.2d 878, 880 (7th Cir. 1960), defendant argued that he had given an adequate warning to plaintiff of the flammability of his adhesive product because the wording of the warning was "similar" to the warning on competitors' packages.

28. *See, e.g.*, *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wash. 2d 629, 453 P.2d 619 (1969) (ladder manufacturer allowed to show that its ladder met the construction requirements of the American Standard Safety Code for Portable Metal Ladders). *See also DePree v. Nutone, Inc.*, 422 F.2d 534 (6th Cir. 1970); *Impact on Product Liability, supra* note 2, at 1559 (statement of Ralph Stephens).

For some products, formal standards have been evolved by voluntary standard-setting organizations such as the Underwriters' Laboratory, the American Association of Medical Instrumentation and the American National Standards Institute. Standards prescribe such things as insulation on electric wires, welding and bolts in ladder construction, and metal used for heart pacemaker construction. Evidence that the manufacturer has conformed to formal voluntary standards is, of course, highly persuasive, and evidence that the manufacturer failed to comply can be devastating. *See Philo, Use of Safety Standards, Codes and Practices in Tort Litigation*, 41 NOTRE DAME LAW. 1, 5 (1965). It is important to note, however, that standard-setting bodies are not objective arbiters of the injury prevention/cost tradeoffs. They are composed of industry employees and, as a general rule, produce consensus standards that reflect the lowest common denominator of the large manufacturers in a line of products. The National Commission on Product Safety studied the safety standards produced by 48 private standard-setting organizations and concluded: "[T]hese standards are chronically inadequate, both in scope and permissible levels of risk." NATIONAL COMMISSION ON PRODUCT SAFETY FINAL REPORT 48 (1970). The Commission also concluded that safety itself was a secondary consideration in the process of private standard development. The Senate Judiciary Committee held hearings on privately developed standards in March 1975. These hearings found that the standards were used by large, established companies to bankrupt small competitors and to obstruct inventors with better ideas. For example, the committee took testimony that a company that developed a backflow valve for pipes that would cut valve costs in half could not get the approval of the standard-setting organization, many of whose members made the more expensive valves. *Voluntary Industrial Standards: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 63 (1975) (statement of Robert Tesar).

29. *See, e.g.*, *Mississippi Power & Light Co. v. Whitescarver*, 68 F.2d 928, 930 (5th Cir.

Cases in which industrywide custom has been adjudged to fall below the level of due care are infrequent.<sup>30</sup> This is at least partly true because of the enormous difficulties encountered by plaintiffs in proving the inadequacy of industry custom. Industry frequently has a monopoly on expert witnesses in technical fields—either because the experts are employed directly by industry or because they are dependent on industry for consulting fees or research contracts. The available treatises and journal articles are rarely written by disinterested scientists or engineers. In addition, individual plaintiffs may have comparative difficulty using discovery procedures in various state and federal courts,<sup>31</sup> whereas defendants have routine familiarity with them.

Plaintiffs' difficulties are exacerbated by corporate defendants' exclusive control over a wide variety of liability related information and sometimes by defendants' actions to make that information unavailable. For example, General Motors threw away all consumer complaints about its Corvair after about two years. These complaints were, of course, important to plaintiffs in establishing that General Motors had notice of the defect.<sup>32</sup>

The problem looms still larger in the area of industry custom, as most or all manufacturers of goods similar to those made by a products liability defendant have a stake in proving that the custom is legally adequate. This stake creates a disincentive to criticize competitors' practices. This principle was clearly demonstrated to a Ford engineer who publicly released a Ford-made film showing that General Motors' Corvair had a propensity to go out of control. He was subsequently told that Ford would eventually feel the effects if its competitor suffered.<sup>33</sup>

Finally, secrecy as a condition of settlement can be effectively used by manufacturers to assure that a successful design case will not benefit future plaintiffs. For example, a Corvair owner who received permanent brain damage from breathing fumes emitted by a defective Corvair heater was

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1934) (defendant argued unsuccessfully that evidence should be admitted that the power lines that electrocuted a workman conformed to a height requirement specified in a United States Department of Commerce manual).

30. "Cases will no doubt be infrequent in which any defendant will be held liable for failing to do what no one in his position has ever done before." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 33, at 167 (4th ed. 1971), *quoted in* 4 *THE RESEARCH GROUP, INC.*, *supra* note 11, at 112.

31. See Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645, 667 (1967).

32. The letters were eventually discovered in a junkyard and sold to General Motors for \$20,000 by the junk dealer after he learned that a consumer organization, the Center for Auto Safety, was interested in them. *Auto Safety Oversight Hearing—Corvair Heater: Hearings Before the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 136-51 (1972).

33. See Nader & Cathcart, *Auto Safety: Impact of VW Verdicts*, 8 TRIAL, July-Aug. 1972, at 20. Volkswagen also evaded normal discovery procedures by injured plaintiffs. *Id.*



obliged to alter documents filed with the court as a condition of settlement. The changes indicated that his case had been based on a manufacturing defect rather than a design defect that would clearly have affected other consumers. Further, the settlement required that he deliver all relevant engineering data, all medical reports and the Corvair in question to defendant, and that he and his attorney promise never to "talk, write, or otherwise advertise or promulgate the facts of the . . . case, and particularly the theory of liability relative to the defective heater."<sup>34</sup>

Even though it is difficult to win a lawsuit against a manufacturer whose product conforms to industry standards, it is important for industry custom to remain mere evidence of due care. If it becomes dispositive of the issue, industry will have little incentive to improve its products as technological advances are made.<sup>35</sup>

[I]f a state of the art defense were applied literally and absolutely, only manufacturers whose product design was "less than" the industry average would be held liable for a consumer's injuries sustained in a product-related accident.

The likely result is economically appropriate only if the average manufacturer will undertake all economically efficient measures to make its products safer and to prevent accidents, even without legal standards which clearly make it worthwhile for the manufacturer to do so. However, this is *not* likely to happen.<sup>36</sup>

"Institution of a state of the art defense of this type is untenable. All courts that have considered the issue have resoundingly rejected imposition of such a defense. Each of these courts [has] strongly emphasized that the allowance of this defense would reduce the safety of [a manufacturer's] product."<sup>37</sup>

The legal study commissioned by the Interagency Task Force on Product Liability<sup>38</sup> points to *Horn v. General Motors Corp.*<sup>39</sup> to show how industry would abuse an absolute state of the art defense. In that case, plaintiff was injured when the impact of an auto collision drove her into sharp prongs designed to hold the horn cap on her car's steering wheel. General Motors unsuccessfully argued that this method of attaching the horn

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34. *Auto Safety Oversight Hearing—Corvair Heater*, *supra* note 32, at 220-21. The story of General Motors' tactics reached the public when plaintiff's attorney, Edward Wolf, was subpoenaed by and testified before the Senate Commerce Committee. *Id.* at 217.

35. *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353, 368 (E.D.N.Y. 1972); *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 70 (Ky. 1973).

36. 4 THE RESEARCH GROUP, INC., *supra* note 11, at 113.

37. *Id.* at 111.

38. See text accompanying notes 11-18 *supra*.

39. 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976). See also *Badorek v. General Motors Corp.*, 11 Cal. App. 3d 902, 935, 90 Cal. Rptr. 305, 328 (1970).

cap was common among auto manufacturers and that therefore no liability should accrue even though a simple, equally cheap alternate design—attaching the horn with screws—was available.

The “second collision” auto cases show the value of products liability litigation in improving industry customs. These cases imposed an obligation to produce cars that do not enhance collision injuries. In *Larsen v. General Motors Corp.*,<sup>40</sup> the Eighth Circuit held an auto manufacturer negligent in designing a Corvair steering assembly that impaled the driver in a collision. Steering assemblies in automobiles are now either padded or collapsible. In *Ford Motor Co. v. Zahn*,<sup>41</sup> the same court ruled that an auto manufacturer has to provide dashboards free of sharp objects that produce lacerations in collisions. This is now the usual practice.<sup>42</sup>

The state of the art defense is advocated on the grounds that it is necessary to deter courts from requiring manufacturers to make accident proof products at any expense. Professor Richard A. Epstein, an insurance industry consultant, states that manufacturers need protection from courts that declare products defective “regardless of the cost” necessary to improve them.<sup>43</sup>

As it is the jury which normally weighs the costs of additional safeguards against the benefits they provide, it is not always clear what factors have been most responsible for decisions to hold a manufacturer liable for an injury caused by his product. The cases indicate, however, that the feasibility of alternate designs or manufacturing processes are critical to these decisions. No product is required to be totally safe at any cost. In the words of *Larsen*,

[A]n automobile manufacturer is under no duty to design an accident-proof or fool-proof vehicle . . . .

. . . .

. . . While all risks cannot be eliminated nor can a crash-proof vehicle be designed under the present state of the art, there are many common-sense factors in design, which are or should be well known to the manufacturer that will minimize or lessen the injurious effects of a collision.<sup>44</sup>

In fact, many cases emphasize the relatively low cost of safer products. In

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40. 391 F.2d 495 (8th Cir. 1968).

41. 265 F.2d 729 (8th Cir. 1959).

42. See also *Volkswagen of Am., Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974); *Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex. Civ. App. 1974); cases cited in Nader & Page, *supra* note 31.

43. Epstein, *Products Liability: The Gathering Storm*, 1 REGULATION, Sept./Oct. 1977, at 15. See generally Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978).

44. 391 F.2d at 502-03.

*Garcia v. Halsett*,<sup>45</sup> plaintiff's arm was mangled when he reached into a washing machine to get his clothes out and it began spinning. The court stated that the manufacturer could have installed microswitches to shut off the machine's electricity when the door was opened for a cost of two dollars. In *Driesonstok v. Volkswagenwerk, A. G.*,<sup>46</sup> the Fourth Circuit pointed out that the auto manufacturer has a duty to adopt a safe design if it involves "no substantial increase in price," but that a safety feature that "would appreciably add to cost, add little to safety and take an article out of the price range of the market" would be a different story.<sup>47</sup> In short, the practicality of alternative designs is critical to judgments regarding possible product defects; manufacturers are not liable for all product related injuries.

Industry spokesmen like Professor Epstein believe that the court system should not judge the "delicate tradeoffs" necessary in designing a "safe" product.<sup>48</sup> It is true that juries and judges may reach different decisions on these "delicate tradeoffs" than manufacturers; the outcome of court decisions is therefore likely to be unpredictable and may well create uncertainty at the time the product is designed.<sup>49</sup> The alternative to court consideration of industry safety practices, however, is industry self-regulation, a concept sure to bring certainty to industry designers at unbearable expense to consumers.

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45. 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

46. 489 F.2d 1066 (4th Cir. 1974).

47. *Id.* at 1073. See also *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1187 (5th Cir. 1974); *Balido v. Improved Mach. Corp.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973); *Roda, Products Liability—The "Enhanced Injury Case" Revisited*, 8 FORUM 643 (1973).

Other examples include *Chicago, B. & Q.R.R. v. Krayenbuhl*, 65 Neb. 889, 91 N.W. 880 (1902), in which a boy was seriously injured playing with the giant turntable at a railroad roundhouse. As pointed out by Professor Lambert, these devices are like carousels without music and have a fatal fascination for children. Despite this toy-like appearance, however, they will often slice off the foot of a child playing with them. Such injuries can be prevented by the use of a one dollar lock. In view of the slight burden of adequate precautions, the railroad was required to use the safety device in the overriding interest of accident prevention. *Impact on Products Liability*, *supra* note 2, at 1612 (statement of Thomas Lambert, Jr.).

Likewise in *LaGorga v. Kroger Co.*, 275 F. Supp. 373 (W.D. Pa. 1971), the court observed that a child's jacket would not have exploded into flame and badly injured the wearer if "only a few cents" more had been spent to add a flame retardant chemical to its external layers. *Id.* at 379.

*Muncy v. General Motors Corp.*, 357 S.W.2d 430 (Tex. Civ. App. 1962), involved an automobile ignition switch that permitted removal of the key without turning the engine off. General Motors, the manufacturer of the car, held patents on designs that would have prevented any injuries. See Nader, *Automobile Design: Evidence Catching Up with the Law*, 42 DEN. L. CENTER J. 32, 36-37 (1965).

48. Epstein, *Products Liability: The Gathering Storm*, *supra* note 43, at 18.

49. Uncertainty is the norm in many business judgments, however, and is not necessarily bad. In fact, it may well lead to more deliberate decisionmaking.

## II. COMPLIANCE WITH GOVERNMENT REGULATIONS AS AN ABSOLUTE DEFENSE

Another measure proposed to lower insurance costs is the creation of an absolute defense of compliance with government regulations.<sup>50</sup> Traditionally, compliance with government standards has been one factor considered in determining whether manufacturers have acted with due care, but it has not been the only factor considered.<sup>51</sup> "Consumer product safety standards set a safety floor below which consumer products must not fall. If persons are injured by products which meet these mandatory standards, they nevertheless are entitled to their day in court to demonstrate that additional precautions were necessary in the exercise of due care."<sup>52</sup>

Like the state of the art defense, this defense would adversely affect safety incentives. Manufacturers have enormous power to influence the formation of government standards, with the result that the standards are frequently political compromises at best. Some regulations adopted by governmental bodies are "rubber-stamped versions of existing, voluntary standards adopted by manufacturers within an industry."<sup>53</sup> Under the Consumer Product Safety Act,<sup>54</sup> in fact, safety standards are to be developed by outside parties.<sup>55</sup> Because of the expense involved, the only outsiders

50. *E.g.*, S. 403, 95th Cong., 1st Sess. (1977); H. 1078, Mass. Legis., 1977 Sess.; A. 3070, 197th N.J. Gen. Assembly, 2d Ann. Sess. (1977). *Contra*, the National Motor Vehicles Safety Act of 1966, 15 U.S.C. § 1397(c) (Supp. V 1975); the Consumer Product Safety Act, *id.* § 2074(a).

51. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *LaGorga v. Kroger Co.*, 275 F. Supp. 373 (W.D. Pa. 1971); *Nevis v. Pacific Gas & Elec.*, 43 Cal. 2d 626, 275 P.2d 761 (1954); *Volkswagen of Am., Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974); *Ebers v. General Chem. Co.*, 310 Mich. 261, 17 N.W.2d 176 (1945); *Berkebile v. Brantly Helicopter Corp.*, 219 Pa. Super. Ct. 479, 281 A.2d 797 (1971); *Kemp v. Wisconsin Elec. Power Co.*, 44 Wis. 2d 571, 172 N.W.2d 161 (1970).

52. Brodsky & Cohen, "Uncle Sam," *the Product Safety Man: Consumer Product Safety Standards in the Marketplace and in the Courts*, 2 HOFSTRA L. REV. 619, 648-49 (1974); *see* 4 THE RESEARCH GROUP, INC., *supra* note 11, at 127-30; RESTATEMENT (SECOND) OF TORTS § 288C (1965).

Drug manufacturers have traditionally argued that because the Food and Drug Administration approves their products for marketing they should not be liable for injuries caused by those products. *Lewis v. Baker*, 243 Or. 317, 413 P.2d 400 (1966), *overruled in* *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 528 P.2d 522 (1974). In *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 241 N.W.2d 822 (1976), the Nebraska Supreme Court apparently accepted compliance with FDA regulations as a complete defense, stating that FDA approval of the drug should not be subject to challenge "because some other experts may differ in their opinions." *Id.* at 200, 241 N.W.2d at 828; *see* THE RESEARCH GROUP, INC., *supra* at 140; Stetler, *Responsibility of the Food and Drug Administration Under Federal Tort Claims Act*, 72 DICK. L. REV. 580, 595 (1968) (suggesting government be partially or entirely liable for injuries caused by FDA-approved drugs because of the "[v]ast, virtually absolute powers" FDA has over drugs).

53. FINAL REPORT, *supra* note 9, at VII-30; 4 THE RESEARCH GROUP, INC., *supra* note 11, at 131.

54. 15 U.S.C.A. §§ 2051-2081 (1974 & Cum. Supp. 1977).

55. *Id.* § 2056. *See generally* Brodsky & Cohen, *supra* note 52, at 635-40.

interested in undertaking such an effort are manufacturers' organizations. Moreover, government regulations may be seriously out of date even if they were adequate when enacted. Finally, safety standards cannot include every circumstance of product danger; they often address only some aspects of design.

If a court finds that a governmental standard is rigorous, up-to-date and directly addresses the defect alleged, compliance with that standard should be dispositive of the manufacturer's due care. But the courts should not be precluded from judging the value of the standards on a case by case basis. For if compliance with regulation were a defense to products liabilities claims, manufacturers would lose the incentive to improve products as soon as the standard was set. Manufacturers would also have a much greater incentive to lobby for weaker regulations. Current products liability litigation encourages industry to push for mandatory, industry-wide safety standards;<sup>56</sup> once a company has lost a major products liability suit, it has an interest in seeing that its competitors also invest money in injury prevention devices.

Industry has far greater resources than the federal or state governments. The United States drug industry, for example, has annual sales of sixteen billion dollars per year, while the Food and Drug Administration has an annual budget of sixty-five million dollars to oversee all drug manufacture and production.<sup>57</sup> If industry relied passively on government regulation in safety matters, marketplace safety would plummet. But so long as the private incentive of litigation is maintained, product safety will be self-policing. Moreover, it is interesting to note that the businessmen who now argue that compliance with government regulations should be their only obligation have traditionally complained about government interference with their working lives.<sup>58</sup>

Small businessmen frequently argue that they do not have the resources to keep up with technological developments and that it is unrealistic to expect them to do anything beyond ascertaining what the government requires. Manufacturers are increasingly obliged to conduct sophisticated safety tests on products and to master complex scientific information. For example, in 1900 a manufacturer could throw some chemicals into a tub, come out with a hair dye, put it in an attractive package and sell to anyone who would buy. By contrast, the manufacturer in *Brown v. Roux*

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56. See Whiteside, *Annals of Advertising*, NEW YORKER, Dec. 19, 1970, at 42, 66.

57. Telephone Interview with Ed Nida, Food and Drug Administration, Washington, D.C. (Mar. 10, 1978).

58. *Impact on Product Liability*, *supra* note 2, at 653 (testimony of William Wallace); *Product Liability Insurance: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 345 (1977) (testimony of Thomas Lambert, Jr.).

*Distributing Co.*<sup>59</sup> was expected to be familiar with the extensive published literature on the chemistry and toxicology of hair dye. He was held "to an expert's knowledge of the arts, materials and processes" and required "to keep reasonably abreast of the scientific knowledge and discoveries concerning his field."<sup>60</sup> Manufacturing is no longer a question of mixing and packaging, and rightly so. Society's interests in preventing injury have overcome the interests of small businessmen in manufacturing complex products without sufficient expertise.

Much of the impetus for the compliance defense and other "reforms" promoted by industry springs from a felt need for certainty. The present products liability system is unpredictable. Decisions are made by bodies immune to political pressure—courts and juries. In contrast, decisions on the administrative level are easily influenced by manufacturers. One suspects this is why manufacturers feel comfortable with government standard setting, but not with obligations generated by courts. What industry fears is decentralized decisionmaking.<sup>61</sup>

Stringent, up-to-date government safety standards would obviously increase predictability for manufacturers and for consumers protected by the standards. But government safety standards do not consistently rise to this level, in part because of industry pressure to keep them ineffectual. And when there is a conflict between manufacturers' needs for absolute legal predictability and the societal need for continual scrutiny and improvement of product safety, the latter need should prevail.

### III. CUTOFF DATES FROM TIME OF SALE

State and federal bills that would put an absolute statute of limitations on products liability claims running from the time of design or sale of the product have also been proposed; the limit sought is usually between four and eight years.<sup>62</sup> These proposals would effect a major change in statutes of limitations, which now run from the time an injury occurs<sup>63</sup> or, under an alternative and more modern view, from the time it was or should have been discovered.<sup>64</sup>

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59. 312 S.W.2d 758 (Mo. 1958).

60. *Id.* at 763.

61. Nader, *The Corporate Assault on Products Liability*, 13 TRIAL, Oct. 1977, at 39.

62. *E.g.*, S. 403, 95th Cong., 1st Sess. (1977) (ten years); H. 1581, 100th Ind. Legis., 1st Sess. (1977) (five years); A. 3070, 197th N.J. Gen. Assembly, 2d Ann. Sess. (1977) (ten years); S. 527, Pa. Legis., 1977 Sess. (six years); S. 766, 65th Tex. Legis., Reg. Sess. (1977) (four years); H. 1162, 45th Wash. Legis., 1st Extraordinary Sess. (1977) (eight years); S. 444, Wis. Legis., 1977-1979 Biennial Sess. (1977) (six years).

63. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1102 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir.), *cert. denied*, 351 U.S. 989 (1956).

64. *See, e.g.*, *Urie v. Thompson*, 337 U.S. 163, 170 (1949).

The purpose of the traditional statutes was to permit repose on the part of the manufacturer and to force plaintiffs to assert their claims while the evidence was still fresh. These reasons would also support a statute of limitations that begins to run at the time of sale—an absolute statute. There are strong countervailing reasons against the choice of this trigger date, however.

An absolute statute of limitations could bar a lawsuit even before the product is purchased or injury has occurred. The right to sue could be extinguished even before the right of action arises. The injustice of this situation to individual consumers has led past courts to construe ambiguous statutes of limitations to run from the time of injury.<sup>65</sup>

The vast majority of products liability litigation does not involve old products. According to the Task Force Report, most products liability suits are brought for injuries caused by products five years old or less. Only thirteen percent of the cases in which the date of manufacture was known involved products over twenty years old. According to insurance industry data on closed claims, 97.1 percent of bodily injuries occur within five years of purchase.<sup>66</sup> An absolute statute of limitations would, therefore, have no effect on the vast majority of claims.

The new statutes would, however, bar recovery for product related injuries that are first observable many years after exposure. It would become impossible to sue a manufacturer for causing cancer through chemical exposures five to forty years earlier<sup>67</sup> or birth defects that become apparent when the child reaches puberty ten to fifteen years after exposure.<sup>68</sup> The proposed statutes of limitations would also bar products liability suits based

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65. *E.g.*, *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 403, 335 N.E.2d 275, 278-79, 373 N.Y.S.2d 39, 43-44 (1975); *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976).

66. FINAL REPORT, *supra* note 9, at VII-16. Since comparatively few cases involve old products, it is hard to understand why statutes of limitations from time of sale are being promoted as a solution to the products liability insurance crisis. The Task Force, in an unusual lapse of good sense, argues that although the data do not suggest that this measure would be effective, a 10 year statute for certain products should be considered because the insurance companies have "concern about the potential loss regarding older products that may be an important factor of the increase in liability premiums for manufacturers of durable goods." *Id.* (citation omitted).

67. *Chemicals and the Future of Man: Hearings Before the Subcomm. on Executive Reorganization and Government Research of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess. 181 (1971) (report of the Surgeon General); Searle, *Chemical Carcinogens and Their Significance for Chemists*, 6 CHEMISTRY IN BRITAIN 5, 7 (1970).

68. Recovery might be precluded for other injuries from chemical exposure, such as cataracts and other eye injuries that take years to develop, *cf. Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973); *Krug v. Sterling Drug, Inc.*, 416 S.W.2d 143 (Mo. 1963) (allowing recovery for such injuries), and injuries that occur from premature deterioration of products (such as carbon monoxide poisoning from defective auto heaters), *Defective Auto Heaters: Hearings Before the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 217 (1972).

on defects in durable goods. Workplace machinery lawsuits are sometimes initiated long after sale, since these machines are built, priced and sold to last a long time.<sup>69</sup> Products liability lawsuits give the manufacturers of such products an incentive to ensure the long term safety of their products. With absolute protection from lawsuits, a manufacturer would be unlikely to spend the extra money for a durable metal for his elevator, or even to inquire about the behavior of his product over the long run.<sup>70</sup>

Old products litigation is a hardship to the manufacturer because the evidence is not fresh. But whatever difficulty the manufacturer faces in dredging up old records of manufacture and maintenance, and in obtaining expert testimony, must also be faced by the plaintiff in proving that the product was defective according to the standard of care applicable at the time of sale.<sup>71</sup> The plaintiff may also have difficulty proving that the product was defective when it left the defendant's hands and that improper maintenance or normal wear and tear later in the product's life did not cause the defect.<sup>72</sup> A plaintiff bringing a lawsuit after a time lapse must also show that the product was properly handled and maintained, and must explain why, in the intervening years, others were not similarly injured.<sup>73</sup> With the heavy burden of gathering evidence placed on such plaintiffs, the complaint that old products litigation is arbitrary seems unjustified.

Manufacturers must assume responsibility for slumbering defects in their products no less than for immediate ones. Further, the effect of an absolute statute of limitations on insurance fees is highly speculative. The incentive for long-term safety of products should not be undermined merely in hope of lowering insurance rates.

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69. Manufacturers who wish to limit their liabilities may specify the useful life of the product, making sure that the expiration date is clearly and permanently visible for all subsequent users. Directions for proper maintenance should also be provided, and maintenance services can be provided by the manufacturer, at nominal cost, subsequent to sale. Manufacturers are reluctant to specify a "useful life" for their products, as this specification may be a competitive disadvantage in the short run when compared to similar products without deadline labels. Still, in the long run, this label would prevent misunderstanding and litigation.

70. "A bomb is nonetheless deadly if it contains a time mechanism." *Fredericks v. American Export Lines, Inc.*, 227 F.2d 450, 452 (2d Cir. 1955).

71. *E.g.*, *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973). *See also* *Crump v. Clark Equip. Co.*, 481 F.2d 667 (5th Cir. 1973); *Mondshour v. General Motors Corp.*, 298 F. Supp. 111, 114 (D. Md. 1969); *Rheingold, Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325 (1971).

72. *Kaczmarek v. Mesta Mach. Co.*, 463 F.2d 675 (3d Cir. 1972); *Ulrich v. Kasco Abrasive Co.*, 532 S.W.2d 197 (Ky. 1976); *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 457 Pa. 321, 319 A.2d 914 (1974).

73. *Gomez v. Bliss*, 27 Misc. 2d 649, 211 N.Y.S.2d 246 (Sup. Ct. 1969); *see* *Schindley v. Allen-Sherman-Hoff Co.*, 157 F.2d 102 (6th Cir. 1946).



## IV. CONCLUSION

The products liability legal system should aim at maximizing incentives to design and manufacture safe products. It should, therefore, continue to base liability on a determination of fault, whether it is couched in terms of negligence or in the newer language of "defective products."<sup>74</sup>

Insofar as the proposals described herein would tend to insulate manufacturers from a case-by-case determination of their responsibility, these proposals would reduce incentives to test and discard unsafe products. They would also make the job of the regulatory agencies more difficult and subject to greater antiregulatory pressure.

The breadth and flexibility of the common law have permitted it to effectively discipline the harmful effects of technology. It should not now be restricted by the relatively narrow interests of manufacturers and insurers. Manufacturers' difficulties should instead be alleviated through the use of self-insurance<sup>75</sup> or plans to reduce the time and cost of litigation without making inroads on consumers' common law rights.

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74. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

75. See S. 1611, 95th Cong., 1st Sess. (1977); H.R. 7711, 95th Cong., 1st Sess. (1977) (creating a mechanism for exempting private products liability trusts from taxation).