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Frank J. Vandall

OUR PRODUCT LIABILITY SYSTEM: AN EFFICIENT SOLUTION TO A COMPLEX PROBLEM

FRANK J. VANDALL*

INTRODUCTION

In recent years, a substantial volume of material has been written contending that the American civil justice system is out of control,[1] jury awards have improperly reached astronomical proportions[2] and the American penchant for tort litigation, particularly product liability tort litigation, is on the verge of causing the ruination of the business and manufacturing communities, if not the entire republic.[3] The writers of these gloomy materials claim, in alarmist fashion, that product liability and medical malpractice litigation has delivered the "insurance crisis." This "crisis" is evidenced by the diminished availability of insurance in certain areas and for certain activities, and by the dramatically increased rates charged for insurance coverage.[4] It is asserted that these increased rates have compelled physicians to leave the medical profession, forced small businesses to close their doors, pushed major manufacturers into bankruptcy and priced many types of insurance beyond the reach of those who need it.[5] The most frequent and popular suggestion offered by the alarmists as a cure for this dilemma is a call for far-reaching tort reform, including comprehensive reformation in the product liability area.[6]

This article begins by suggesting that available data is woefully insufficient to support such catastrophic reform; hard facts are simply not available to support the notion that a real problem exists in the product liability insurance area.[7] It suggests that since most goods and services

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* Professor of Law, Emory University. B.A., 1964, Washington and Jefferson College; J.D., 1967, Vanderbilt University; LL.M., 1968, S.J.D., 1979, University of Wisconsin. The author wishes to acknowledge the research assistance provided by Deborah Mann, Joice Elam, James L. Hickey and Jane Tuttle.

1. *See, e.g.*, Address by William M. McCormick, Chairman and Chief Executive Officer, Fireman's Fund Insurance Companies, entitled *The American Tort System: A Time to Rebalance the Scales of Justice* (Jan. 7, 1986), *reprinted in* 52 VITAL SPEECHES OF THE DAY, Feb. 15, 1986, at 267.

2. *Id.* at 268.

3. *See* Molotsky, *Drive to Limit Product Liability Grows as Consumer Groups Object*, N.Y. Times, Mar. 1, 1986, at 32, col. 1.

4. *See* Ross, *Reforms, Profits Swallow Up Insurance Crisis*, L.A. Times, Jan. 5, 1987, at 2, col. 3 [hereinafter cited as Ross].

5. *See generally* S. REP. No. 422, 99th Cong., 2d Sess. 2 (1986) [hereinafter cited as *Senate Report*]. For a discussion on manufacturers' liability and bankruptcy, see Couric, *The A.H. Robins Saga*, 72 A.B.A. J. 56 (1986).

6. *See* Rose and Abbott, *Federal Liability Law Would Lessen Uncertainty*, Legal Times, July 9, 1984, at 15; Mayer, *Change Urged In Product Liability Law; Product Liability Laws Overhaul Being Sought*, Wash. Post, Mar. 10, 1982, at D7; *see also* Reed and Watkins, *Product Liability Tort Reform: The Case for Federal Action*, 63 NEB. L. REV. 389 (1984).

7. *See infra* notes 16-32 and accompanying text.

have increased in price over the last fifteen years, it should not be surprising that the price of insurance has also increased. The article's second section, an economic analysis of the alleged "crisis," suggests that the free market — rather than government regulation or tort reform — may be more helpful in lowering the price and increasing the availability of insurance.[8] Section three examines our American system of tort recovery based upon strict liability. It explores the underlying rationale for using a strict liability analysis in product liability actions and suggests that abolition of this system could lead to the establishment of socialized medicine as a means of compensating victims. The section advocates manufacturer responsibility, not government largesse, as the appropriate means for compensating product liability victims. It concludes that strict liability is less expensive than other alternatives.[9] The fourth section evaluates the inadequacies of several product liability reform proposals.[10] The final section examines the benefits derived from "loss shifting."[11] It concludes that the American product liability system in its current form is working well and provides a relatively inexpensive mechanism for resolving the complicated tensions which frequently arise when a product liability tort is committed.

I. CRISIS OR FICTION? THE PRODUCT LIABILITY INSURANCE PROBLEM

As with any public policy issue, proponents and opponents represent divergent interests and points of view. This phenomenon frequently results in confusion and makes understanding and resolution of the issue in question more difficult. To some extent, this helps to describe the confusing and sometimes contradictory nature of the product liability insurance problem. There is no question that during recent years, impetus for reform in the product liability area has reached a fever pitch.[12] Manufacturers, suppliers and insurance companies argue that the product liability insurance problem is in need of attention and reform.[13] High insurance rates may force some manufacturers out of business.[14] Claiming that a product liability insurance "crisis" exists,

8. *See infra* notes 33-40 and accompanying text.
9. *See infra* notes 48-53 and accompanying text.
10. *See infra* notes 54-85 and accompanying text.
11. *See infra* notes 86-93 and accompanying text.
12. *See supra* note 6.
13. The American Insurance Association, which represents the interests of property/casualty insurance companies, found that by 1986 the number of federal product liability suits had increased by 750% since 1974. During the same period of time, the average jury verdict in product liability cases had increased from under $400,000 to over $1.8 million. *Product Liability Reform Act: Hearings on S. 2760 Before the Committee on the Judiciary of the United States Senate*, 99th Cong., 2d Sess. 666 (1986) [hereinafter cited as *Hearings*] (statement of Peter A. Lefkin, Counsel, Am. Ins. Ass'n). However, these allegations are not new. *See* Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C.L. REV. 677, 678 (1978) [hereinafter cited as Johnson] (manufacturers faced with either paying dramatically increased fees for product liability insurance or going out of business due to the product liability insurance "crisis").
14. The introduction to Senate Bill 2760, proposed in 1986, provides:
The inefficiency and unpredictability of the product liability system have been linked to the increasing cost and unavailability of liability insurance. An increas-

the insurance industry has supported the move for legislative protection of manufacturers' interests.[15]

As far back as 1977, the Interagency Task Force on Product Liability, under the direction of the United States Department of Commerce, studied a variety of problems in the product liability area.[16] The Task Force attempted to define the product liability coverage problem and to provide insight into possible legislative reforms that would ease the plight of manufacturers faced with going out of business due to high insurance rates. The study revealed that manufacturers of industrial chemicals and certain consumer goods, such as pharmaceuticals, power mowers, ladders and medical devices, are most severely affected by heightened insurance costs.[17] The Task Force also examined the availability and affordability of insurance, both in small and large manufacturing firms, and found that some small businesses are forced to choose between purchasing products liability insurance at very high premiums or foregoing the protection of insurance entirely.[18] The Task Force concluded that the product liability insurance problem was not of "crisis" proportions.[19]

The Task Force identified three primary causes for the rise in product liability insurance premiums: the insurance industry's rate-making procedures, the tort-litigation system, and unsafe manufacturing practices employed by those seeking to be insured.[20] Several less substantial causes also were identified, including consumer and worker awareness, increases in the number and complexity of products, product misuse and inflation.[21] Certainly all of these factors have impacted the cost of product liability insurance premiums, but inflation is frequently over-

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> ing number of companies, whether they make such products, are [sic] sporting goods, textile manufacturing equipment, machine tools, medical devices or vaccines, cannot buy adequate insurance coverage. Some have had their insurance cancelled or have experienced reduced coverage with increased deductibles at higher prices. Others cannot obtain coverage at any price.

Senate Report, *supra* note 5, at 2.

15. Although the American Insurance Association supports product liability reform, it found that Senate Bill 2760 was incomplete in developing solutions to the product liability insurance problem. The Association has placed substantial blame on the legal system for the current problems in the product liability area. *See Hearings*, *supra* note 13, at 666, 670.

16. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1977) [hereinafter cited as TASK FORCE FINAL REPORT]. The Task Force also published a seven volume legal study that was prepared by independent contractors as part of the study of product liability problems. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: LEGAL STUDY (1977) [hereinafter TASK FORCE LEGAL STUDY].

17. Schwartz, *Proposed Remedies for the American Problem: U.S. Governmental Activity*, 29 MERCER L. REV. 437, 440 (1978) (setting forth a summation of Task Force findings and noting that the problem of increased cost of product liablity insurance is more severe for smaller firms in all industries because, unlike a large manufacturer which produces goods in large quantities, a small firm may not be able to pass on the cost of product liability insurance in the price of its goods). Mr. Schwartz was chairman of the Interagency Task Force on Product Liability.

18. *Id.*

19. *Id.*

20. TASK FORCE FINAL REPORT, *supra* note 16, at I-20.

21. *Id.* at I-29 to I-31.

looked as a contributing factor, and is especially deserving of further discussion.

Increased insurance rates are not so alarming when considered in relation to inflationary trends evident in other industries and for other types of goods and services. For example, in 1972, the price of a basic Datsun 1200 was $2,051.[22] By 1987, the price of a basic Nissan Sentra, a successor to the Datsun 1200, was $6,199.[23] This represented a 300% price increase over fifteen years. Moreover, between 1967 and 1983, the Consumer Price Index for all goods increased by almost 200%.[24] And, during that same sixteen year period, hospital room rates increased over 500%![25] It is not surprising that insurance rates have doubled or tripled over the years when the cost of virtually all other services and goods have also doubled or tripled. When manufacturers, sellers and insurance companies argue for tort reform, they rarely mention the substantial impact inflation has had on this issue.

Another confusing area is that of insurance company profitability. Although the insurance industry claims that the current tort system is causing bankruptcy throughout the industry, recent earnings by the insurance industry are impressive and appear to be at an all-time high. Figures complied by A. M. Best Company, an independent firm that follows the insurance industry, show that in 1985, property/casualty stock prices rose fifty percent, twice the rate of increase for the Dow Jones Industrial Average.[26] In the first quarter of 1986, these stocks were up an additional twenty-six percent.[27] According to the Insurance Services Office, which advises insurance carriers on rate setting, operating profits of insurance companies tripled during the first nine months of 1986, compared to the same period in 1985.[28] Earnings rose to $3.6 billion, up from $1.2 billion in 1985.[29] If a "crisis" within the insurance industry ever existed, current profitability reports would suggest that it now has passed.

In attempting to assess the nature of the insurance problem, it becomes clear that few facts are available from the insurance companies.[30] Information is not generally available as to the amount of insurance

22. *Subcompact Cars, Datsun 2-door*, CONSUMER REP., Apr. 1972, at 224, 226.

23. *Small Cars, Nissan (Datsun) Sentra 2-door*, CONSUMER REP., Apr. 1987, at 211, 213.

24. *Health Care Costs and Their Effects on the Economy, 1984: Hearings Before the Joint Economic Committee, Congress of the United States*, 98th Cong., 2d Sess. 93 (1984) (statement of James Hacking, Assistant Legislative Counsel, American Association of Retired Persons).

25. "The tremendous growth in health care expenditures is expected to continue on into the future. By 1990, total health spending is expected to reach some $758 billion, more than double where it is today." *Id.*

Damage awards in personal injury suits also have increased over the last few years. A portion of the increase is likely due to higher medical expenses.

26. Scherffius, *The Insurance Crisis: Causes and Cures From a Plaintiff's Lawyer's Perspective*, ATLANTA LAW. 15, 17 (Fall 1986) (quoting figures from A.M. Best Co.).

27. *Id.*

28. Ross, *supra* note 4.

29. *Id.*

30. *Hearings*, *supra* note 13, at 305 (statement of Robert L. Habush, President, Association of Trial Lawyers of America).

sold, the income generated from premiums, the amount paid out in claims and, most importantly, the amount made as profit.[31] This lack of data from insurance companies makes it unclear whether an insurance "crisis" truly exists.[32]

II. An Economic Analysis of the "Crisis"

Assume that product liability insurance rates have increased dramatically, and that some manufacturers and sellers have been unable to obtain insurance. As a result, they have been forced to go out of business. Many question what should be done about this situation.

The real question is — should *anything* be done? Economists would submit that no action should be taken; instead, the influences of the marketplace should be permitted to eventually provide an appropriate remedy.[33] This type of economic analysis, as applied to manufacturers and sellers unable to obtain insurance, might be more easily understood by way of analogy to the gasoline shortage of the middle-to-late seventies.[34]

During that period, the price of gasoline went up dramatically. People altered their driving habits by driving less and taking vacations closer to home.[35] Automobile manufacturers — especially the Japanese — responded with smaller, more fuel-efficient cars.[36] At the same time, many oil-producing countries, such as Saudi Arabia, the United States, England and Mexico, expanded their drilling for, and production of, oil and gas.

The result has been that much more oil is currently available and the price of oil has decreased. The natural influences of the marketplace have worked, and the oil shortage "crisis" has been resolved.

Similarly, some economists might recommend that the product liability insurance crisis be handled the same way — by allowing the market forces of supply and demand to establish the appropriate price for insurance.[37] If insurance prices continue to rise, new producers will inevitably enter the marketplace to sell insurance. In fact, this is already occurring. In several states, cooperative groups of local physicians are providing medical malpractice insurance for their members.[38] Indeed,

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31. *Id.*

32. In declaring unconstitutional a statute limiting awards in medical malpractice suits, an Illinois judge found that there was no empirical data to support the claim that a medical malpractice insurance crisis exists. 5 Law. Alert 10 (1986) (quoting from Bernier v. Burris, No. 85 CH 6627 (Cook County Cir. Ct., Ill., Dec. 19, 1985)).

33. *See* M. & R. Friedman, Free to Choose 13-18 (1980) [hereinafter cited as Friedman]; A. Polinsky, An Introduction to Law and Economics 11 (1983); R. Posner, Economic Analysis of Law 208, 485 (2d ed. 1977); P. Samuelson, Economics 368-70 (11th ed. 1980) [hereinafter cited as Samuelson].

34. *See, e.g.*, *The Big Travel Mess*, Newsweek, June 18, 1979, at 22; *A Global Deal on Prices*, Time, Jan. 14, 1974, at 15; *The Painful Change to Thinking Small*, Time, Dec. 31, 1973, at 18.

35. *Hitting the Road Again*, Newsweek, June 7, 1982, at 55; *The Holiday Jitters*, Newsweek, May 28, 1979, at 67.

36. Every major manufacturer now has at least one small, fuel-efficient model.

37. *See* Friedman, *supra* note 33.

38. James R. Posner, an insurance expert, reports:

these co-ops are "reasonably successful."[39] With this heightened competition, insurance premiums invariably will become lower. Eventually, the insurance price and availability "crisis" will have resolved itself.[40]

Other questions have been raised about what should happen to manufacturers and sellers that cannot obtain insurance. The economic response lies in whether the companies are profitable or not. If they are profitable, an insurance company will eventually offer them insurance, most likely at high rates. If companies are not profitable, insurance will be more difficult to obtain because premiums may be out of reach for such marginally-operated companies. For companies that are not profitable because of high risks and large losses in product liability lawsuits, increased insurance rates are the market's way of proclaiming their products as too risky or dangerous.

Eventually in these high-risk situations, the issue focuses on whether certain products are necessary to society despite their inordinate risks. Where these questions arise, and where private sector insurance coverage is not available, the government may be called upon to decide whether to support companies that are struggling due to their production of necessary, high-risk products. For example, in the mid-seventies when companies refused to produce swine flu vaccines because of liability fears — particularly caused by their inability to secure adequate insurance — the federal government insulated the manufacturers from liability.[41] Similarly, the government has absorbed part of

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> Nearly forty malpractice insurance companies were formed between 1975 and 1982 with the sponsorship of state medical societies and other physician groups. Eleven state hospital associations also formed insurance companies, either in the United States or "offshore." In part, these companies were formed to replace lost coverage in states where commercial companies had withdrawn entirely from the market. . . . These companies have made primary insurance available to doctors and hospitals in nearly all parts of the country.

Posner, *Trends in Medical Malpractice Insurance, 1970-1985*, 49 LAW & CONTEMP. PROBS. 37, 39 (1986).

For a report on alternatives that may reduce the "malpractice crisis" faced by doctors, see Browning, *Doctors and Lawyers Face Off*, 72 A.B.A. J. 38 (1986). For an examination of the effect of high rates on other classes of insureds, see Blodgett, *Premium Hikes Stun Municipalities*, 72 A.B.A. J. 48 (1986); Goldberg, *Manufacturers Take Cover*, 72 A.B.A. J. 52 (1986); Lynch, *The Insurance Panic For Lawyers*, 72 A.B.A. J. 42 (1986).

39. Hirsh, *Malpractice Crisis of the '80s*, 14 LEGAL ASPECTS OF MED. PRAC. 4, 5 (1986). Although Dr. Hirsh found that physician-owned companies have been reasonably successful, he acknowledged that these companies also are facing an affordability crisis.

40. To enhance competition, the government should facilitate entry into the insurance market. Prices rise and fewer firms compete when market entry is artificially restricted by government regulation. *See* P. MACAVOY, FEDERAL-STATE REGULATION OF THE PRICING AND MARKETING OF INSURANCE (1977) (Professor MacAvoy argues that deregulation of the insurance industry should be considered). For the traditional view, see M. RHODES, 2A COUCH ON INSURANCE 2D § 21.1 (1984) (states have the power to regulate the insurance business).

41. Congress, to ensure that the swine flu program would proceed, enacted legislation in 1976 to resolve the problem. *See* Pub. L. No. 94-380, 90 Stat. 1113 (amended 1978) (current version at 42 U.S.C. § 247b (Supp. 1987)). The legislation provided that the United States, not the manufacturers or other participants in the program, would be liable for all injuries caused by the vaccine. The United States retained the right to obtain indemnification against any manufacturer or other participant whose negligence caused the claim. In effect, drug manufacturers were made ultimately liable for negligence, while the burden of strict liability awards fell on the government. In addition, the United States

the higher costs of "DPT" vaccines.[42] In sum, if the market is allowed to respond to the forces of supply and demand, and the continued manufacture of some necessary products is thereby threatened, the government will likely follow with corrective measures.

III. Contrasts in Compensation: The Differences Between Strict Liability and Socialized Medicine

To better understand the efficiency and value of our strict liability system, one must first examine a different system. For example, England's approach to personal injury compensation is a substantial contrast to the approach taken in the United States. England has a "cradle-to-grave" compensation system.[43] If a British citizen is seriously injured by a defective product, the government's social insurance program automatically pays for the victim's medical expenses, drugs, prosthetic devices and a portion of his or her lost wages.[44] Compensation is the government's responsibility. The drawback of the British system is its great expense since the cost of this compensation is paid by an enormous tax on citizens and industry.[45] Consequently, citizens have limited disposable income, resulting in a gross national product far below that of the United States.[46] England's high taxes also prohibit industry from making badly needed investments.[47]

In comparison with England's welfare state, the strict liability sys-

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funded $230 million of liability insurance to protect the drug manufacturers against indemnity claims. P. Keeton, D. Owen & J. Montgomery, Products Liability and Safety 356 (1980).

42. The Diphosphothiamine vaccine — commonly known as "DPT" vaccine — is given to children to protect them from diptheria, pertussis (whooping cough) and tetanus.

Lederle Laboratories announced in May of 1986 that, to combat rising liability insurance costs, it would nearly triple the price of its DPT vaccine to private physicians from $4.29 to $11.40 per dose. Wash. Post, July 16, 1986, at 17. However, manufacturers have made an approximate $80 million windfall profit from the price increases. The government pays for half, or up to $100 million, of the cost of the DPT vaccine sold annually. Atlanta J. & Const., Aug. 24, 1986, at 6A.

43. *See* Gibson, *Products Liability in the United States and England: The Differences and Why*, 3 Anglo-Am. L. Rev. 493 (1974) [hereinafter cited as Gibson]; Plummer, *Products Liability in Britain*, 9 Anglo-Am. L. Rev. 65 (1980) [hereinafter cited as Plummer]; *see also* Samuelson, *supra* note 33, at 816-17.

44. Interview with Professor A. L. Diamond, Director of the Institute for Advanced Legal Studies, London, England (March 17, 1984); 1 Royal Comm'n on Civ. Liab. and Compensation for Pers. Inj. 48 (1978). Neither Gibson nor Plummer attach much weight to the impact of socialized medicine on the non-development of British product liability law. Gibson states: "For some reason, English courts have not been as reluctant to create new criminal offenses as they have been to expand civil remedies." Gibson, *supra* note 43, at 518. Plummer entirely overlooks the role of "free" medical care:

> Unless a person injured by a defective product can invoke the terms of the 1978 Consumer Safety Act, or is fortunate enough to be able to convince a court he should have a civil cause of action for breach of a duty imposed by a statute which does not specifically provide for such an action, he must rely on the contractual remedies provided by the Sale of Goods Act of 1893 or be able to prove negligence.

Plummer, *supra* note 43, at 68-69 (footnotes omitted).

45. *See* Samuelson, *supra* note 33, at 816-17.

46. *Id.*

47. *Id.*

tem in the United States is relatively efficient and inexpensive. Nonetheless, many product liability reform proposals have been designed to eliminate strict liability.[48] This is unfortunate because in some aspects our existing strict liability system works as a free market substitute for socialized medicine, supplanting the need for wholesale governmental intervention in the compensation process. Our strict liability system does not require a huge tax on citizens or industry to support it, since only those found liable must pay.[49] The costs of legal representation are also borne directly by the private sector. Through the "entrepreneurial-lawyer system," representation of injured parties is made possible by the contingent fee.[50] When an injury occurs, an attorney is consulted, and the attorney takes the case if he or she believes it is viable. If the attorney improperly evaluates the case, the attorney will recover nothing and, in fact, may lose thousands of dollars worth of time invested over a substantial period.

If the United States were to abandon its present compensation system in favor of one patterned after England's socialized-medicine approach (and I am not suggesting this course be followed), there would be little need for trials or for any strict liability analysis whatsoever. The verdicts would be small. Few incentives for suit would exist, and most damages would be compensated by the state. In contrast, our concept of strict liability has developed over time to make it easier for consumers to obtain compensation from manufacturers or sellers when injured by their products. In so doing, the scales of justice have been slightly tilted in favor of the consumer.[51]

Accordingly, the private sector must bear the resulting costs. In many cases, the burden will be on the manufacturer or seller to either obtain insurance or raise the price of the product, thus spreading the

48. The most recent proposal was Senate Bill 2760, 99th Cong., 2d Sess. (1986), which was considered by the Senate during the 1986 term. *See Hearings*, *supra* note 13. The bill provided a return to a negligence standard for product liability actions. *See also* H.R. 5471, 99th Cong., 2d Sess. (1986), which also used a negligence standard for product liability suits. However, "[a]fter withering on the legislative vine since June, product liability legislation has died on the 99th Congress." Starobin, *Senate Product Liability Bill Killed After Brief Filibuster*, 44 CONG. Q. 2316 (1986).

49. However, others would argue that the cost of liability is borne by our entire society, through distribution of losses through insurance companies and in the increased cost of products. *See infra* notes 86-93 and accompanying text.

50. For a thorough discussion of several advantages provided by the contingent fee system, see Schmidt, *Contingent Fee: Key to the Courthouse*, 92 CASE & COM. 2-10 (Jan.- Feb. 1987).

51. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 534-38 (5th ed. 1984) [hereinafter cited as PROSSER AND KEETON ON THE LAW OF TORTS]; D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY 286-89 (2d ed. 1981). A leading strict liability case is Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (*see infra* notes 90 & 91 and accompanying text).

> The . . . policy operating in [the evolution of strict liability] law is a clear recognition of the effect upon consumers of mass production and distribution of goods and services aided by the mass media of advertising. The policy which the decisions exemplify can be stated as an attempt to tilt the balance more favorably toward the single or individual consumer injured by a vast impersonal merchandising juggernaut.

Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1086 (1965).

loss, rather than the burden of the entire loss (often thousands of dollars) being placed on an innocent injured person.[52] It is also more desirable — and less expensive — from a societal view to have a product liability system founded on strict liability rather than a compensation system that is part of an enormously expensive welfare state as in England.[53]

IV. A CRITIQUE OF REFORM GOALS AND PROPOSALS

The foremost goal of those who advocate product liability reform is to shield manufacturers and sellers from liability.[54] The theory is that product liability suits cause the price of products to increase, and this is supposedly undesirable. However, when product liability litigation results in higher prices, one of the most valuable components of product liability law is actually functioning in an appropriate manner. Such price increases act as a deterrent,[55] as a beacon to consumers that a given product is dangerous, defective or has serious drawbacks. Aware of a potential hazard, consumers then discontinue purchasing these detrimental products.[56] Fewer consumers are injured; fewer suits are filed. The system provides a meritorious economy. Manufacturers and sellers seek to abrogate this valuable function when they advocate reform legislation.

In addition, legislatively protecting manufacturers from the impact of risk-taking is economically unwise. A natural component of business activity involves the evaluation and taking of risks. Increases in the prices of products — because of product liability losses and higher insurance rates — also act as signals to manufacturers that something may be wrong with their products. These price signals should not be blunted.[57]

A second goal of reform is to eliminate strict liability and to return to a negligence standard in product liability cases.[58] There are three

52. "The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers . . . rather than by the injured persons who are powerless to protect themselves." Greenman v. Yuba Power Products, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

53. Samuelson, *supra* note 33, at 816-17.

54. *See Hearings*, *supra* note 13, at 2. Reforms, such as caps on damages, elimination of strict liability, presumption of due care and statutes of repose, were developed to protect the manufacturer from suit, provide the manufacturer with a strong defense and limit or cut off the manufacturer's liability. The intent is to reduce the amount the seller spends on damages.

55. Deterrence is a major function of tort law. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 51, at 25-26.

56. A. Polinsky & W. Rogerson, Products Liability, Consumer Misperceptions, and Market Power (May 1982) (working paper available from Emory University Law & Economics Center).

57. Calabresi, *Product Liability: Curse or Bulwark of Free Enterprise?*, 27 CLEV. ST. L. REV. 313, 322-23 (1978). *But see* Comment, *Solving the Products Liability Insurance Crisis: A Study of the Role of Economic Theory in the Legislative Reform Process*, 31 MERCER L. REV. 755 (1980)(advocates adoption of statute limiting manufacturers' risk to solve product liability insurance crisis).

58. *See supra* note 48 and accompanying text.

major flaws in this proposal. First, there are important differences between a cause of action founded on negligence, and one brought under strict liability.[59] Second, the creation of a "new" cause of action will generate confusion over what it means and what remains of former actions. This confusion will take years to clarify. During the clarification period, valid claims will be lost due to attorney and judicial misunderstanding. Finally, the applicable standards and procedures comprising our present product liability system have evolved over more than 100 years.[60] There is simply insufficient data for casting this system aside.[61]

Understanding the goals of those who advocate product liability reform helps to provide a partial insight into the dynamics of this issue. To more fully comprehend the scope of reform's impact, however, one must examine some of the proposals advocated.

A. *Drawbacks to the "Double-Burden" Approach*

The "double-burden" proposal refers to the plaintiff's double burden of proof required in a strict liability action. One such approach comes from a literal reading of Section 402A of the Restatement (Second) of Torts[62] which requires that a plaintiff prove that the product is both "defective" *and* "unreasonably dangerous."[63] The Restatement approach places a significantly increased burden of proof on the plaintiff — contrary to the rationale underlying strict liability, which serves to *reduce* the plaintiff's heavy burden of proof. In an ineffectual effort to reduce the plaintiff's burden, the California Supreme Court, in *Cronin v. J.B.E. Olson Corp.*,[64] ruled that a plaintiff in a product liability action must prove that the product is "defective" and also the "proximate cause" of the injury.[65] The *Cronin* approach, like the Restatement approach, re-

59. An important difference, then, between negligence and strict liability is, authors have suggested, that in negligence the key consideration for the courts is the major policies involved, that is, whether the risk exceeds the benefit of the activity. In practice, however, the courts avoid discussing the policy questions. Therefore, a distinction between negligence and strict liability is that in strict liability the court is asked to face directly the question of whether the risk of the activity exceeds the benefit. This express weighing of critical policies in products liability cases is the central theme of *Escola, Greenman*, and *Cronin*. The proposed similarity between negligence and strict liability has existed only because of the commentators' molding of negligence into something it has never been: a frontal consideration of important social policies.

Vandall, *"Design Defect" in Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 68-69 (1982) [hereinafter cited as Vandall].

60. For a historical analysis of strict liability in the product liability area, see Vandall, *supra* note 59, at 62-65; Wade, *Strict Tort Liability for Products: Past, Present and Future*, 13 CAP. U.L. REV. 335 (1984); 1 PROD. LIAB. REP. (CCH) ¶ 4500.

61. *See supra* notes 30-32 and accompanying text.

62. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

63. Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286, 296 (1966).

64. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (the plaintiff in *Cronin* recovered damages under a strict liability theory after sustaining injuries caused by defective safety hasps sold by the defendant).

65. *Id.* at 124, 501 P.2d at 1155, 104 Cal. Rptr. at 435. Cases following the *Cronin* approach include Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (*Cronin* approach applies to manufacturing defects and design defects); Hen-

quires two fairly heavy burdens. A substantial flaw in *Cronin* is the "proximate cause" requirement:

> The term "proximate cause" is unclear and superfluous. Findings of proximate cause and defect involve the same policy inquiries, and it is repetitious and misleading to ask whether the defect was the proximate cause of the damage. The social policy question is asked once when the court weighs the various factors to see whether the product is defective. It is confusing to the court, the jury, and the attorneys to ask the same policy question again, but under a different label, proximate cause.[66]

Another "double-burden" approach was included under the proposed Model Uniform Product Liability Act.[67] Under Section 104 of the Act, the plaintiff must prove that the product is "unreasonably unsafe."[68] Clearly, the plaintiff would also have two burdens under this proposal: to prove that the product is "unreasonable" *and* that it is "unsafe." In effect, the end result is that the plaintiff must prove negligence twice. This will confuse the jury and perhaps lead to unintended verdicts.

B. *Statutes of Repose*

Numerous states have adopted statutes of repose as part of their reform packages. Statutes of repose are sometimes confused with statutes of limitations, but the impact of a repose statute is different from a statute of limitations.[69] Statutes of repose alter the torts system by providing a fixed period of time from the date of the original sale, usually five to twelve years, in which a product liability suit must be brought.[70] As a result, a product liability suit may be barred by a statute of repose before the injury even occurs.

Although statutes of repose will prevent some victims of injury from an old defective product from suing for damages,[71] the majority of plaintiffs involved in product liability litigation have not been injured by

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derson v. Harnischfeger Corp., 12 Cal. 3d 663, 527 P.2d 353, 117 Cal. Rptr. 1 (1974) (wrongful death action based on theory of strict liability for defective design of crane); Titus v. Bethlehem Steel Corp., 91 Cal. App. 3d 372, 154 Cal. Rptr. 122 (1979) (plaintiff recovered under theory of strict liability for injuries caused by product lacking adequate safety features).

66. Vandall, *supra* note 59, at 75.

67. 44 Fed. Reg. 62,714 (proposed Oct. 31, 1979).

68. Model Uniform Prod. Liab. Act § 104 (1979).

69. A statute of limitations differs from a statute of repose; a statute of limitations begins to run *at the time of injury* while a statute of repose begins to run *at the date of sale*. *See* Vandall, *Undermining Torts' Policies: Products Liability Legislation*, 35 AM. U.L. REV. 673, 682 n.51 (1981) [hereinafter cited as *Undermining Torts'Policies]*; *see also* Comment, *Limiting Liability: Products Liability and a Statute of Repose*, 32 BAYLOR L. REV. 137, 143 (1980) (statutes of repose will bring uniformity to the limitations area of product liability, reduce uncertainty by placing a limit on manufacturers' liability and lower insurance costs for manufacturers).

As of February, 1986, at least eighteen states had passed statutes of repose: Alabama, Arizona, Florida, Hawaii, Illinois, Indiana, Kentucky, New Hampshire, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Wisconsin and Wyoming. 5 LAW. ALERT 7 (1986).

70. *Undermining Torts' Policies*, *supra* note 69, at 682-83.

71. Gingerich, *The Interagency Task Force "Blueprint" for Reforming Product Liability Tort*

extremely old products. Ninety-seven percent of bodily injuries occur within five years of purchase.[72] Consequently, a statute of repose will have little effect on most claims.[73] However, there are several types of victims on whom a statute of repose will have a devastating impact. First, are those whose injuries are revealed years after the initial exposure, such as victims of "DES"[74] or asbestos.[75] Second, are persons who are injured by long-lasting workplace machinery.

In battles over the constitutionality of product liability statutes of repose, ten states have held that the statutes violate the "open courts" provisions of their constitutions,[76] while four states have held they violate "equal protection."[77] On the other side, four states have held their statutes of repose were constitutional under their "open courts" provisions.[78]

C. *The "Statutory Compliance" Defense*

A popular reform proposal calls for holding a product non-defective where the manufacturer has complied with existing statutes.[79] Compliance with governmental standards is one factor considered at common law in determining whether a manufacturer has acted with due care.[80] However, to provide — absolutely — that compliance with a governmental standards statute would create a presumption that a product was not defective nor unreasonably unsafe would be an unfair defense to a product liability claim. The likely result will be that manufacturers will prevail when they otherwise would have lost due to

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Law in the United States, 8 GA. J. INT'L & COMP. L. 279, 288 (1978) (citing *Task Force Final Report*, *supra* note 16, at VII-25).

72. TASK FORCE FINAL REPORT, *supra* note 15, at VII-16.

73. Johnson, *supra* note 13, at 690.

74. Diethylstilbestrol — commonly known as "DES" — is a drug formally used for the prevention of miscarriages. In 1971, the Federal Food and Drug Administration banned the drug for such use because of evidence that the drug was ineffective in preventing miscarriages and was dangerous to unborn children. THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 202-03 (1987).

75. Product liability claims arising from workers who were exposed to asbestos decades ago have only been filed in recent years as asbestosis victims have become ill. *See* Preger, *Asbestos-Related Disease* (Book Review), 6 AM. J.L. & MED. 390, 391 (1980); Richard & Meier, *Lawyers Lead Hunt For New Groups of Asbestos Victims*, Chicago Daily Law Bulletin, Feb. 19, 1987, at 1, col. 1.

76. The ten states are Alabama, Arizona, Florida, Kentucky, New Hampshire, South Dakota, Rhode Island, Texas, Wyoming and Utah. 5 LAW. ALERT 6 (1986).

77. The four states are Hawaii, Oklahoma, South Carolina and Wisconsin. *Id.* at 7.

78. The four states are Illinois, Indiana, North Carolina and Oregon. *Id.*

79. For example, the Model Uniform Product Liability Act provided: "When the injury-causing aspect of the product was, at the time of manufacture, in compliance with legislative regulatory standards or administrative regulatory safety standards relating to design or performance, the product shall be deemed not defective . . . ." Model Uniform Product Liability Act § 108(A), 44 Fed. Reg. 62,714, 62,730 (proposed Oct. 31, 1979).

Widespread adoption of such a statute would influence both the availability of insurance and the size of the premium. TASK FORCE LEGAL STUDY, *supra* note 16, at 130; *see also* DEFENSE RESEARCH INSTITUTE, PRODUCTS LIABILITY POSITION PAPER No. 9 (1976).

80. Johnson, *supra* note 13, at 687; PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 51, at 233.

the plaintiff's failure to rebut the statutory presumption of due care.[81]

The defense of statutory compliance will discourage manufacturers from developing safer products. To the contrary, the proposal provides financial incentives for manufacturers to lobby for weaker regulations, rather than to develop safer products.[82] Opponents of the statutory compliance defense argue that the current product liability system is one in which decisions are made by institutions that are immune from political pressure, such as courts and juries.[83] Other institutions, however, are not immune. It is well known, for example, that manufacturers frequently influence administrative agencies to adopt less rigid safety standards.[84] Because of this influence, manufacturers prefer to have agencies — rather than courts — set applicable standards.[85] If the statutory compliance proposal is adopted, we will undoubtedly see weaker guidelines resulting in more harmful products.

V. THE EFFICIENCY OF "LOSS SHIFTING"

"Loss shifting" refers to the theory whereby an injured party is compensated by shifting the loss and financial liability from the injured party to the seller, and indirectly from the seller to its customers and insurers.[86] The cost of loss shifting is thereby shared by hundreds of thousands, not by one victim, nor by one defendant. The seller may also choose to redesign the product, engage in research or drop the product from its line.[87]

Historically, courts were slow to identify loss shifting. Judges struggled with the concepts of negligence, fraud, express warranty and im-

81. *Compare* Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 495 A.2d 348, 358 (1985) ("Compliance with a statutory standard is evidence of due care, but compliance with the standard does not preclude finding of negligence for failure to take additional precautions."), *with* Jones v. Hittle Serv., 219 Kan. 627, 632, 549 P.2d 1383, 1390 (1976) ("Compliance is evidence of due care and that the conforming product is not defective, and may be conclusive in the absence of a showing of special circumstances.").

82. Manufacturers have the power to influence the formation of government standards. Agencies often adopt regulations that are "rubber-stamped" versions of voluntary standards already practiced by the industry. There will be no incentive to improve products since the existing practice is acceptable. Johnson, *supra* note 13, at 687-88.

83. *Id.* at 689.

84. According to the so-called interest group or economic theory of legislation, market forces provide strong incentives for politicians to enact laws that serve private rather than public interests, and hence statutes are supplied by lawmakers to the political groups or coalitions that outbid competing groups. The widespread acceptance of interest group theory has led to suspicion about much of what Congress does, creating, in turn, a climate hospitable to judicial interference with legislative outcomes.

Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986); *see also* R. POSNER, THE FEDERAL COURTS 271 (1985); Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 876 (1973); Forward to Green, *Nader Group Report on Antitrust Enforcement: A Summary*, 4 ANTITRUST L. & ECON. REV. 1 (1970).

85. Johnson, *supra* note 13, at 689.

86. J. DOBBYN, INSURANCE LAW 229 (1981); R. KEETON, INSURANCE LAW -BASIC TEXT § 3.1 (1971).

87. Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

plied warranty, but were sometimes seemingly frustrated because the plaintiffs continually lost their cases. The watershed case in this area was *Escola v. Coca-Cola*,[88] wherein Justice Traynor, in a concurring opinion, relied on loss shifting to support his theory of absolute liability. In *Escola*, he stated that the loss should rest on the manufacturer rather than the injured consumer:

> The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public.[89]

In *Greenman v. Yuba Power Products*,[90] Justice Traynor adopted a strict liability theory similar to that previously suggested in *Escola*. Since *Greenman*, courts have handed down a line of decisions with a unified purpose: to protect the consumer. Recent decisions have emphasized policies favoring injured parties: loss shifting, availability of insurance and injury prevention.[91] This trend to shift the loss away from the injured party and onto the manufacturer culminated in *Barker v. Lull Engineering Co.*,[92] a decision which held that once the plaintiff has successfully proven a *prima facie* case, the burden of proof shifts to the manufacturer who must demonstrate that the design benefits exceeded the costs of avoiding the defect.[93] The expansive *Barker* decision was premised on loss shifting and a desire to protect the consumer. It represents the efficient manner in which victims of defective products are compensated for their injuries. It is a policy which deserves to be maintained.

VI. CONCLUSION

Before any product liability reform is adopted, the relevant facts must be uncovered and carefully examined. However, the search for facts which would support the need for product liability reform is a snipe hunt. We are told that industry is in trouble due to excessive product litigation, yet we find that, in general, industry is flourishing. We are told that insurance rates must increase or the insurers will be forced out of business, but we see that in terms of profit, the insurance industry has recently had gold-banner years. Also, few critical facts are available from the insurance industry in regard to the amount of insurance sold, the number of claims made, and the amount of claims paid. How can legislatures intelligently pass reform measures when such crucial facts are lacking? The answer appears to be that most product liability re-

88. 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).
89. *Id.* at 462, 150 P.2d at 441.
90. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
91. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); Pike V. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).
92. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
93. *Id.* at 432-33, 573 P.2d at 457-58, 143 Cal. Rptr. at 237-38.

form proposals are a result of the lobbying pressures brought by manufacturers, the defense bar, and insurance companies.[94] Unfortunately, the present reality is that product liability reform is based on political pressure, *not facts*.

The goal of those who would "reform" our product liability system is clear: to shift the cost of injuries back onto the shoulders of consumers and victims. In a country with socialized medicine, like England, this would make sense because consumers would still be able to recover for medical expenses and a portion of lost wages. In the United States, however, it means that manufacturers and insurers would profit at the expense of injured consumers. If the "reformers" are successful in transforming their proposals into reality, injured parties will no longer be fairly compensated. And such a change would represent a shameful reversal of over 100 years of reasoned development in product liability theory.

94. *See* Page and Stephens, *The Product Liability Insurance "Crisis:" Causes, Nostrums and Cures*, 13 CAP. U.L. REV. 387 (1984) (the tort system is not one of the forces pushing product liability insurance rates skyward).