

The meeting was called to order at 9:00 a.m. Senator Close was in the Chair.

PRESENT: Senator Close
Senator Hernstadt
Senator Dodge
Senator Raggio
Senator Sloan
Senator Ford
Senator Don Ashworth

ABSENT: None

SB 105 Clarifies procedures and requirements for disclaimer of property interests.

For further discussion of this measure, see the minutes of the meetings for January 30, 1979 and February 5, 1979.

The Committee reviewed SB 105 and the California statute from which it came, for any substantive changes.

Following a brief discussion, a subcommittee consisting of Senators Don Ashworth, Raggio and Hernstadt was assigned the task of creating a mock-up of the two measures. The Committee will review this mock-up and amend SB 105 as necessary.

No action was taken at this time.

SB 106 Limits liability of manufacturers and sellers for defective products.

Mr. Frank Bender testified in support of this measure. He stated that 2 years ago, only 4 states had product liability laws. Since that time, 14 more states have added some time limit as to when product liability suits can be brought and the federal government is considering several proposals in that regard.

He further stated that the AFL-CIO and the United Steelworkers of America supported this type of legislation. In reading from the State Legislator's Guide to Product Liability Claims, Mr. Bender commented that "1 out of every 7 PL suits involves a machine that is over 40 years old; 1 out of every 4 involves a machine that is over 30 years old; and one-half of all cases involve a machine that is over 20 years old. Many, if not most of these machines have been sold, re-sold, modified, and maintained and operated at various levels of safety and efficiency."

Mr. Bender stated that insurance premiums have increased drastically because of PL cases; anywhere from 1800% to 4000% in one year.

He further commented that he felt that the statute of limitations should be based on the useful life of the product rather than an arbitrary figure of 12 years.

Senator Sloan questioned what the impact of this would be on actions of strict liability in the area of food. There are certain types of products that inherently involve a potential for harm, regardless of the level of care that is taken by the manufacturer. The theory of the law has been that if a manufacturer was going to engage in that type of activity, he would have to assume the burden because he could disperse the cost among all his customers. It was Senator Sloan's opinion that SB 106 would eliminate those kinds of actions.

Mr. Bender had to concur with that observation.

Senator Hernstadt pointed out that if an individual in California bought a product which had been manufactured in Nevada and was defective, any course of action would be governed by the laws of intrastate commerce.

Senator Raggio concurred and further commented that any limitation placed on liability in Nevada would not affect causes of action that occur in other states.

Mr. Bender stated that less than 1% of a manufacturer's products are sold in Nevada on a national average. He further stated that another benefit of a product liability statute in Nevada is that it would be an encouragement to manufacturers to locate their operations here.

Bob Guinnan, Nevada Franchised Auto Dealers, testified in support of this measure. He stated that the Auto Dealers were anxious to have something done in the area of product liability, whether it be this bill or the uniform draft being recommended by the Department of Commerce. He further commented that last year alone, retailers and manufacturers paid an estimated \$2 3/4 billion for product liability insurance.

Cal Dunlap, Washoe County District Attorney, testified that he was opposed to SB 106 but that he would favor some appropriate change in the product liability law. It was his position that any change in the existing case law in this area, be very carefully thought out.

Kent Robison, Nevada Trial Lawyers Association, testified in opposition to SB 106. He disagreed with Mr. Bender's observation that the present PL law in Nevada is a deterrent to new industries moving here. He cited a case that he is presently involved in wherein a man leaned up against a coke machine and it short-circuited and electrocuted him. Mr. Robison stated that they know that the short-circuit came from the machine but the experts are unable to specifically identify the area from which it emanated. It was his opinion that if SB 106 were passed, this type of action would be precluded from being brought.

Peter Neumann, Nevada Trial Lawyers Association, stated that he disagreed very strongly with Mr. Bender's comment that over one-half of all PL cases involve equipment that is over 20 years old. He distributed for the Committee review, an article from Consumer Reports entitled "Adding Insult to Injury: The Drive to Change the Product-Liability Laws." (see attached Exhibit A)

Senator Dodge asked if a manufacturer would be able to protect himself if, at the time he sold the product, he told the consumer that it had a useful life of "x" number of years.

Mr. Neumann responded that it would not be an absolute defense but it would be a practical consideration for the jury.

The Committee adjourned at this time for the General Session. They will reconvene immediately following their adjournment.

The meeting was called to order at 11:00 a.m. Senator Close was in the Chair. All members were present.

Discussion continued on SB 106 with Mr. Peter Neumann.

Mr. Neumann stated that this measure would completely emasculate common or decisional law and return it to negligence. It would go back to the old concept of "reasonable care." Under that, if a manufacturer could prove that he had a good quality control program and was very careful in the manufacture of his product, he could not be held liable for defective items.

In referring to the time limitation problem, Mr. Neumann stated that in an article entitled "The Asbestos Time Bomb," it was proven that the asbestos industry knew, between 1929 and 1931, that their product was causing cancer. If SB 106 were passed, it would preclude those people who had been working with asbestos all these years, from collecting for damages.

Senator Raggio indicated that one of the main concerns of the proponents of SB 106 were the high insurance premiums. He asked if the Nevada Trial Lawyers Association had been able to verify whether or not the increase in premiums was directly attributable to recovery in PL cases.

Mr. Neumann responded that Congressman LaFalce from New York State, had proposed a bill which would allow Congress to find out. However, he did not believe the figures were in yet.

He further stated that on page 414 of the Consumer's Report there was a study of the incidence of such claims.

Allan R. Earl, with the law firm of Galatz, Earl and Bigger, in Las Vegas, testified in opposition to this measure. He concurred with the previous testimony and further commented that he believed Section 4 would be in conflict with the existing Evidence Code. He felt the question specifically revolved around whether or not a change in design after an injury has occurred, is allowable into evidence. He stated that under our present Evidence Code, it would be. He further stated that the California Supreme Court recently ruled on that exact question and found that it is proper and socially desirable to allow evidence into trial of the fact that the design of a product had been changed after the injury.

Mr. Earl stated that according to this bill, under certain circumstances an injured party must go against the seller first before he can go against the manufacturer; and under different circumstances, it is just the opposite. Mr. Earl pointed out that this is in conflict with the present Joint Tort Feasors statute.

Bill Sapeta, Filper Corporation (a manufacturer of capital equipment) informed the Committee that the insurance industry's losses on product liability coverage prior to 1969 payouts, were about 135% of the premiums collected; from 1969 to 1973, the payouts increased to 279%. He stated that premiums have increased 154% from 1969 to 1973.

Mr. Sapeta also stated that claims in 1969 amounted to 27,300 with an average loss of \$2,800 per claim. In 1973, there were 34,300 claims with an average loss of \$8,500.

Mr. Sapeta further stated that his company was very supportive of consumer's rights in the area of product liability.

Mr. Bill Shell of Las Vegas testified in opposition to this measure. He asked that the Committee give it careful consideration before taking any action.

Mr. Ken Collin of Las Vegas concurred with the previous remarks in opposition to this measure.

No action was taken at this time.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Cheri Kinsley
Cheri Kinsley, Secretary

APPROVED:

Senator Melvin D. Close, Jr., Chairman

CONSUMER REPORTS

A PUBLICATION OF
CONSUMERS UNION
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JULY 1978

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PLYMOUTH
HORIZON

How good are Polaroid's 'instant' movies?

Adding Insult to Injury

The Drive to Change the Product-Liability Laws

A 13-year-old boy named Richard Grimshaw was a passenger in a new 1972 *Ford Pinto* when the car stalled and was hit from behind by a second car. The *Pinto's* fuel tank exploded. The driver, Lily Gray, a 52-year-old neighbor, was burned to death. Grimshaw himself was burned over 90 percent of his body. He lost his nose, his left ear, and part of his left hand. He has undergone more than 60 operations since the accident.

Grimshaw sued the Ford Motor Co. for compensation. Grimshaw's lawyers contended that the *Pinto* fuel tank was located in a dangerous position, three inches behind the differential, and constructed so it would burst under even a moderate impact. In addition to compensation for injury, Grimshaw asked for punitive damages, claiming that Ford was aware of the *Pinto's* hazardous design when it marketed the car. Judge Leonard Goldstein advised the jury it could award punitive damages if the evidence showed Ford had intentionally caused the injury or willfully disregarded safety.

The trial was concluded early this year. The jury awarded Lily Gray's family \$666,280 and Grimshaw \$2,841,000 as compensation for injury. And in an action that stunned the legal and insurance worlds, not to mention the Ford Motor Co., it awarded Grimshaw \$125-million in punitive damages, the highest product-injury award ever.

According to post-trial interviews with jurors, the most convincing evidence was a series of films of low- and moderate-speed collision tests conducted by Ford. Invariably, gasoline spurted out of the tank.

Another important piece of evidence was an internal memo from two Ford engineers, referring to a regulation proposed by the National Highway Traffic Safety Administration. The engineers weighed the auto industry's annual costs and benefits in installing a particular fire-safety device on fuel tanks in all cars and light trucks.

The cost was pretty easy to figure. First, it was assumed the price per vehicle would have to be increased \$11. Then, assuming an annual output of 12.5 million vehicles, the engineers estimated the total cost would be \$137-million.

The benefit estimate was much more tentative. The engineers figured the maximum saving would be 180 lives, 180 cases of severe burns, and 2100 burned vehicles. Then,

using data provided by the NHTSA, they assigned a value of \$200,000 per death, \$67,000 per burn case, and \$700 per vehicle. That brought their estimate of the total benefit to \$49.5-million.

The obvious conclusion was that the benefit of the fire-safety device didn't justify the cost. Understandably, Grimshaw hadn't been consulted.

Grimshaw's lawyers had originally asked for \$100-million in punitive damages. But one of the jurors thought that wasn't nearly enough. He figured Ford had probably saved that much by not improving the fuel tanks, and the company would therefore be breaking even if it had to pay the same amount in punitive damages. So he proposed raising the amount to \$125-million to make it a real punishment, and the required 8 of the other 11 jurors went along. (Actually, Ford testified in court that the tanks have been modified several times since 1972; the greatest change came in 1977 when new Federal standards were established.)

The judge apparently considered the punitive award excessive and has since reduced it to \$3.5-million, and Ford has decided to appeal the case. But the figure that sticks in everyone's mind is \$125-million. That's one of the numbers business executives point to when they talk about a "product-liability crisis."

The cost of product-liability insurance has increased sharply in recent years, because, manufacturers say, more and more people are receiving larger and larger payments for injury. To many executives, this adds up to a crisis. So now manufacturers and insurance companies are demanding some radical changes in the law governing their responsibility toward consumers who are injured by defective products.

Is there really a crisis? And will those changes in the law benefit consumers? Skepticism seems in order.

FROM CAVEAT EMPTOR TO CAVEAT FABRICATOR

The product-liability issue is a lot more complicated than it used to be. For one thing, consumer products have changed enormously. Compare the old-fashioned hand saw with the modern power saw. The power saw is obviously more dangerous to use and difficult to manufacture without defects. And because manufacturers are under competitive pressure

to remodel their products often, defects are bound to appear now and then.

Consumers are also much more aware of their rights these days, and less willing to bear the cost of accidental injury. Where the potential award is large, a lawyer will usually take the case for a contingent fee, accepting a part of the settlement, usually about one-third, as payment. The contingent-fee arrangement makes it easier for an accident victim to sue, because the victim pays the lawyer nothing if the suit is unsuccessful. Of course, a lawyer won't get involved unless there's a good chance of winning.

The law covering product-related injuries has also changed significantly. Since the turn of the century, there has been a gradual shift from the principle of *caveat emptor* to the principle of *caveat fabricator*—from "Let the buyer beware" to "Let the maker beware." The legal changes have taken two different forms—changes in tort law and changes in contract law. Tort law deals with your responsibility to avoid hurting other people or damaging their property. Contract law deals with agreements you make with other people—for example, when you agree to exchange money for a new car.

One of the landmark tort cases was *MacPherson v. Buick Motor Co.*, in 1916. When one of the wheels of his Buick collapsed, MacPherson sued the company for negligence and won. The case is important because it was the first time a buyer was able to bypass the dealer and collect from the manufacturer. In earlier cases (excepting food, drugs, firearms, and chemicals), the buyer could collect only from the direct seller, and only if the seller were responsible for the defect. If you were hurt by a defect in your car, you were out of luck if you couldn't prove it was the dealer's fault.

The MacPherson case broadened the accident victim's opportunities to recover damages, since the victim could sue anyone in the chain from manufacturer to retailer. But to win the suit, the victim still had to prove (a) that the injury was caused by a product defect, and (b) that the defect was due to the defendant's negligence or carelessness.

Since negligence is hard to prove, some lawyers subsequently used the contract argument. They said that a product injury was evidence of a breach of contract. Even without a written agreement, this line of reasoning goes, the sale of a product involves a contract between the buyer and the seller. The contract includes an implied warranty that the product will perform as intended. If the product injures the buyer, the seller has breached the warranty and should pay for the injury.

Many judges accepted that argument. But at first they generally assumed that, since the buyer and seller were the principal parties to the contract, the buyer could sue the seller for breach of contract but could not sue the manufacturer. This assumption fell apart in 1960, in another automobile case, when the New Jersey Supreme Court decided that both the dealer and the manufacturer violated the implied warranty if the product proved defective.

While all of this was going on in the field of contract law, judges were having second thoughts about tort law. They were beginning to doubt that negligence was a central issue. The idea first turned up in 1944 in a case before the California Supreme Court. The plaintiff was a waitress who had been injured by an exploding *Coca-Cola* bottle. Her lawyer was able to prove that her injury had been caused by the bottler's negligence, and the court decided in her favor. But Justice Roger J. Traynor stated in a concurring opinion that it should no longer be necessary for the injured person to prove the manufacturer's negligence. His rationale was that the manufacturer is in a better position than the consumer to minimize the number of accidents. The manufacturer can also spread the risk of injury by buying insurance and including this cost in the price of the product.

It took another two decades to develop that idea. The California Supreme Court again took the lead in reshaping the law. In a 1963 case involving a power-tool injury, the court ruled in the victim's favor on the theory of strict liability. Justice Traynor summarized the court's opinion: "A manufacturer is strictly liable when an article he places on the market, knowing it will be used without inspection, proves to have a defect that causes injury to a human being."

Strict liability is the prevailing doctrine today, though interpretations vary a good deal from state to state. The plaintiff still has to show (a) that the injury was caused by the product, and (b) that the injury was due to a defect that was in the product when it left the manufacturer's hands. But the plaintiff doesn't have to prove that the defect was due to negligence.

RHETORICAL OVERLOAD

This evolution in the law, which has allowed many more consumers a chance to collect compensation for their injuries, has helped produce something approaching hysteria in industry. Here's how *Iron Age*, a magazine for executives of the metalworking industry, began a 60-page article on product liability: "First, there was the Great Depression. Then we had World War II. In time the economists will have to decide whether product liability can join such elite company of industrial, earthshaking crises."

As it turns out, there isn't much evidence to support this fear. Instead of comprehensive statistics, there are dozens of "horror stories" about juries' awarding accident victims huge amounts of money under bizarre circumstances. The \$125-million in punitive damages awarded in the *Pinto* case has joined the horror stories, even though the judge reduced the award to only 3 percent of that figure and Ford is appealing the judgment.

One of the favorite horror stories concerns a man who sued for injuries sustained while trying to cut his hedge with a lawn mower—obviously a misuse of the lawn mower. The man is supposed to have won an enormous settlement. The trouble is, no one has yet been able to verify that the incident

**The jury smiled
when they made the award.
They didn't know it was coming
out of their own pockets.**

They thought they were giving away the insurance company's money. So it wouldn't hurt to be generous.

Because insurance companies can afford to pay big awards. All they have to do is collect higher insurance premiums.

From you. And excessive awards eventually cost you money.

We don't object to paying fair awards. That's our business. But paying exaggerated awards inflates costs.

And can affect your insurance in other ways. Insurance companies might be forced to limit the kinds of coverage or the number of policies they write.

Insurance, after all, is simply a means of spreading risk. Insurance companies collect premiums from many people and compensate the few who have losses.



The price of insurance must reflect the rising cost of compensating those losses and the work that goes into doing that.

And that includes the escalation in jury awards.

That's why your premiums have been going up.

*No one likes higher prices.
But we're telling it straight.*

**CRUM & FORSTER
INSURANCE COMPANIES
THE POLICY MAKERS.**

ever occurred, that such a suit was ever filed, or that any settlement was ever made.

Until fairly recently, it was commonly believed that the number of product-liability claims had reached one million a year. Now there's evidence that the correct number is less than one tenth of that.

Most of the commentary on product liability has been directed to corporate executives, lawyers, and legislators. But in the last year or so, a few insurance companies have raised the issue in their advertising to the public. For instance, one ad for Crum & Forster Insurance Companies (above) is headlined, "The jury smiled when they made the award. They didn't know it was coming out of their own pockets." Another Crum & Forster ad repeats as fact the story about the man who tried to cut his hedge with a lawn mower. The same ad states, "In 1976 an estimated one million product liability claims were filed."

Aetna Life & Casualty has also tried the direct approach. One of its ads is headlined, "Too bad judges can't read this to a jury," referring to these words: "When awarding damages in liability cases, the jury is cautioned to be fair and to bear in mind that money does not grow on trees. It must be paid through insurance premiums from uninvolved parties, such as yourselves."

These ads are insulting and misleading. Insulting because they imply that judges and juries are irresponsible. Misleading because they imply that it's easy for a plaintiff to win a large award.

Actually, very few product-liability cases are taken all the way to a court verdict. According to a recent survey by

the Insurance Services Office, an industry research organization, about three out of four claims, generally the smaller ones, are settled without lawsuits. About one out of twenty claims reach a verdict, and three out of four verdicts favor the defendants (the companies being sued). Only half the people who file lawsuits receive any compensation at all.

IS THERE REALLY A PROBLEM?

Separating fiction from fact has been difficult because no one has kept reliable records of the number and size of product-liability claims. But the Government has recently completed a study that eliminates some of the confusion.

In January of 1976, representatives of several corporations asked the Ford Administration to look into the reasons for the rapid rise in the cost of liability coverage. The President established the Federal Interagency Task Force on Product Liability to study the matter. After 18 months of research, supervised by Professor Victor E. Schwartz of the University of Cincinnati College of Law, the Task Force published its final report last November. The Task Force focused on nine high-risk industries and concluded that the problem was real but much less serious than they had been led to believe. Here are some of the questions that were answered:

1. How many claims are filed in a year? The estimate for 1976—for all industry—was between 60,000 and 70,000, nowhere near the million claims bruted about in scare stories.

2. What's the trend in the number of claims? The number of claims per year has apparently been increasing at a much faster rate than the number of accidents.

3. What's the trend in insurance rates? For manufacturers of certain high-risk products—pharmaceuticals, medical devices, power lawn mowers, sporting goods, and ladders—the average premium increased 200 percent between 1975 and 1976. For some of those companies, the premiums have gone up as much as 1000 percent.

4. Are any companies having trouble getting coverage? A few. The problem is affordability, not availability. And this affects small companies much more than large ones.

5. Have any companies been forced out of business? Not solely because of product-liability difficulties. But the increased insurance costs may be one of several factors that cause companies to go out of business or merge with other companies.

6. Has product innovation been affected? Manufacturers of pharmaceuticals and medical devices seem to have slowed development of new products. Some small manufacturers may have stopped producing some of their high-risk products. But the Task Force wasn't sure whether consumers are better off or worse off without these products.

7. Have prices been affected? Evidently, but it's hard to say how much. For most products, the cost of product-liability insurance comes to less than 1 percent of the price. But for some kinds of sporting equipment, the insurance cost may be as much as 15 percent.

8. What are the main causes of the product-liability problem? The Task Force isolated three.

One is that the insurance companies have based their rates on guesswork. Until fairly recently, product-liability

losses weren't separated from general-liability losses. Then the product-liability losses went up so fast that the insurers haven't had time to develop a competent system for pricing product-liability coverage. The Task Force suspected that some insurers had been frightened into overcharging.

Another cause is that manufacturers haven't paid enough attention to preventing accidents. The Task Force observed that this seems to be changing, however, as the cost of insurance increases.

The third cause is uncertainty about the law. As noted earlier, the law has changed in the plaintiff's favor. Manufacturers and insurers are naturally worried that the trend will continue. Furthermore, courts' interpretations of the law vary from state to state. Because the law is so unsettled, insurance companies have trouble predicting losses and setting appropriate premiums.

What we have, then, is a collision of economics and the law. From the manufacturers' point of view, one way to lighten their economic load is to tighten the law. But if that happens, the economic load carried by injured consumers is going to get heavier.

THE ECONOMICS OF INJURY

It may be more useful to think of the issue as an injury problem rather than a product-liability problem. After all, the liability system isn't the only way of dealing with injuries caused by defective products. Alternatively, accident victims might be compensated through a national health-insurance system. If you're injured, the Government makes up for your medical expenses and any income you've lost, no questions asked.

The trouble with that kind of system is that it gives manufacturers no incentive to produce safe products. Since manufacturers (or their insurance companies) now have to compensate at least some of the people injured by defective products, there's an incentive to make products reasonably safe. As Professor Thomas F. Lambert of Boston's Suffolk University says, "One of the most practical measures for cutting down accidents in the field of product failure is a successful lawsuit." In his view, prevention is the key: "A fence at the top of a cliff is better than an ambulance in the valley below."

Prevention is an obvious alternative to compensation. But prevention requires thought and long-range planning. It's much easier for manufacturers and insurers to rail about jury awards and hope accident costs will somehow decline.

But when manufacturers and insurance companies warn that consumers will have to absorb the recent increases in accident costs, that's a false alarm. Consumers have *always* absorbed the costs of accidents. But the burden has shifted from consumers who happen to get hurt to all consumers who buy the product.

Twenty years ago, the typical person injured by an exploding beer bottle had to pay the medical bills and accept related losses. Today, that person is more likely to sue the brewer. And because of changes in the law, that person is more likely to receive some compensation from the brewer. The cost of that compensation—and the cost of investigating and litigating the claim—is included in the price of the beer. In other words, the product comes equipped with a hidden

insurance policy, and everyone who buys the beer pays part of the premium.

Manufacturers are reluctant to put money into accident prevention because, as Ford president Lee Iacocca says, "Safety doesn't sell." But if the cost of compensation continues to rise, manufacturers will be forced to offset their losses by building more safety into their products. A few more *Pinto* lawsuits and even Lee Iacocca may catch on: Safety doesn't sell, it pays.

CAVEAT LEGISLATOR

The product-liability problem has certainly been exaggerated. But to the degree that the problem exists, there are a number of steps that might be taken to alleviate it—to the benefit of business and consumers alike. So far, however, the demand for change has come almost exclusively from industry.

Evidently, manufacturing and insurance groups have been very persuasive. In April, the U.S. Commerce Department reported that 42 states were considering new product-liability laws. At least half a dozen states had already passed such laws, and a few had been introduced in Congress. Most of the changes have to do with the tort system—the branch of law concerning injury compensation—and most are intended to reduce manufacturers' liability.

The proposed state laws vary a lot. But according to The Research Group, a legal-consulting firm that keeps a close watch on product-liability developments, three features turn up more often than others.

One is a **statute of limitations**. A statute of limitations is usually a limit on the period of time between the date of an injury and the last day you can file a lawsuit about that injury. If the limit is five years, for example, you can file a suit any time within five years after the injury. The idea is to force people to sue before the evidence has been discarded.

By contrast, the statute of limitations in the proposed laws usually starts the clock running at the date the product is originally sold. For most laws, the limit is between six and ten years. If the limit is six years, for example, you can file a lawsuit any time within six years of the sale date.

The trouble with this kind of limit is that it may prevent a lawsuit even before the injury occurs, which was previously unheard of in American law. For example, if California had a six-year statute of limitations running from the date of sale and Grimshaw had been hurt in a 1972 *Pinto* in 1979, he wouldn't have been able to sue. His suit would have been prevented not because he didn't file it soon enough but because he wasn't injured soon enough.

What manufacturers are obviously trying to do is head off lawsuits for injuries caused by obsolete products. But instead of setting up limits that infringe on the consumer's right to sue, it would be much fairer to simply allow the jury to take the product's age into consideration in deciding the case. If the product is so old that it would be unfair to hold the manufacturer responsible, the jury can vote in the manufacturer's favor.

A second popular feature in the proposed state laws is the **state-of-the-art defense**. This would let the manufacturer off the hook if the product conformed with the safety standards that were generally acceptable in the industry

at the time the product was produced. But what if the industry's standards were terrible? What if all manufacturers were turning out dangerous products?

Take the case of injury caused by a power lawn mower. There have been some significant safety improvements in mowers in recent years. But if you're injured by a 10-year-old lawn mower and you sue the manufacturer, you could lose the case if the company's lawyer could use the state-of-the-art defense. The lawyer would only have to show that the mower was as safe as most others produced 10 years earlier.

It makes no sense to allow a manufacturer to avoid responsibility by saying, in effect, "The other guys were just as bad." The state-of-the-art defense only gives the manufacturers of dangerous products an incentive to delay safety improvements as long as they can.

The third feature that's commonly included in proposed laws is the alteration-or-misuse defense. If the defense is *absolute*, this allows the defendant to avoid *all* responsibility for the injury if it can be proved that the product was misused by the plaintiff or altered after the original sale.

Take an accident like Richard Grimshaw's. Suppose the owner of a 1972 *Pinto* sued Ford for injuries in a rear-end collision. And suppose Ford could prove that the *Pinto's* bumper had been removed before the accident. If the alteration defense were absolute, Ford would win the case because the owner had contributed to the injury by altering the product. Or suppose the accident happened after dark and the car's lights were off. In that case, Ford could probably win by demonstrating misuse of the product.

Should manufacturers be considered totally free of blame when there's evidence of misuse or alteration? It seems much fairer to apply the concept of *comparative fault*. That is, a jury should be permitted to apportion responsibility for an injury and award compensation accordingly. If a jury decides that a driver's missing bumper was partly responsible for an injury but that the manufacturer's poorly designed fuel tank also contributed something, the jury should be free to assign part of the blame, and therefore part of the cost, to each.

Many of the proposed state laws are clearly anticonsumer, and they're bound to be challenged in the courts. In the meantime, by passing such laws, legislatures are merely adding to the general confusion. They're making it harder for manufacturers, insurers, lawyers, and consumers to figure out exactly what the rules are.

As the Task Force report noted, one of the primary causes of the product-liability problem is uncertainty about the tort system. For example, different states have different definitions of product defects. Some states award compensation for emotional as well as physical injury; others do not. The doctrine of comparative fault is available in some courts, but it is applied in a variety of ways.

To reduce the uncertainties, the Commerce Department has proposed to draft a model product-liability law. Assuming the model law proves to be equitable and not simply a device for drastically limiting manufacturers' liability, and assuming most states follow the model, this seems to be a sensible step toward a uniform method of handling product-liability cases.

AN ALTERNATIVE: NO FAULT, NO SUE

Some critics say the tort system is inherently inefficient. Small claims tend to be ignored because lawyers aren't interested in pursuing them. The larger the claim the more time it takes to investigate and process, even if the case doesn't get to court. And if the suit is successful, the trial lawyer usually takes part of the settlement. Consequently, as Professor Jeffrey O'Connell of the University of Illinois Law School points out, only one-third of the average dollar spent on product-liability insurance reaches the accident victim.

Professor O'Connell and others have suggested a no-fault system as an alternative. A better name might be "no-sue." Instead of resorting to the tort system, the accident victim would collect compensation directly from the manufacturer's insurance company. The victim would have to show only that the product caused the injury, not that it was defective. And to keep costs low, the victim would be compensated only for verifiable losses—medical expenses and income losses—not for "pain and suffering" losses, which are hard to measure in dollars and can often amount to more than the verifiable losses.

There are numerous variations on the no-fault or no-sue plan. In general, they have the potential advantage of returning a larger part of the insurance dollar to the accident victim. Although the average amount of compensation would be reduced, more of those who suffer injuries would receive compensation.

Implementing a no-sue system would be difficult. The insurance company would still have to define the policy coverage. For instance, would products made 20 years ago be covered? The company would also have to investigate to make sure the product actually caused the injury.

As the Task Force noted, the no-fault or no-sue device seems to be a very long-range solution to the product-liability problem. However, the Commerce Department has proposed further study of the idea, and it may be that the no-sue device can eventually be applied at least to some products.

Meanwhile, don't believe everything you read in those insurance-company advertisements. Quick changes in the present laws can come only at the consumer's expense. The trend toward strict liability has forced manufacturers and insurance companies to take safety much more seriously. It would be a mistake to take the pressure off now.

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QUOTE WITHOUT COMMENT

“The switchblade boys in the consumer electronics retail fraternity are giving every indication that they plan to turn the industry's newest and brightest hope for profits—the VTR [video tape recorders]—into a golden turkey. . . . Today, though the units are presumably in short supply, a determined consumer can inspect almost any VTR on the floor of a regular retailer, then trot off to purchase it from a back door discounter for a 10 per-cent-over-cost \$825 or \$850. This is a pity, indeed, when one regards the vast, unwashed market out there, waiting to buy VTR at prices that would afford the dealer a fair mark-up.”—Mel Buchwald writing in CONSUMER ELECTRONICS.