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Product Liability and Safety

THE HISTORY OF PRODUCT LIABILITY

NEWS FLASH: Woman spills coffee and sues McDonald's for $2.8 million! That case, perhaps more than any other in the past decade, stimulated a growing national feeling that the court system has lost all connection to common sense. It has prompted calls for change in the way the law compensates people for injuries caused by products—product liability law.

Product liability law has for decades been under attack from business and the insurance industry. However, it is also now under a legislative assault. Democrats and Republicans alike are clamoring for reforms. Advocacy ads by groups with names like "Citizens for a Sound Economy" (along with competing ads by the Trial Lawyers Association) have flooded airwaves in states with swing-vote legislators. Sifting through all the arguments about reform is a daunting task. Before we try to assess the current debate, it is best to have an understanding of how the law on product liability has developed over the years.

The earliest approach to product liability in the law was a system known as *caveat emptor,* or "Let the buyer beware." It meant that a consumer injured by a defective product was unable to sue the manufacturer and recover damages. Gradually, individual states, which have primary jurisdiction over liability law, began to shift away from *caveat emptor* as the economy became less agricultural and more industrial. By the turn of the 20th century, the usual state law on product liability had become a conjunction of two doctrines: privity of contract and the

negligence standard. The privity of contract doctrine allowed suits over product-related injuries only when the parties to the suit had a contractual relationship between them. In practice, this meant that consumers were typically unable to bring product liability suits against manufacturers, since most products purchased by the consumer were obtained from a retailer, not from the manufacturer. Since there was no direct economic transaction between consumer and manufacturer, the privity doctrine disallowed liability suits against the producers of defective products. Moreover, if a consumer was allowed to bring a suit against a seller, the consumer had to establish negligence in order to prevail. In the law, negligence generally is understood as a failure to exercise due care. If a product defect had its source in the manufacturing process, and if the defect was not easily apparent on visual inspection, then the retailer who sold the product would not be negligent in most cases.

In 1916, the New York Court of Appeals issued a ruling that, over time, came to be adopted as the law in most other states. In the case of *MacPherson v. Buick Motors,* the court held a manufacturer negligent and hence liable for failure to inspect the wooden spokes of its automobile wheels for defects. The case was one of the first to remove the privity doctrine's requirement of a direct contractual relationship between plaintiff and defendant. As a result of this decision, plaintiff consumers had merely to establish the following in order to sue and recover damages from a manufacturer of a defective product: (1) an injury occurred, (2) the product was defective, (3) the injury was the result of the product defect, (4) the product came from the defendant, and (5) the defendant was negligent in letting the defective product onto the market. Proving negligence was, however, often difficult. Negligence requires that the plaintiff establish facts about the defendant's state of mind or conduct. In many cases, the information required for proof is not available. The situation in the famous Ford Pinto case—where the plaintiffs secured internal Ford memoranda that indicated Ford executives knew about the risk of gas tank explosions yet calculated it was not cost-beneficial for Ford to correct the problem—is perhaps unusual in the degree of evidence available about the defendant's state of mind.

Another watershed case was decided in 1960. A New Jersey court, in the case of *Henningsen v. Bloomfield Motors,* decided that an injured consumer should be entitled to recover damages because the axle of the car she was riding in broke. The court held that the axle was defective and the product was not reasonably fit for its intended use. The court reasoned that consumers have a right to expect that a car, as a durable good, will not have such serious defects. The court's decision announced a new doctrine of liability law—the doctrine of implied warranty. It establishes that manufacturers implicitly warrant their products to be fit for intended use by the very act of offering them for sale. The crucial aspect of this case is that it removed the fifth item required for a successful product liability suit. Consumers under this theory would not have to establish negligence.

In 1963, a California court announced a similar decision in the case of *Greenman v. Yuba Power Products.* That case, decided on principles of tort law (the area of the law covering injuries between private parties), issued in the doctrine of

strict liability. From the consumer plaintiff's position, it was practically equivalent to the implied warranty theory since both approaches removed the negligence requirement.

The strict liability approach has become the dominant approach to product liability in most states since that 1963 California decision. The shift in the law from negligence to strict liability is perhaps even greater than the shift away from the privity doctrine. Whereas the negligence standard focuses on the conduct and state of mind of the defendant, the strict liability standard concerns only the quality of the product. If the product is defective (usually defined as unreasonably dangerous), the manufacturer can be required to pay damages regardless of whether it was at fault. Essentially, with the adoption of the strict liability approach, product liability law has gone from a fault-finding exercise to a mechanism for compensating those injured by product defects.

This shift from a fault-based to a compensatory standard has been defended on two grounds. First, strict liability is seen as a mechanism for spreading the costs of accidental product defects. Under negligence, if a product is defective but the manufacturer is not negligent, the cost of the injury is located entirely on the injured party. (Defects can exist without negligence because, even with the strictest design and quality control standards, a defective product can slip through the net into the stream of commerce. The only way to guarantee zero defects is to cease all production.) With a strict liability standard, such a case would result in the manufacturer or, more likely, the manufacturer's insurance company, paying the injured consumer. The cost of that payment would eventually be turned back on other consumers of the injuring product.

The second traditional defense of strict liability is that it provides an incentive for manufacturers to make their products safer. If manufacturers know that they will be liable for any defect that causes injury, then they will take extra steps to ensure products are safe and defect free. (Some have claimed that strict liability will not increase safety since manufacturers are held liable for unforeseen product defects that they cannot prevent. This, of course, makes some sense. However, it seems to apply more to design defects than to defects that are the result of the manufacturing process. Some of those latter could still be eliminated if producers had financial incentives to exercise stricter quality controls.)

The law has obviously shifted away from protection for producers and more towards protection for consumers. Some have even suggested that we now have a legal system of "seller beware." While it is true that manufacturers are now more greatly exposed to financial liability for products that cause injury, it is not the case that manufacturers are without legal defenses or that we have reached a stage of absolute liability. First, plaintiffs in product liability cases must still establish that there was a defect. Second, even if that is established, there are many legal doctrines and tactics available for defendant manufacturers. Manufacturers can argue that the consumer misused the product (although the misuse cannot be one that was reasonably foreseeable, for that again makes the producer liable). They can prove that the consumer was contributorily negligent, for example by showing that the defect was obvious and that the consumer used the product anyway. They can argue that the product's inherent risks were patently known and that the con-

sumer therefore voluntarily assumed the risk. (This has been quite a successful line of defense used by tobacco manufacturers. See Decision Scenario A, "Tobacco Companies Under Fire.") Producers can argue that the product contained a warning. Finally, they can claim that, although the product risk cannot be eliminated, the product provides great social utility. (Drugs are often placed in this last category.)

ASSESSING PRODUCT LIABILITY ALTERNATIVES

If we reflect on this brief historical sketch, we can imagine four broad policy alternatives for how to assign liability for defective products that cause injury. At one extreme, we could adopt a policy of *caveat emptor.* Under this policy, consumers would be unable to recover damages, and business would be totally insulated from liability suits.

Next, we can imagine a negligence approach similar to the one that predominated in the law between 1916 and 1963. Under this standard, consumers have increased opportunity to receive compensation relative to the first approach. Business, however, would be that much more exposed to financial liability for the consequences of its products.

Then, we can imagine the strict liability system of the recent past. Under this approach, a business would be held strictly liable for *any* injuries caused by a defective product. The costs of such injuries would initially be located on the business itself through its insurance premiums. Ultimately, those costs would be reflected in product prices.

Finally, we could imagine a hybrid policy that has been suggested as an alternative to the current approach. It would locate financial responsibility for injuries on the individual business when the defect was the result of negligence. However, if the defect were a pure accident, that is, not the result of corporate negligence, the consumer would still recover, but the monies would come from a general fund to which we all, as taxpayers, contribute. The idea of this hybrid is to retain the compassionate compensation for the injured found under strict liability but to lessen the financial burden on business.

As you read the cases and readings of this chapter, try to identify the advantages and disadvantages of each of these broad policies. For example, *caveat emptor* might provide for a greater variety and for cheaper products, since insurance for liability would not be a cost of doing business. It would also allow more consumer injuries to occur. Alternatively, strict liability with businesses purchasing private insurance to cover the costs of defect-related injuries would increase product costs. But it would also maximize the manufacturer's incentive to produce safe products, because the more numerous the injury-causing defects, the higher its insurance premiums will be. We encourage you to identify other benefits/costs of these four alternatives. Only after such an analysis can you arrive at an adequately informed decision about which alternative is the best public policy.

Before addressing specific legal reforms now under discussion, we should discuss a few criticisms that have been leveled against the current strict liability approach. Opponents of the current American system deride it as the most costly in the world. (Note the cost estimates in the first reading of the chapter.) They maintain that it harms American industry's competitiveness and costs the United States jobs. They argue that American business pays 10 to 50 times more for product liability insurance than does its international competition. Our largest trading partner, Canada, for instance, does not have the costs of a strict liability system. There, manufacturers are generally liable only for negligently caused product defects.

Opponents also charge the liability system as partly responsible for a decline in the willingness of Americans to accept responsibility for their actions. They point to a cultural climate where whatever bad happens to a person must be someone else's fault. Critics also claim that the system, with its potential for large awards, encourages fraudulent or frivolous suits that are filed as fishing expeditions by greedy lawyers and their clients. (In Philadelphia, known for its high number of insurance fraud cases, a woman filed a fraudulent suit against the public transit agency for injuries purportedly sustained in a train accident. Unfortunately for the woman, the "train accident" she saw reported on the news, and in which she claimed to be injured, was merely a report on an emergency preparedness drill!) As a result, the critics claim, we have experienced a flood of product liability lawsuits in recent years.

Those in favor of strict liability must admit that with every reduction in what a plaintiff must prove to win an award, more frivolous or fraudulent suits are possible. They also need to recognize a concern about the effect of the legal system on cultural attitudes. However, they argue that a return to negligence in order to avoid the economic costs of the current tort system would be a draconian overreaction that penalizes those who are the greatest victims, the seriously injured. And, they contend, strict liability has not created the difficulties alleged. They note that much of the litigation over the past 20 years is against a small number of defendants. If one removes the mass tort cases for damaging products, such as the Dalkon Shield (see Decision Scenario D on that case) or asbestos, the litigation flood slows remarkably. Proponents also point to reports that suggest the costs of the system are often overstated. A Rand study found that only 10 percent of those injured in product accidents ever bring suit.

Still, a problem must be recognized for small businesses that operate on narrow profit margins and yet have radically increasing insurance costs. There are questions, though, about whether the increase in insurance premiums is justified by the amount paid out in damage awards to victims. It is certainly true that many of the large jury verdicts that are reported in the news are subsequently reduced on appeal. The question, then, is whether the problems of the product liability system are severe enough to justify abandoning a strict liability approach in favor of one of the other alternatives. Some argue that any problems that exist can be addressed by marginal changes in the law. Others hold that adequate corrections demand a more wholesale change in liability rules.

Those in favor of more radical change often charge that the system of strict liability is unfair to business. They argue that business ought not be held responsi-

ble for accidents that are beyond its control. No matter how rigid the quality control standards of a business, a defective product might still slip through. As we have seen, that business will be financially liable for injuries that its product causes. Business lobbyists, however, point out that the business in that instance is not morally responsible for the injuries. Being forced to pay for negligence is one thing, they argue; being forced to pay for unforeseen, and perhaps unforeseeable, defects is quite another.

The reading by John McCall addresses this question of fairness. McCall suggests that many objections to the traditional defenses are ultimately questions about fairness. He argues that an adequate understanding of fairness will show that strict liability is compatible with fairness, and perhaps even required by it. He contends that when the traditional justifications of safety and cost sharing are conjoined with an adequate understanding of fairness, they are sufficient justification for adopting strict liability as our overall public policy. McCall notes, however, some problematic cases in which the legitimacy of the current standard may be called into question.

REFORMING PRODUCT LIABILITY LAW

Even some of those who are generally sympathetic to strict liability are now urging reform of liability law. Many, as noted in the reading from the Bush White House Council of Economic Advisors, regard the current system as imposing excessive costs on the society. One could imagine that such concerns might drive a move towards radical reform of the law. However, the recent reform proposals under consideration by both the House and Senate are more tinkering at the margins of the law rather than a wholesale reform of strict liability.

In the late 1990s, both the House and Senate passed bills changing liability law. Generally, those reform bills limited punitive damage awards to successful plaintiffs to the greater of $250,000 or three times the award for lost wages and medical expenses. They also capped pain and suffering awards at the same $250,000 figure. They sometimes required plaintiffs in federal liability cases to pay the defendant's legal fees if the plaintiff rejected a settlement offer and the jury award was less than that offer (a provision known as "loser pays"). Finally, they prohibited punitive damage awards in cases where a drug or medical device had FDA approval. However, the bills passed by the Congress were vetoed by President Clinton. More recent reform efforts in the federal Congress have stalled in the U.S. Senate. Advocates of reform have responded by attempting more piecemeal legislation that protects particular industries or businesses from liability lawsuits. In 2004 alone, Republicans in Congress were able to pass bills in the House of Representatives that would have prohibited liability judgments against the Texas manufacturer of a gasoline additive suspected of causing cancer, against gun manufacturers faced with suits alleging improper marketing that permitted criminals to acquire handguns (see both the reading by George Brenkert and Decision Scenario B on gun marketing), and against fast-food restaurants charged with responsibility for the increasing levels of obesity among Americans. As this

text goes to press in the spring of 2004, none of these bills was able to garner a majority in both houses of Congress, however.

Reform advocates have had much more success at the state level. That is perhaps a more significant result given that most product liability law falls within state court jurisdictions. Caps on punitive damages and on awards for noneconomic damages (such as, for pain and suffering) have been passed by 24 states since the liability reform movement began in earnest in the mid 1980s (though some of those state laws have been struck down by state court decisions). States have also focused on specific areas of concern. Recently, medical malpractice rules have gained substantial attention. Spurred by stories of physicians facing doubled or even tripled premiums for liability insurance and by reports of physicians abandoning their practices in specialties such as obstetrics, legislatures have adopted special rules for medical liability lawsuits. Most frequently these include the now standard $250,000 limit on any pain and suffering compensation award.

There are serious questions, however, about whether these medical liability reforms will solve the identified problem. Some suspect that caps will do little to ease the insurance crisis. One Texas study noted, for instance, that noneconomic damages remained fairly constant during the period between 1988 and 2000. It found that the real increases in awards came in areas such as compensation for medical expenses and lost earnings. Insurance industry spokespeople, however, contended that a cap on pain and suffering awards would allow them to reduce liability insurance premiums for physicians by 12 percent.

More generally, those in favor of liability law reforms often claim that they are needed to restore fairness to the liability system and to remove innovation-stifling burdens on the competitiveness of American business. Critics of the reforms see proposals such as "loser pays" or the limits on plaintiff attorney legal fees as effectively removing access to the court system for many consumers. They also find the limits on punitive damages to be unnecessary and insufficient to deter wrongdoing by larger corporations. They note that punitive damage awards are a relatively small percentage of total awards. Critics of the recent reforms also contend that a limit of $250,000 on noneconomic damages will be insufficient to compensate the most seriously injured plaintiffs for their very real suffering.

It seems likely that federal and state legislatures will continue to attempt reforms in product liability law. We hope that the material in this chapter will allow you to assess both the current and future debates.

PRODUCT SAFETY REGULATION

If product liability law is about how and when to assess damages once a product injury has occurred, product safety regulation is about preventing accidents from happening in the first place. The current legal approach to product safety regulation is known as a standards enforcement approach. The government, through executive agencies such as the Consumer Product Safety Commission (CPSC) and the Food and Drug Administration, mandates that products meet certain

safety standards if they are to be available for sale. The agencies have the authority to ban products from the market, to order recalls, and to impose fines for violations of mandated standards. (As with all administrative agencies' decisions, these actions of the CPSC and FDA are subject to appeal; the agencies are not the final authorities in these matters.)

This form of government regulation of consumer products has met with some resistance. One of the main complaints against safety standards is that those standards take too little notice of the costs that they impose on business and on society generally. Often, critics charge, business is made less efficient, products more costly, and jobs scarcer because of safety-oriented regulations. Obviously, we cannot eliminate product risks. What we must decide is when levels of risk are acceptable, which is a rough definition of "safety." Those critical of current safety regulation would have us answer this question by engaging in a formal cost-benefit analysis before promulgating any new safety standard. Many critics, for instance, suggest that our current regulations are often the result of public overestimation of the risks of harms. They believe that, as a society, we spend more trying to avoid minimal risks that gain public attention than we spend on more serious and more likely public health problems. In response to this perceived misallocation of national resources, reform legislation has been introduced into Congressional debate; it would require all federal agencies to conduct a complex review of regulatory costs and benefits that would then be subject to both corporate comment and judicial review. However, critics of the use of technical cost-benefit analysis in the context of safety regulation note that safety benefits are difficult to quantify in dollar terms. The standard methods used to assign dollar values to safety benefits have serious conceptual difficulties. For example, measuring the dollar value of safety by determining what consumers are willing to pay for safety in the market (a willingness-to-pay methodology) depends on assumptions that consumers have adequate information about the safety profile of the products they purchase. That assumption may not be accurate.

Another major criticism against safety regulation is that it expresses a paternalistic attitude towards consumers. Since the agencies set standards that all products in a given market must meet, the agencies also prevent consumers from choosing for themselves just what mix of safety features they are willing to pay for. Critics maintain that protecting consumers from their own choices is a paternalistic interference with consumer autonomy. Given the value placed on autonomy in Chapters Two and Three (and elsewhere throughout this text), that is a most serious charge. It is a charge made more serious since most protective legislation follows this same standards enforcement approach. (Consider the EPA, OSHA, and other agencies.) If the charge holds, and protective regulation is unjustifiably paternalistic, we would have an argument for dismantling much of the federal bureaucracy and for letting consumer demand determine safety levels through free-market bargaining.

A number of responses to this charge are possible. One could admit that regulation is paternalistic and claim that the paternalism is justified either because citizens are incapable of making intelligent choices (the justification for treating children paternalistically) or because the social benefits of paternalism are great

enough to justify it. In our society, neither of these justifications is compatible with the deep-seated commitment to individual autonomy.

A second line of argument against the charge of paternalism is provided by those who contend that consumer choice in the marketplace is not really free. Proponents of regulatory standards who argue this way will claim that there are significant enough market imperfections that government intervention is needed in order to protect consumers. The pure market approach, they argue, places individual consumers in an unequal bargaining position that in fact jeopardizes their autonomy.

A third response would be to defend regulatory action as a way of protecting the rights of third parties. Laws requiring motorcyclists to wear safety helmets, for example, have been urged as a way of reducing the need for taxation to support the care of individuals who suffer severe brain damage in accidents. Similar arguments are obvious in the case of gun regulations.

A final line of response argues that safety regulation is not really paternalistic. It attempts to prove that it is economically rational for the consumer to autonomously surrender to the government his or her authority to choose. Such surrender is rational, they claim, when the costs of making the decision oneself are great. Note that this argument is not intended as a particular defense of every instance of government regulation.

Recently, one of the oldest federal consumer safety agencies, the FDA, came under fire in a different way. Critics of the agency charged that its drug and medical device approval process is still too slow, despite recent attempts to streamline the process and get life-saving medications onto the market more quickly. Previous House Speaker Newt Gingrich, in fact, called the FDA "America's leading job-killer." Critics have proposed both more streamlining of the approval process and a narrowing of the agency's charter. Now, the agency is responsible for assuring that drugs and medical devices are safe *and* efficacious. Reformers are suggesting that the agency limit its review to assuring safety and let consumers in the market determine if products are effective. That way, they argue, life-saving drugs and devices will be available sooner. Opponents of the reform worry that the narrowed charter will result in consumer purchases of useless products that will sometimes delay effective treatments. As you can see from this brief survey, the advisability and effectiveness of government safety regulation will continue to be subject to debate.

ETHICS AND THE MARKETING OF DANGEROUS PRODUCTS

Whatever view you take on the issue of government regulatory action, there remains a further question for you to address. It is a question about what *ethical* standards should be used in assessing the marketing of dangerous products. We need to remember that it is possible for an act to be legal and yet not morally appropriate. It is possible, then, that the sale of some products would be legal but immoral. Some critics of the tobacco industry consider the sale of cigarettes to be an instance of this.

One reason for the difference between an action's legality and its moral acceptability is that the law is not always a desirable method for enforcing moral norms. For example, sometimes the law should not attempt to enforce a moral norm because that attempt will cause more moral problems than it solves, as some would say was the result of the Prohibition Era's attempt to enforce abstinence from alcohol. So, before we use law to enforce a moral norm, we need to ask whether the enforcement will be effective, whether it will lead to a decline in respect for law generally, and whether it will predictably cause other, significant harms.

This caution about using the law to enforce all of morality only makes more pressing the need to supplement your assessment of government safety regulation with a parallel moral assessment of the practice of marketing dangerous products. One possible moral assessment would be to argue that the autonomy of both consumer and seller generates a moral right to sell any product for which there is market demand.

This use of autonomy will not work, however. It merely is an application of the extreme *laissez faire* understanding of liberty that was discarded in Chapter Three. Autonomy does not mean having a right to do whatever one pleases. Rather, autonomy must be linked to areas of life that are of crucial importance for an adequate human existence. Buying or selling a particular product seems unlikely to qualify for that lofty status. There are intuitively reasonable cases where the sale of products is limited but where the extreme understanding of autonomy would object to those limits. The most addictive and dangerous of the currently illegal drugs are examples. Moreover, even if we acknowledge a right to sell any product that we wish to, that does not automatically mean that selling it is morally appropriate. Having a right to do something does not entail that you ought to do it, all things considered.

At the other extreme is a view holding that it is unethical to market any product that predictably causes harm or whose net social impact is negative. This, too, seems unacceptable. While the harmful consequences of products are a matter of serious concern, this method of assessment is merely the utilitarian approach that was challenged in Chapter Two. And, while the first approach gives too much weight to consumer and seller desires, this utilitarian approach appears to give too little weight to consumer sovereignty.

Another approach to the moral evaluation of the sale of harmful products would be to say that it is acceptable to sell products that are dangerous if consumers are adequately warned about those dangers. However, there is evidence that warnings are often not processed by consumers or are not forceful enough. Also, some question whether mere warnings are enough to morally justify marketing a dangerous product when the seller spends millions in advertising and public relations to counteract the effect of any warnings. Hence, some who accept the sale of harmful products argue that it is not morally appropriate to promote and advertise those products.

Others suggest that while it may be acceptable to sell potentially harmful products, with appropriate warnings, to wary adults, producers have a moral obligation to assure that those products are not sold in ways that provide easy access for minors.

We urge you to morally assess if, when, and how dangerous products should be sold. In developing such a position, you need to make specific reference to all the different products that people claim are dangerous. Should sales of tobacco, guns, alcohol, heroin, and crack cocaine all be assessed similarly? Or are there differences in the products that will justify reaching a different moral conclusion for each of these products? Whatever the law says, or whatever you believe the law *ought* to say, an ethical evaluation of their sale is still essential.

CASE STUDY Caution: McDonald's Coffee is HOT!—And Its Food Will Make You FAT!

Feeling the Heat

On February 27, 1992, 79-year-old Stella Liebeck was burned after spilling on her lap a cup of coffee that she had purchased at a McDonald's drive-through window. She brought suit against McDonald's and was awarded a jury verdict of $2.86 million—$160,000 in compensatory damages and $2.7 million in punitive damages. A judge reduced the punitive damage award to $480,000, or three times the amount of the award for the injury. McDonald's and Liebeck subsequently settled out of court for an undisclosed amount.

The initial jury award received quite a bit of media attention—most of it critical. And the award became a rallying cry for those interested in reform of the current product liability law. Advocacy ads excoriating the award as an example of the legal system gone haywire appeared on radio and television as the Congress was beginning debate on liability reform.

The legal case began when Ms. Liebeck requested $10,000 for medical expenses and an additional amount for pain and suffering. McDonald's refused a settlement. Liebeck's initial demand in court was for $300,000. The company argued, however, that the coffee was not unreasonably dangerous and that Liebeck was responsible for her own injuries. The jury obviously evaluated the case differently than did McDonald's or much of the media.

The jury's verdict was driven by a number of factors. McDonald's served its coffee at 185 degrees Fahrenheit, far higher than the temperature of typical home-brewed coffee. The jury found that coffee at that temperature was both undrinkable and more dangerous than a reasonable consumer would expect (part of the definition of a defective product). The coffee was hot enough to cause third degree burns over an extensive portion of Liebeck's thighs and buttocks. The injury required skin grafting and resulted in scarring.

Testimony at trial revealed that McDonald's had over 700 past burn claims lodged against it. The company claimed that it served the coffee at that temperature in response to consumer demand, but it had done no survey to assess the sales impact of coffee served at lower temperatures. As a result of past claims, McDonald's had put a warning on the cup and had designed a tighter-fitting lid. The latter, ironically, may have been a factor in Liebeck's injury; she held the cup between her legs in order to pry the lid off.

The jury found that Liebeck was 20 percent responsible for her own injury, but it also found McDonald's warning was not sufficiently noticeable to alert consumers to the danger. The punitive damage award of $2.7 million was, jurors later said, an attempt to send a message to fast-food chains. The amount was approximately two days of coffee sales for McDonald's. The judge reduced that punitive damage award. In doing so, however, he said that McDonald's action was "willful, wanton, reckless and callous."

Supersized Suits

Almost exactly 10 years after Ms. Liebeck's injury, Caesar Barber, a 5'10" 270 lb. man with a history of diabetes and heart attacks and also a habit of eating at McDonald's several times a week, filed

This case was prepared from information in the following sources: *Dateline NBC*, April 28, 1995; *Consumer Reports*, May, 1995, p. 312; *Jury Verdict Research, Liebeck v. McDonald's Restaurants*, Case # CV 932419; "Special Report: 'The first thing we do, let's kill all the lawyers,'" from the Consumer Freedom Foundation at www.consumerfreedom.com/headline_detail.cfm?HEADLINE_ID=1500; "Whopper of a Lawsuit," Geraldine Sealey, July 26, 2002 at www.abc.com; *Pelman v McDonald's*, 237 F. Supp. 2d 512.

a class-action lawsuit alleging that McDonald's was negligent in selling food laden in fat, cholesterol, salt, and sugar. His suit asked the court to hold McDonald's liable for its part in the epidemic of obesity now confronting the United States. Barber later admitted on a national television news show that he had failed to follow his doctor's advice by continuing to eat fast food even after his first heart attack.

Barber's lawyer withdrew the suit, but his explorations into liability lawsuits against the fast-food industry were not over. One month later, in August of 2002, he filed a class-action suit against McDonald's on behalf of two children and their parents, as well as unnamed others. The children were significantly overweight and as a result suffered from diabetes, high cholesterol, high blood pressure, and coronary heart disease. The suit, *Pelman v. McDonald's,* alleged that McDonald's was in substantial part responsible for the children's ills. Damages were sought based on claims that McDonald's had engaged in deceptive advertising and was negligent both in selling dangerous products and in failing to warn consumers. (In an earlier and unrelated deceptive advertising suit, McDonald's settled for $10 million with a group who claimed that they were misled by McDonald's advertising into believing that the chain's fries were vegetarian fare when, in fact, they were fried largely in beef lard.)

Obesity has become a major health problem in the United States. In March 2004, the Surgeon General released a report identifying obesity as the second-leading cause of preventable death in the United States, trailing only cigarette smoking. Each year, approximately 400,000 people in the United States die of obesity-related health problems. At the turn of the 21st century, obesity rates are nearly double what they were 20 years earlier, and the problem is especially troubling among the young. Today, at least 13 percent of children aged 6–11 and 14 percent of adolescents aged 12–19 are overweight or obese. In 1980, only 7 percent of children and 5 percent of adolescents fell into those categories. Obese persons face a 50 percent to 100 percent increased risk of premature death. Those deaths are complications of the heart disease, diabetes, hypertension, and cancer that accompany the extra weight.

A federal judge in New York initially dismissed the *Pelman* suit, but he did so "without prejudice," an indication that the plaintiffs were free to file an amended complaint. The judge took the unusual step of writing a lengthy opinion in which he provided clear instructions on how the suit might be amended to increase its chance of success. He even provided examples from past cases where similar allegations of deception and negligence were accepted by the courts.

On the charge of deceptive advertising, the judge found that the plaintiffs had not produced any specific advertisements as examples. Nor had the plaintiffs produced any evidence that there was a causal connection between McDonald's advertising and the health effects suffered. The judge required that any amended complaint address these failings. In fact, the judge gave a blueprint for refiling by noting past successful cases against McDonald's for deceptively advertising that "salt was down across the menu" and for emphasizing low cholesterol in some of its foods that were high in saturated fat. (While the foods themselves were low in cholesterol, they contained high levels of saturated fat, which produces increased blood cholesterol when processed by the body.) He indicated that the courts might look more favorably on the suit if it produced examples of such ads and provided evidence that the plaintiffs had relied on them.

On the negligence charges, the judge also found that the allegations were not substantiated. But he again noted how an amended complaint might succeed. He instructed the plaintiffs to provide a basis for assessing that McDonald's foods were more dangerous to health than a reasonable consumer would understand, perhaps by reference to the highly processed nature of the chain's products. He suggested that the plaintiff's attorneys pursue the charge that McDonald's foods were potentially not fit for their intended use by showing that advertising presented the foods as intended for daily consumption. And he invited the plaintiff's attorney to provide evidence that McDonald's was the proximate cause of the health problems. He recommended that the complaint include information about how frequently they ate at McDonald's and how it was unlikely that their health problems were the result of other causative factors. Finally, he indicated that an amended filing must show that McDonald's failed to warn consumers in an adequate way about unrecognized health dangers of its food.

The suit was refiled a few months after the initial dismissal. The judge this time dismissed the suit "with prejudice" because the amended complaint failed to include the arguments that he had suggested in the earlier opinion. He chastised the plaintiffs' attorneys and barred them from filing this same suit in the future.

Early in 2004, two related stories made the news. The U.S. House of Representatives passed a bill that would prohibit civil liability lawsuits against the

fast-food industry. At press time for this text, however, the bill had not been adopted by the Senate. And McDonald's announced that it was discontinuing its famous promotional campaign that encouraged consumers to "supersize" by purchasing larger portions of fries and drinks for a few pennies extra.

- Punitive damage awards exist in order to deter future harmful actions. What level of award do you believe is necessary to achieve that deterrence effect? When would a cap on such awards undercut the purpose of the awards?
- How can a jury apportion responsibility for injury between plaintiff and defendant? What principles could be used to establish a respective percentage responsibility as was done in the Liebeck case?
- Was McDonald's action in the coffee case reckless as the judge claimed? Can a corporation legitimately block such a charge if it has evidence of customer preferences to explain its actions?
- Given the facts as presented, if you had been on the jury, would you have voted with all the other jurors to award Liebeck damages? Would you have awarded the same amount?
- What differences do you see in the coffee and obesity cases? Are those differences relevant enough to warrant different conclusions in the two cases?
- The judge in the *Pelman* case initially seemed willing to entertain the idea that a fast-food restaurant might be legally liable for obesity-related health problems suffered by customers. Is there basis for his apparent openness? Would it ever be reasonable to hold a corporation responsible for the effects of customers' food selections?
- What do you think of the wisdom of creating a permanent barrier to lawsuits against an industry or a company through targeted legislation?

READING 8.1 WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM

George W. Bush's White House Council of Economic Advisers

INTRODUCTION

With estimated annual direct costs of nearly $180 billion,[1] or 1.8 percent of GDP, the U.S. tort liability system is the most expensive in the world, more than double the average cost of other industrialized nations that have been studied.[2] This cost has grown steadily over time, up from only 1.3 percent of GDP in 1970, and only 0.6 percent in 1950. The current cost amounts to nearly $650 for every citizen of the United States, and is one reason that many commentators have called for reform of the tort liability system. The cost is especially troubling because only 20 percent of these dollars actually go to claimants for economic damages, such as lost wages or medical expenses.

Defenders of the status quo argue that the existing system protects consumers by making firms responsible for damages caused by their products and services.[3] Indeed, the underlying notion that firms are induced to recognize the full social cost of their products is one economic rationale for an *efficient* tort system.[4] That is, just as firms must pay compensation to employees and suppliers as part of the cost of producing output, ideally tort liability forces the firm to consider the potential for damage that the firm's products may cause. In this sense, it is analogous to "making polluters pay."

However, poorly designed policies can mistakenly make polluters pay too much and impose excessive costs on society through forgone production of public and private goods and services. Tort law alters firm behavior in a socially desirable manner if tort liability claims are optimal. If claims are excessive and fail to provide proper incentives, then these claims are a drain on resources that can deter the production of desired goods and services and reduce economic output. The United States bears the burden of an expensive and inefficient liability system through higher prices, lower wages, and

From "Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System," by the White House Council of Economic Advisers, April 2002; accessed via http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf

decreased returns to investment, as well as lower levels of innovation.

The similarity between inefficient tort litigation and taxes suggests that the economic costs of the tort liability system may be better understood by pursuing the analogy between the expected costs arising from the tort system and taxes on firms. As with a tax, it is possible to examine the question of who bears the incidence of—that is, who pays for—excessive tort costs. An important lesson in the economics of taxation is that *people* pay taxes; firms are legal entities that can bear no real burden. Put differently, the burden of any tax depends not on who writes the check (the legal liability), which may be the firm, but rather on the market outcomes that shift the cost to workers, consumers or owners of capital.

WHAT ARE THE ROLE AND LIMITS OF LIABILITY LAWS IN A MARKET ECONOMY?

The production and sale of nearly every economic good or service entails a degree of risk, however small, that the product may cause unintended harm. Children can be injured playing with toys, patients may have adverse reactions to medications or medical procedures, and workers may fall off ladders or be injured by machinery. Because consumers often have less than perfect information about these risks and are generally unable to insure against them, the government plays a potentially important role in promoting health and safety.

Many policy tools are available to address such risks, including a reliance on market forces, contracts, direct regulation, social insurance, and the legal liability system. Each approach has its relative strengths and weaknesses, and reliance on any single one may not be desirable.[5] In the United States, the tort system of legal liability is sometimes viewed as contributing to overall social objectives by ensuring that firms consider more fully the health and safety aspects of their products.

A guiding insight is that competition in private markets for goods and services pushes firms to produce the kinds of goods that consumers prefer using the most efficient combination of labor, capital and other inputs. If consumers and firms are already faced with incentives to weigh the social costs and benefits of their respective consumption and production decisions, the burden of government policy is to preserve economic efficiency by avoiding intervention.

For some transactions, however, it may be infeasible to account fully for all of the relevant benefits and costs. A consumer purchasing a new car, for example, may have neither the technical expertise nor the information necessary to fully evaluate the risk of injury posed by a particular design feature. It could also be costly to obtain complete information on every key aspect. Alternatively, a patient purchasing a medical procedure, for example, may be unlikely to fully understand the complex risks, costs and benefits of that procedure relative to others. Such a patient must turn to a physician who serves as a "learned intermediary," though there remains the problem that the patient may also not be able to judge the skill of the physician from whom the procedure is "purchased." In such a case, the ability of the individual to pursue a liability lawsuit in the event of an improper treatment, for example, provides an additional incentive for the physician to follow good medical practice. Indeed, from a broad social perspective, this may be the least costly way to proceed—less costly than trying to educate every consumer fully. In a textbook example, recognition of the expected costs from the liability system causes the provider to undertake the extra effort or care that matches the customer's desire to avoid the risk of harm. This process is what economists refer to as "internalizing externalities." In other words, the liability system makes persons who injure others aware of their actions, and provides incentives for them to act appropriately.

Central to this view, however, is the notion that the exposure of firms to potential tort liability costs provides proper incentives. In the specific context of punitive damages, Professor W. Kip Viscusi of Harvard University makes the point that "the linchpin of any law and economics argument in favor of punitive damages is that these awards alter incentives."[6] In his research on corporate decisions regarding environmental and safety torts, Viscusi evaluates the effect of punitive damages "by examining the risk performance in the four states that do not permit punitive damages as compared with other states that do." He finds that "this detailed effort to detect a deterrent effect yielded no evidence of any safety incentive role. This lack of evi-

dence is consistent with the proposition that punitive damages are random." If punitive damages are essentially random, then they will not provide proper incentives for risk mitigation. Instead, they will operate purely as a "tax" on firms—a cost with no corresponding benefit.

Some scholars disagree with Viscusi's conclusion. For example, Professor David Luban of Georgetown University argues that one should consider the "retributive aims of punishment" as well as the deterrent aims.[7] However, tort liability only achieves a goal of retribution if the economic burden of the punishment is borne by the responsible party, which may not be the case if the costs are ultimately passed through to investors, workers or consumers, or if punitive damages are essentially random, as Viscusi argues. Professor Theodore Eisenberg of Cornell Law School and several coauthors take an alternate view, claiming that tort liability is largely predictable and is therefore capable of providing proper incentives to firms.[8] However, while both authors question Viscusi's findings, neither provides direct empirical evidence to indicate that punitive damages actually have a deterrent effect. In fact, the empirical evidence that Eisenberg and co-authors do offer is consistent with the possibility that punitive damages are awarded on a random basis, as noted by Professor A. Mitchell Polinsky of Stanford University.[9]

Other research has examined the effect of expected tort liability costs on innovation and investments in safety. At lower levels of expected liability costs, Viscusi and Professor Michael Moore of Duke University[10] find that firms have incentives to invest in product safety research in an effort to reduce liability costs while still bringing a particular product to market. At higher levels of expected liability costs, however, firms will choose to forgo innovation or to withhold a product from the market, resulting in a net negative effect of expected liability costs on innovation. Based on their estimates, Viscusi and Moore identify many industry groups for which high liability costs exert a net negative effect on innovation.

Industry-specific studies by other authors have generally supported the results of Viscusi and Moore, documenting negative effects of liability on innovation in many areas, such as general aviation, chemicals, pharmaceuticals, and medical practice. The evidence of direct linkages between liability and safety in industry-specific analyses has been weak. Other factors, such as regulation and the fear of bad publicity, may provide stronger incentives to improve safety features than does legal liability, though liability may play an indirect role by encouraging the spread of safety-related information and by bringing potential hazards to the attention of regulators.[11]

Reconciling these alternative views is beyond the scope of this paper. Instead, recognizing the controversy that exists about the incentive effects of tort liability in general, and punitive damages in particular, this paper will consider several scenarios. For our most cautious estimates of the size of the "litigation tax," we make the very strong assumption that both economic (e.g., loss of wages, medical expenses) and non-economic (e.g., pain and suffering, loss of consortium, punitive) damages are currently set at an optimal level. We then consider an intermediate case that treats non-economic damages as essentially random and therefore part of the litigation tax. Finally, we consider the case in which all of the costs of the U.S. tort system are treated as economically excessive, which would result if both economic and non-economic damages were largely random and failed to provide proper incentives.

WHAT ARE THE DIRECT COSTS OF THE U.S. TORT LIABILITY SYSTEM?

In the year 2000, according to a study by Tillinghast-Towers Perrin, the U.S. tort system cost $179 billion. This includes $128 billion of "insured" costs derived from financial data for the U.S. insurance industry. These data "are considered highly reliable in that they are subject to audit and reviewed by state regulatory agencies."[12] The costs include benefits paid to third parties or their attorneys, claim handling, legal defense costs and insurance company administrative costs. Tillinghast estimates that $30 billion in costs is paid by firms that insure themselves. Finally, they estimate that an additional $21 billion is due to medical malpractice. We will make use of these Tillinghast estimates for illustrative purposes in this paper, although the main conceptual contribution of this paper—that excessive tort claims act as a tax paid by individuals—would hold with equal force with any alternative measure of direct costs.

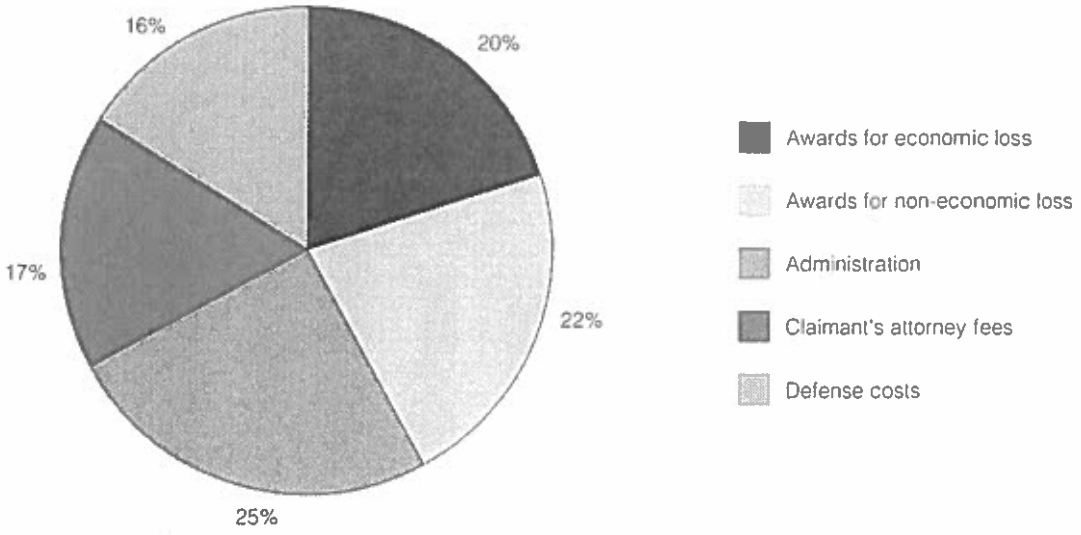


FIGURE 1. Distribution of Liability Costs

SOURCE: Tillinghast-Towers Perrin, "U.S. Tort Costs: 2000, Trends and Findings on the Costs of the U.S. Tort System," February 2002. Reprinted with permission.

The estimate of nearly $180 billion in direct costs of the U.S. tort system is likely to understate substantially the actual costs of the tort system for several reasons. First, the $180 billion estimate predates September 11. The terrorist attacks have increased the uncertainty surrounding legal liability claims. Insurance companies, uncertain how to assess new liability risks, are raising premiums and capping or denying coverage. As such, the cost of the tort system in the future will likely be even greater than the year 2000 estimates employed herein. Second, this estimate ignores the many economic distortions that arise as a result of individuals and firms trying to avoid lawsuits. These costs, which will be discussed in more detail below, can include distortions to labor markets (e.g., doctors deciding not to practice certain specialties or in particular communities for fear of being sued), the practice of "defensive medicine," or the decision by manufacturers to keep products off the market.[13] Third, this estimate also ignores the potential deleterious effect of excessive tort claims on innovation. In product areas where litigation is frequent and costly, the prospect of high liability claims may be enough to ward off any potential new entrants.

Lacking a more comprehensive estimate of total costs, however, we will use the $180 billion as an initial conservative estimate of total tort costs. An even more difficult issue is deciding how much of this $180 billion is economically "excessive." There is no easy or widely accepted empirical answer to this question. To the extent that awards are largely "random" and fail to provide incentives to firms, most, or even all, of the tort expenses are excessive. Alternatively, to the extent that damages awarded to claimants are a good proxy for the actual damages caused, the fraction of tort costs that go to claimants to compensate for damages, plus reasonable "transactions costs," could be loosely viewed as the "right" level, and costs above this amount as being excessive.

To pursue this line of reasoning, recall that more than half of the total annual cost of tort is due to administrative expenses and legal fees. As observed, "viewed as a mechanism for compensating victims for their economic losses, the tort system is extremely inefficient, returning only 20 cents of the tort cost dollar for that purpose."[14] This share of total tort costs that go to direct compensation for victims is lower than in the past. In the late 1980s and early 1990s, economic damages accounted for 22–25 percent of total tort system costs.[15]

As indicated in Figure 1, an additional 22 cents goes to claimants for non-economic damages, such

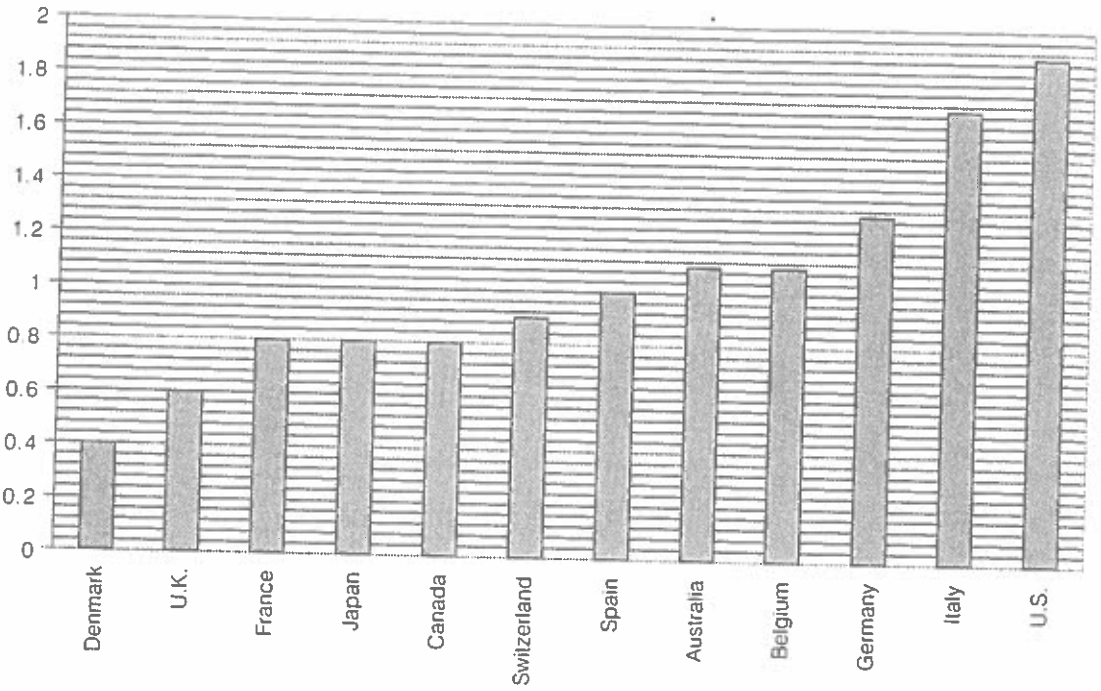


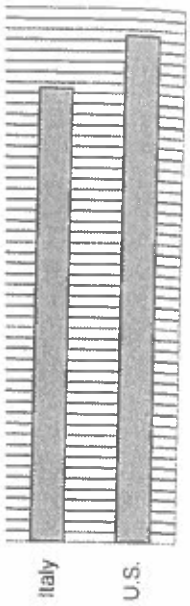
FIGURE 2. International Tort Costs as a Percentage of GDP, 1998

SOURCE: Tillinghast-Towers Perrin, "U.S. Tort Costs: 2000, Trends and Findings on the Costs of the U.S. Tort System," February 2002 Reprinted with permission.

as pain and suffering, loss of consortium and punitive damages. The remaining 58 percent of tort costs go to pay for administration, claimants' attorney fees, and defense costs. However, one should not necessarily view the entire 58 percent as "excessive," because some level of "transactions costs" is required in order to administer any system. As a guide for what is a reasonable level of costs, we use the experience of the Workers' Compensation system in the United States, which is designed to deliver compensation efficiently to workers who are injured on the job. Workers' compensation is a no-fault system, and thus litigation costs will be lower. According to the National Academy of Social Insurance, for every dollar paid to workers' compensation claimants, approximately 23 cents is paid in administrative costs.[16] Using this assumption that "fair" administrative costs should be roughly equal to 23 percent of damages paid to claimants, one can begin to estimate the "excessive" costs inherent in the U.S. tort system.

Even if we start with the extremely cautious assumption that both economic ($36 billion) and non-economic damages ($40 billion) are set at an economically efficient level, and that an additional 23 percent should be spent on administration, an efficient tort system would result in transfers of only $93 billion per year.[17] By this cautious calculation, the current U.S. tort system includes "excessive" tort costs of $87 billion per year.[18] Were one to adapt the assumption that non-economic damages are random, the "litigation tax" would rise to $136 billion per year, even after accounting for reasonable administrative expenses.[19] To the extent that the economic damages awarded by the tort system are not well targeted and therefore fail to provide proper incentives to firms, the entire $180 billion in direct costs is economically excessive.

Another useful perspective is provided by comparing the cost of tort liability in the United States to that of other developed countries. While it is difficult to make cross-national comparisons because



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of data limitations, estimates by Tillinghast-Towers Perrin suggest that the U.S. tort system is substantially more costly than that of other countries. As shown in Figure 2, U.S. tort costs in 1998 were 1.9 percent of GDP, approximately double the average cost of the other nations studied. Only Italy, with costs of 1.7 percent of GDP, rivaled the U.S. in total direct costs. Tort costs in Denmark, the United Kingdom, France, Japan, Canada and Switzerland are all estimated to be less than 1 percent of GDP.

HOW LARGE IS THE BURDEN OF THE LITIGATION TAX?

Regardless of which estimate of the direct cost presented [. . .] is closest to the truth, it is likely to substantially *underestimate* the total economic cost of the U.S. tort system. In the analysis of taxation, economists recognize that the total burden of a tax exceeds the revenue it collects. The excess burden or "deadweight loss" of taxation arises because taxes distort production and consumption decisions. In the current setting, an example of this phenomenon is that physicians may prescribe unnecessary precautionary treatments, often referred to as "defensive medicine," in order to avoid non-financial litigation penalties such as harm to their reputations and the time and stress associated with a malpractice suit.[20] Some socially desirable products and services are likely never produced due to excessive tort liability claims.

Anecdotal evidence suggests that some products that may have a net benefit to society as a whole are withheld from the marketplace due to excessive concerns of liability from the tort system. For example, concerns over liability have resulted in withdrawals of certain medicines, and halted the production of vaccines such as smallpox and DPT. In trying to gauge the size of these costs, the appropriate measure of loss is the difference between the value of the good that is not produced and the value of the next best alternative. Because only one of these goods is produced in the market, it is difficult to assess this loss. The net economic cost of these types of actions is difficult to quantify, and is not included in the $180 billion estimate.

Despite these difficulties, one can approximate the magnitude of the deadweight loss through the literature on taxation. Recent research by Professor Dale Jorgenson of Harvard University estimates that the marginal deadweight loss per dollar of revenue raised by the corporate income tax in the United States is 27.9 cents.[21] If all tort claims have a comparable deleterious effect on the economy, the deadweight loss resulting from the $180 billion in direct costs would be an *additional* $50 billion. Even using the most cautious estimate that excessive direct costs total $87 billion, an additional 27.9 percent deadweight loss would bring the total cost of the litigation tax to $111 billion. In the intermediate case with direct costs of $136 billion, the total economic burden would be $174 billion annually.

WHO PAYS FOR EXCESSIVE LIABILITY CLAIMS?

Who pays the litigation tax? While a tax may be collected from a firm, its burden must ultimately be borne by individuals through job loss or a reduction in wages (workers), an increase in consumer prices (consumers), a decline in property values (landowners), or a reduction in profits and thus share prices (owners of capital). Of course, these categories are not mutually exclusive. The same person could suffer from lower wages, face higher prices for products, and have lower returns on his pension assets.

Determining the true economic burden, or economic incidence, of a tax is a complex undertaking, as it requires that one consider how wages and prices have adjusted throughout the economy as a result of the tax. If wages fall as the result of a tax, economists say that the tax has been *shifted backward* onto labor. If prices rise, economists say that the tax has been *shifted forward* to consumers.[22] Alternatively, firm profitability could be reduced, in which case the tax burden is borne by participants in private pension plans and owners of stocks and mutual funds.

For example, in the United States, the Social Security system collects 12.4 percent of a worker's wages[23] to support retirement and disability benefit payments. Half of this, or 6.2 percent, is levied on the worker. The remaining 6.2 percent is levied on the employer. However, most of the employer-paid portion of the social security tax is shifted backward so that the employer portion of the payroll tax has the same effect on a worker as does the portion

levied directly on the worker. Thus, even though employees *legally* bear only half of the payroll tax, they bear the full—or almost full—economic burden of the tax through lower wages.[24]

The *legal* incidence of the costs of the U.S. tort system falls on firms engaged in the production and sale of goods and services. Moreover, to the extent that the distribution of tort costs is largely random, tort costs only increase a firm's costs and decrease profits in a manner similar to the corporate income tax. Thus, to a first approximation, one can view the economic incidence of excessive tort costs as being similar to the corporate income tax in the United States.

The incidence of the corporate income tax is the subject of considerable debate among tax economists. Most economists believe that a substantial portion of the corporate tax is shifted to consumers through higher prices, or to workers if wages decline due to a decreased demand for the taxed good. The remainder falls on investors. Importantly, to the extent that it falls on capital, it is on owners of *all* capital, not just those firms most likely to fall subject to tort litigation. To see this, suppose that some industries or sectors are more likely to be subject to liability losses. If the high cost of liability makes investing in these sectors less attractive, capital will move out of the higher cost sector, driving down the rate of return to capital in other sectors. The lower return reflects the cost of the litigation tax. Thus part of the burden of these tort claims can be borne by all owners of capital not just those in the sector with higher tort claims.

Traditionally, three governmental agencies have engaged in the distributional analysis of tax policy: the Joint Committee on Taxation (JCT), the Office of Tax Analysis (OTA) at the Department of Treasury, and the Congressional Budget Office (CBO). During the 1980s and early 1990s, "JCT did not distribute corporate income tax changes at all, on the ground that the incidence of the tax was too uncertain."[25] Beginning in 1992, JCT allocated the corporate income tax to owners of capital generally, and for the past several years, the JCT has not conducted distributional analysis at all. OTA makes the assumption that the tax is borne by owners of capital. Traditionally, the CBO has used three different variations: 100 percent by capital, 100 percent by labor, and half by each. The inconsistent set of assumptions and methodologies across agencies highlights the uncertainty about the economic incidence of the corporate income tax. In fact, a recent survey of economists who specialize in public finance found that virtually all of these economists believe that the burden of the corporate income tax is shared by both capital and labor generally, but "there is significant disagreement about the precise division."[26]

To the extent that capital markets are globally linked, allowing capital to flow freely across borders, the after-tax rate of return to capital must be equated across countries. One implication is that if tort liability raises the cost of capital in the United States, mobile capital will seek the relatively higher return available elsewhere, until rates of return are again equalized. The result is that the capital stock in the United States may be smaller with high tort costs than with low tort costs. A smaller capital stock means there is less capital per worker, thus lowering productivity and wages. In this way, the costs of tort may fall on the less mobile factors of production, namely labor. If global capital markets were fully integrated and capital freely mobile, then the entire burden of the costs of excessive tort in the United States could be shifted to labor through reduced real wages and consumers through higher prices.

The relative magnitude of the burden of excessive tort costs in the U.S. is quite substantial. For perspective, in the year 2000, total wage and salary disbursements to private industries (i.e., excluding government workers) totaled just over $4 trillion.[27] Taking the extremely conservative excessive cost estimate of $87 billion—an estimate that treats the current level of economic and non-economic damages as appropriate, allows for a reasonable administrative charge of 23 percent of the award, and ignores the deadweight burden—the litigation tax is equivalent to a 2.1 percent wage and salary tax shifted onto private sector workers. Alternatively, if this $87 billion were shifted forward to consumers through higher prices, this would be equivalent to a 1.3 percent tax on personal consumption.[28] If the excess burden were not passed through to labor or consumers, and instead was borne entirely by capital, then it would be equivalent to a tax on capital income of 3.1 percent.[29] It should be noted that nearly 80 million Americans own corporate stock,

Table 1 Size of the Tort Litigation Tax

Incidence Assumption	*Equivalent Tax Base*	*Annual "Excessive" Tort Costs*		
		$87 billion	*$136 billion*	*$230 billion*
Fully shifted forward through prices	Consumption Tax	1.3%	2.0%	3.4%
Fully shifted backward onto workers	Wage Tax	2.1%	3.3%	5.7%
Fully borne by investors	Capital Tax	3.1%	4.9%	8.2%
25% shifted through prices,	Consumption	0.3%	0.5%	0.8%
25% shifted through wages,	Wage	0.5%	0.8%	1.4%
50% borne by investors	Capital	1.6%	2.4%	4.1%

SOURCE: CEA calculations. The taxes are calculated by dividing the annual excessive tort costs by the appropriate base. The consumption base is total personal consumption expenditures which totaled $6,728 billion in the year 2000. The wage base is total wage and salary disbursements to private industries, which totaled $4,069 billion. The capital base is non-labor payments in national income, which totaled $2,789 in the year 2000.

either individually or through their pension funds.[30] In fact, over 20 percent of corporate stock in the U.S. is held by public and private pension funds—suggesting that if this litigation tax is not passed through to workers via wage reductions or price increases, workers are still harmed through reduced returns on their retirement saving.

Table 1 [. . .] illustrates the "tax equivalence" of tort litigation costs under various assumptions about the incidence of the tax, and the size of the excessive tort costs. As a lower bound on the size of the litigation tax, we treat all economic and non-economic damages as economically appropriate, allow for 23 percent administrative costs, and ignore the deadweight burden. This translates to a litigation tax of approximately $87 billion per year. For an intermediate estimate, we include non-economic damages in the excess cost of tort, following the work of Viscusi. This implies a litigation tax of $136 billion per year, ignoring the deadweight loss. For an upper-bound estimate, we treat *all* tort costs as economically excessive, and also include an estimated $50 billion in deadweight loss.

As illustrated in Table 1, under the assumption that the tax is fully shifted forward through prices, the annual excessive tort costs are equivalent to a tax on consumption ranging from 1.3 percent to 3.4 percent. Alternatively, if shifted backwards onto labor, the "litigation tax" is equivalent to a tax on wages from 2.1 percent to as high as 5.7 percent. If the incidence of the tax falls on investors, it is equivalent to a tax on capital ranging from 3.1 percent to 8.2 percent. The final row of Table 1 illustrates the case in which the burden of the litigation tax is shared by consumers, workers and investors.[31]

Whether it falls entirely on labor, or whether some portion of it also falls on capital owners in the U.S., the cost to the U.S. economy is substantial. For example, in the year 2000, the intermediate cost estimate of $136 billion is more than the Federal government spent on all of the following programs *combined:* Education, training, and employment; general science; space and technology; conservation and land management; pollution control and abatement; disaster relief and insurance; community development; Federal law enforcement and administration of justice; and unemployment compensation.[32] Alternatively, $136 billion is two-thirds the amount of revenue collected from the corporate income tax[33] or nearly half (46 percent) of the amount spent on national defense.[34] Viewed differently, at more than 3 percent of wages per year, the cost of the litigation tax is also far more than enough money to solve Social Security's long-term financing crisis. To a family of average income, three percent of wages is also the cost of more than three months of groceries, six months of utility payments, or eight months of health care costs.[35] That is, $136 billion represents a large drain on the productive resources of the United States.

SUMMARY

The cost of the U.S. legal liability system has increased substantially over the past several decades. While economic theory suggests a potentially useful role for a tort system in providing proper incentives, excessive tort costs are akin to a tax on firms. Like any tax, this "litigation tax" imposes deadweight losses on the economy in the form of products and services that are never produced as a result of the fear of litigation. Both the direct and indirect costs of excessive tort must ultimately be borne by individuals in the economy through some combination of higher prices, lower wages, and reduced returns to investments.

NOTES

1. Direct costs include awards for economic and non-economic damages, administration, claimants' attorney fees and the costs of defense.
2. Tillinghast-Towers Perrin, "U.S. Tort Costs: 2000, Trends and Findings on the Costs of the U.S. Tort System," February 2002.
3. Throughout this paper, we use the term "firm" to refer to any producer of goods and services.
4. Another economic argument sometimes used to support tort liability is that the right to sue provides consumers with "insurance" in the event of an accident. For a discussion of the limitations of this view, see Paul Rubin, *Tort Reform by Contract*, Washington, D.C.: The AEI Press, 1993. For purposes of this paper, it should be noted that regardless of the rationale for the system, the cost is still borne by individual consumers, workers, or investors.
5. For broader discussion of the role of each of these approaches, see W. Kip Viscusi, "Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety," *Yale Journal on Regulation*, Winter 1989.
6. W. Kip Viscusi, "Why There Is No Defense of Punitive Damages," *Georgetown Law Journal*, November 1998.
7. David Luban, "A Flawed Case Against Punitive Damages," *Georgetown Law Journal*, November 1998.
8. Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman, and Martin Wells, "The Predictability of Punitive Damages," *The Journal of Legal Studies*, June 1997.
9. A. Mitchell Polinsky, "Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg, et al.," *The Journal of Legal Studies*, June 1997.
10. W. Kip Viscusi and Michael Moore, "Product Liability, Research and Development, and Innovation," *Journal of Political Economy*, 1993.
11. Peter Huber and Robert Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation*, Washington, D.C.: The Brookings Institution, 1991.
12. Tillinghast-Towers Perrin, "U.S. Tort Costs: 2000, Trends and Findings on the Costs of the U.S. Tort System," February 2002, page 8.
13. Some anecdotal evidence of these costs can be found in Michael Freedman's "The Tort Mess," Forbes.com, May 13, 2002.
14. *Ibid*, page 12.
15. According to previous studies by Tillinghast-Towers Perrin published in 1995, 1992 and 1989.
16. National Academy of Social Insurance, "Workers' Compensation: Benefits, Coverage and Costs, 1999 New Estimates and 1996–1998 Revisions," May 2001.
17. (Economic damages ($36 b.) + Non-economic damages ($40 b.) × Administrative cost factor (1.23) = Non-excessive tort costs ($93 b.)
18. Total tort costs ($180 b.) − Non-excessive tort costs ($93 b.) = Excessive tort costs ($87 b.)
19. Total ($180 b.) − Economic($36 b.) × Admin cost factor (1.23) = Excessive tort costs ($136 b.)
20. Daniel Kessler and Mark McClellan, "Do Doctors Practice Defensive Medicine?" *The Quarterly Journal of Economics*, May 1996.
21. Dale Jorgenson and Kun-Young Yun, Investment, Volume 3, *Lifting the Burden: Tax Reform, the Cost of Capital, and U.S. Economic Growth*, 2001, Table 7.10, page 287.
22. Joseph E. Stiglitz, *Economics of the Public Sector*, Third Edition, New York: W.W. Norton, 2000, page 483.
23. Up to a maximum taxable amount of $84,900 in 2002.
24. Joseph E. Stiglitz, *Economics of the Public Sector*, Third Edition, New York: W.W. Norton, 2000, page 483.
25. Michael J. Graetz, "Distributional Tables, Tax Legislation, and the Illusion of Precision," in David F. Bradford, Ed., *Distributional Analysis of Tax Policy*, 1995, page 47.
26. Victor R. Fuchs, Alan B. Krueger, and James M. Poterba, "Why Do Economists Disagree about Policy? The Roles of Beliefs about Parameters and Values," National Bureau of Economic Research Working Paper No. 6151, August 1997, page 12.
27. *Economic Report of the President*, February 2002, Table B-29.
28. *Economic Report of the President*, February 2002, Table B-1.
29. According to unpublished data from the Productivity and Technology Division of the Bureau of Labor Statistics.

the capital (non-labor) share of nonfarm business output was $2,762 billion in 2001.

30. Investment Company Institute, *Equity Ownership in America*, 1999.

31. The assumed division is 25 percent through prices, 25 percent through wages, and 50 percent through reduced investment returns. This incidence assumption is based on one of the corporate tax incidence scenarios used by Joseph A. Pechman in *Who Paid the Taxes, 1966–85*, Washington, D.C., The Brookings Institution, 1985, p.35.

32. *Budget of the United States Government*, Fiscal Year 2003, Historical Tables, Table 3.2, pages 54–69.

33. *Ibid*, Table 2.1, page 30.

34. *Ibid*, Table 3.1, page 51.

35. Bureau of Labor Statistics, "Consumer Expenditures in 1999," May 2001.

READING 8.2 FAIRNESS, STRICT LIABILITY, AND PUBLIC POLICY

John J. McCall

The recent insurance crisis has intensified the public debate over product liability law. Business and insurance industry lobbyists have pressured for state and federal reform of the current strict liability standards. The main complaints about strict liability center on two claims: (1) the cost of a strict liability system is exorbitant and (2) holding business strictly liable for product-related injuries is unfair. This brief comment evaluates only the second of these claims.

The charge that strict liability is unfair to business gains credibility from an often unspoken underlying principle of fairness: Individuals should not be penalized (or, for that matter, advantaged) for things that are beyond their control and, hence, not their fault. This principle, or something like it, lies behind our intuition that the harms caused by severe mental incompetents do not deserve punishment. Something similar also explains the great attraction of John Rawls's recent theory of justice.

If we apply this principle to the case of product liability, it certainly appears unfair to adopt a strict liability approach when compensating for injuries due to defective products. For, according to strict liability, a business is held financially liable for harms caused by its products even when the defect is not the result of negligence. For example, if a defective product is released on the market despite a strict quality control inspection program, the business can still be held liable according to this standard. Because no quality control system can prevent all defects, a company could escape financial jeopardy only by ceasing production. A corporation, then, can suffer serious economic damage under a strict liability standard for something that is not, in any morally significant sense, its fault.

We should look a bit closer, however, before concluding that strict liability is unfair. By definition, a strict liability standard applies to cases of accidental injury related to product defects. A consumer who is injured by a defective product is not at fault for the injury just as the business is not at fault. In an equally important way, then, the consumer is harmed by something beyond his or her control. (Ignore the complexities associated with contributory negligence on the part of the consumer since those complexities have no bearing on the general question of the fairness of any strict liability standard.)

If we accept the argument that strict liability is unfair to business, the paradoxical conclusion is that the alternative for cases of non-negligent defects is also unfair to the injured consumer. So, rather than drawing conclusions on the basis of the above fault/control principle about the fairness of strict liability, we instead should recognize that this principle is simply inapplicable when no one bears moral responsibility for the harm, that is, when the harm is purely accidental.

We need not abandon, however, any attempt to discuss the fairness of strict liability just because one common principle of fairness does not apply. We

could, for instance, adapt another interpretation of fairness that is also associated with the work of John Rawls. Imagine a hypothetical choice of product liability policy under impartial and unbiased conditions. Suppose we ask an ordinary rational person to suspend her current views on product liability policy and to imagine two mutually exclusive alternative situations: one in which she is injured by a non-negligent-caused product defect and has no legal possibility of compensation; the other in which she is harmed by higher consumer prices or lower dividend return as a shareholder because the corporation must pay for strict liability product insurance. I suspect the first alternative is distasteful enough that the ordinary citizen would agree to accept the second alternative as a way of precluding the first.

If we develop this argument more completely by taking account of all associated costs, we may be able to construct a forceful argument for the conclusion that strict liability, far from being unfair, is actually *required* by fairness. Whatever we think of such an argument, the failure of the initial argument against strict liability is clear enough. At the very least, we ought to allow that a strict liability standard is, *prima facie, not unfair.*

If we do grant that strict liability is at least compatible with fairness, we still need to provide reasons for adopting it over other standards that may also be compatible with fairness. There are two such reasons frequently offered for a strict liability policy. First, proponents claim that a strict liability policy would reduce the number of product-related injuries. Because businesses would be exposed to greater financial jeopardy by a strict liability standard, they would have greater economic incentive to guarantee the safety of their products. The less cautious a company is, the more it can expect to have product liability judgments against it.

George Brenkert argues that this is not a sufficient reason for adopting a strict liability policy.[1] Brenkert suggests (a) that strict liability will not achieve any greater safety results than could be achieved through, say, legislated product safety standards; (b) some accidents are unpreventable; and (c) strict liability may be analogous to the unfair policy of imprisoning the wives (not husbands?) of criminals. Even though I agree that accident reduction is not, in itself, a sufficient justification for strict liability, I also believe that none of these objections is compelling. For instance, lobbying and the appeals process may weaken congressional safety legislation so that fines become a less than effective deterrent. Moreover, even though some accidents will still occur under strict liability, this does not prove that strict liability will not eliminate other injuries when compared, say, with a negligence standard. Finally, the unfair imprisoning of wives who are not at fault is not analogous to compensation for a non-negligent, injury-causing product defect, which, for reasons stated above, is not unfair.

A second policy reason traditionally used in support of strict liability is that it distributes the cost of injuries in a way that minimizes their impact. It also distributes the costs to those who have benefitted from the availability of the injury-causing product. Ordinarily, the cost of product liability insurance is passed on in the form of higher product prices to those who demand the product. But even in cases in which an individual business in an elastic market has markedly higher insurance premiums, costs are still assigned to those who benefitted—the shareholders. (Why might one manufacturer have higher insurance premiums? Does this situation suggest a negligent failure to operate by the best available industry practice? One also wonders about entire industries with high insurance costs where the demand for the product is elastic. Does that indicate that the product is both dangerous and unnecessary?)

I would argue that the costs are more appropriately assigned to other consumers or to shareholders than to either the injured consumer or to society at large. Making the injured bear the full economic cost of the injury seems too harsh. Making society at large bear the cost through some form of socialized product liability insurance violates the principle of "user pays" and lessens the incentive to manufacture safe products. In ordinary circumstances, then, a strict liability standard is preferable to its alternatives.

A number of caveats for this conclusion are in order, however. First, if the social costs of a private insurance system under a strict liability policy were too great (for example, high unemployment, shortages of socially necessary products), perhaps some public subsidy for that insurance would be in order. I hesitate to acknowledge this qualification, though, because recent history indicates that such a policy

exception could be manipulated by business and the insurance industry into a policy norm.

Second, cases arise in which the corporation that supplied the product no longer exists or the harms caused go beyond the available assets of the corporation and, hence, full recovery by the victim from the corporation is precluded. Perhaps in such cases public subsidy to complete the compensation of the victim is preferable to partial compensation. About whether the same subsidy should be available to the families of victims, I am less sure. About joint and several liability cases in which the harms are caused by more than one agent but some of the harm causers no longer exist and the remaining are liable for full compensation of the victim, I am also unsure. These cases indicate the difficulties in fashioning a fair, reasonable, and effective public policy on product liability. However, I hope to have suggested that any such policy ought to start from a strict liability basis.

NOTE

1. George Brenkert, "Strict Products Liability and Compensatory Justice" in *Business Ethics: Readings and Cases*, W. Michael Hoffman and Jennifer Mills Moore, eds. (McGraw-Hill, 1984).

READING 8.3 SOCIAL PRODUCTS LIABILITY: THE CASE OF THE FIREARMS MANUFACTURERS

George G. Brenkert

1. INTRODUCTION

One of the most important and challenging issues of business ethics—or indeed of ethics more generally—is that of "moral responsibility." And though this problem has been with us from the outset of reflection on ethics and business,[1] the following developments in the late twentieth century have exacerbated its difficulty: the increased mobility among people, the development of increasingly complex technologies with ever more significant consequences, the extension of the distance between people's actions and the effects of their actions, the extended distance between the manufacturers of products and the consequences of those products, the expanded possibilities for anonymous actions, and the collapse of many customary forms of restraints between both individuals and organizations. These developments have not only greatly increased the significance of the issue of moral responsibility, they have, at the same time, placed our standard notions of responsibility under considerable strain. The significance of this strain promises to become even greater during the 21st century. As a consequence, I believe, we are in the midst of rethinking and developing new and creative ways of extending our notion of responsibility. People and organizations are being held responsible in ways they were not held responsible in past years. New kinds of cases that attribute responsibility to individuals and organizations appear with increasing frequency.

This can be illustrated in a variety of ways. Companies marketing alcoholic drinks to inner-city blacks and tobacco companies targeting young, working-class women have been charged with violating their responsibilities to these individuals because of the special vulnerabilities they are said to have. Apparel manufacturers have been said to violate their responsibilities by using suppliers who underpay foreign labor to produce garments they market. Consumers are said to be irresponsible if they buy apparel manufactured in sweatshops. Manufacturers are said to be responsible to prevent the misuse of their products by children and adults in other lands. Power companies and manufacturing companies have been said to have responsibilities to reduce the emissions of their plants to help avoid global warming. The publisher of a book on how to commit a murder has been said to be liable in the

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death of persons murdered by a hit man who followed the book's prescriptions. A television talk show has been found liable in the case of a man murdered by a talk show participant who felt that this man had humiliated him on the talk show. And gun manufacturers have been said to be partially responsible for the harm caused by the firearms they produce.

In this paper I want to explore, as one part of this important trend, a new form of responsibility that is, I believe, being developed in some of these cases. I call this "social products liability." I understand this to be an ethical, not a legal, doctrine. Still, its legal counterpart may be found, for example, in some of the lawsuits that have recently been brought against gun manufacturers. Nevertheless, my aim is to sketch a moral, not a legal, doctrine. As such, this paper does not pretend to resolve various legal issues, such as those concerning the liability of gun manufacturers in present lawsuits. Still, I believe that this new form of moral responsibility may be said to lie behind the legal claim that gun makers are partially liable for the harm caused by those who have illegally used the guns those manufacturers have produced. In the present article I can only briefly trace the outlines of such a moral account. I thereby leave the major effort to defend and expand on this view to future occasions.

II. SOCIAL PRODUCTS LIABILITY

The new form of responsibility I wish to sketch does not involve the question of whether a business is morally responsible for some harm caused by one of its products or activities over which it could directly or immediately exercise control. Nor is the defectiveness of the product in dispute. Rather the issue concerns a situation in which a manufacturer produces a non-defective product that is sold to one dealer, and then to some individual who may in turn sell it to another individual who injures or kills someone with it. May, for example, gun manufacturers be held (partially) morally responsible in such situations for the harms and costs involved when someone shoots another person in the course of a robbery, mugging, or argument? In the past, these intervening actors have absorbed such responsibility. Indeed, in the United States this was even true for defective products at the outset of this century. The original manufacturer was able to hide behind those who distributed the product, even though the product was defective.[2] This is no longer the case. Instead, a doctrine of *strict products liability* was developed that allowed manufacturers to be held responsible when the product was defective, even though they had exercised due care in its production. Thus, when the product was not defective, but a person was injured, e.g., a drunk person drove into someone else and injured him or her, neither the dealer nor the manufacturer was held liable for the harms and costs involved.

The questions now being raised against gun manufacturers involve cases in which a non-defective product does what it is designed to do, but, because of the social circumstances in which it comes to be used, imposes significant harms through the actions of those who are using it in ways in which it was not supposed to be used. Gun manufacturers are said to be partially responsible for these harms because the ways in which they have marketed the guns permit, and perhaps encourage, the guns to fall more readily into the hands of those who would misuse them. This is the crux of what I am calling "social products liability." It stands in contrast to the doctrine of strict products liability.

This new view of responsibility involves, I suggest, four different conditions that are individually necessary and, jointly, sufficient for agents to be justifiably held responsible for the harms they cause. These four conditions may be referred to as: Harms and Costs, Contribution, Foresight, and Effective Alternatives. I can only very briefly survey here both the theoretical points and their applications to the firearm industry.

III. HARMS AND COSTS

There are three characteristics of the harms and costs that serve as the initial ground for attributing this extended sense of responsibility to a manufacturer. The first is simply the fact that their products are being used by some individuals to create considerable harm to other individuals (and sometimes themselves) and costs to society. These harms and costs are highly undesirable and disruptive both to the lives of the individuals affected and the healthy functioning of a society.

There are various ways, in the case of the manufacture of guns, that this harm can be portrayed.

One way is to note the number of deaths and injuries due to handguns. For example, it has been claimed that "in 1996, more than 34,000 people were killed nationwide with handguns, making handguns second only to motor vehicles as the most frequent cause of injury and/or death in the U.S. Of these firearm deaths, more than 14,300 were homicides, 18,100 were suicides. Of these, more than 1,100 deaths were from unintentional shootings."[3] By way of contrast, the number of accidental firearm deaths in 1995 was 1,400; that of poisonings was 10,600; 12,600 from falls; 4,500 from drownings; and 43,900 from motor vehicles. "In 1992, handguns were used in approximately 1 million violent crimes."[4] In addition, "approximately 99,000 individuals are treated annually in hospital emergency rooms for non-fatal firearm injuries, with about 20,000 of these victimized by unintentional shootings. Handguns cause most of these injuries."[5]

These figures say nothing of the personal and financial costs. Though the former would be difficult, if not impossible, to quantify, the latter have been quantified, though surely even this is only in a rough fashion. For example, "the Florida Department of Health has estimated the cost of medical, legal, administrative and productivity losses just for people under 25 years of age at more than $129 million. This estimate does not include the cost of gunshot wounds that do not end in death."[6] The costs of deaths and injuries for the entire United States have been estimated at about $20 billion every year.[7]

These figures, if accurate, are disturbing. They are way out of line with all other countries of the world. The individuals who have obtained and used these guns illegally have caused enormous harm. These figures are, however, unclear on a number of items. It is not terribly clear how many deaths and woundings are attributable to handguns as used by criminals. The most recent figures also indicate that there has been a decline in these deaths in most recent years.[8] Further, there are no figures that might represent costs saved through the presence of handguns, e.g., murders, muggings, robberies prevented by someone having a gun. Nevertheless, the figures from other countries suggest that there are other ways to prevent these criminal acts that do not involve the use of handguns. In addition, other numbers indicate that the number of times handguns have been used in self-defense are relatively low, though again any such numbers must be viewed very critically.

Secondly, it is important to note that such costs and harms do not derive from the fact that particular products of an otherwise acceptable product line are defective. Instead, they derive from the use of those products as they were designed. The lack of negligence in production of the product and the lack of physical defect in the product itself are features of social products liability that separate it from previous senses of moral liability or responsibility. Further, there appears to be few balancing goods or benefits that derive from the situations in which the harms and costs are produced. As such, it should be clear that the harms and costs noted here do not constitute a cost/benefit study of guns, or of guns being available, in some way, in a society. The preceding figures would be part of such a study, but do not themselves constitute such a study. Still, there is little doubt that real harm is being done. Further, it is of a nature and level that distinguishes the United States from other similar countries. For example, it is claimed that "more citizens die in handgun fire in just two days in the U.S. than in one year in Canada, Great Britain, Japan, Sweden and Australia combined."[9]

Third, these harms and costs are not always attributable to the use of specific weapons by particular individuals. That is, many times the exact weapon that was used to commit a crime is not identifiable. Even the person who used the gun to commit the harm may not be known. Rather, what is known is that certain manufacturers are selling guns that end up being used in a particular area. This does not allow those harmed, or the cities in which they reside, to bring a lawsuit against a particular manufacturer for the harm caused by a specific weapon. Instead, the charge is that weapons of certain (not wholly specifiable) kinds made by particular manufacturers are causing harm and costs in some region and to some people within that region. This is a unique and special feature of these harms and costs.

Now surely these claims, even if correct, do not imply that the manufacturers of handguns are (partially) responsible for those harms and costs. Thousands are also killed and injured by automobiles. Further, the general nature of the harm, without specification to particular weapons and/or

manufacturers, singles out these charges of responsibility as unique and a considerable extension beyond ordinary forms of responsibility. Still, these figures do raise questions about the circumstances in which those causing the harm have obtained their guns. It is the latter that has led to charges of irresponsibility on the part of gun makers for their marketing practices.

IV. CONTRIBUTION

For social products liability to be attributed to a business, it must do something—other than simply produce the products harmfully used—that can be said to encourage, foster, or abet the process that leads to the harm and costs. There are two features that constitute this condition.

First, the products must be created and placed into the marketplace in ways that unreasonably increase the likelihood that their use will lead to the harms and costs they do. In the case of gun manufacturers, there are several interrelated aspects of their operations that have been said to contribute unreasonably to the increased likelihood of such harms. To begin with, the nature of guns is such that, any time they are used, they carry lethal force. Unlike automobiles, one cannot shoot a gun "slowly," though one may aim its lethal force in different directions. Instead, guns are more like highly lethal poisons and hand grenades. However, rather than designing guns to enhance the legitimate control of their lethal nature, it has been charged that the recent designs of handguns, with their short barrels, easy concealability and poor quality, are such that they are "particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection of persons, property and businesses."[10] Other designs involve special triggers and magazines that permit rapid firing of multiple bullets within a couple of seconds. In short, the design of the guns increases the chances that they will be used to cause harm (even extensive harm) in criminal ways. Of course some of these designs also permit women to carry a handgun for self-protection in their purse.[11] But they also mean that these guns can be carried by criminals more easily. In short, the designs of many of these guns have made them more deadly and dangerous than those produced decades ago. Manufacturers are designing and producing guns with physical characteristics that encourage their use in the kinds of situations central to the harms and costs noted above. Their designs permit, if not encourage, their use in such situations.

At the same time, the advertising campaigns of gun manufacturers used to promote guns do so in ways that appeal to those with violent aims. R. G. Industries uses the slogan "As tough as your toughest customer" and emphasizes that the gun's finish provides "excellent resistance to fingerprints."[12] Similarly, the manufacturer S.W. Daniels Corp. marketed its 9-millimeter semi-automatic pistol as the weapon of "choice of the drug lords of the 80s."[13] Navagar advertised its TEC-DC9 as having a "special finish to increase bullet velocity." It is said to be a "radically new type of semiautomatic pistol designed to deliver high-volume firepower."

It is true that other manufacturers also play up the power or performance of their products in ways in which people may not use them, e.g., cars driving at very high rates of speed. They too sell the "sizzle" of their products. However, the analogy is questionable, in that the "sizzle" of guns, like that of poisons and hand grenades, is something directly connected with doing harm to other humans. Indeed, the more the performance of such products is enhanced, the greater, one would think, the likelihood that some oversight would be required of the way in which such products end up in the hands of their ultimate users. Especially, since unlike cars, high-powered guns will be used in their "high-powered" mode, as opposed to cars, which can be driven slowly.

Again, such marketing increases, rather than decreases, the likelihood that those who ought not to have access to guns, or who will use them in illegal ways, will seek them out. Advertising of this sort targets those who intend to use these guns in undesirable ways. Their advertising approves or validates the use of guns in undesirable manners that are also connected with the harms and costs described above.

Finally, and most importantly, gun makers market their guns to distributors who often do not in turn adequately or properly check those to whom they sell the guns. For example, the Chicago Police department sent two-person teams out to twelve gun stores ringing Chicago to investigate how they sold guns. Repeatedly, the stores sold guns to indi-

viduals without the proper identification, who indicated that they wanted to do harm to someone else, and who gave clear indications that they wished to resell the guns.[14] Gun makers also sell to those who resell the guns out of their cars, at car shows, and from their kitchens. Virtually all of the agreements between gun makers and dealers fail "to ban sales of guns at gun shows and to very small dealers with looser standards than the big retail operations."[15] Further, gun makers have resisted efforts to control or monitor the ways in which ultimate customers get their guns.

In short, gun makers make scant effort in their marketing to prevent guns from falling into the hands of those who should not have them. Though these guns may be used for desirable purposes, their use, at any time, is potentially deadly. In addition, assuming (for present purposes) that they do not have safety locks (and that this does not mean that they are defectively designed), they may potentially be used by anyone at any time without any training. They don't have to be re-registered each year or checked for safety. The eyesight or the skills of those using them are not monitored. Manufacturers don't oversee those to whom they sell the guns who sell to those who shouldn't have them. They sell to those who do not have restrictions placed on them by the state, thus multiplying guns reaching those who should not have them. These include felons, those without proper identification, those who are engaged in straw purchases, as well as those who seem to be angry and who want them to settle a score. In addition, they sell guns to markets that cannot plausibly themselves absorb those guns. In short, they sell to markets that are only intermediate to other more ultimate markets, the ones where the guns are actually used to cause harm and its associated costs.

The preceding points maintain that gun makers operate in such a way that, through the advertising and product design aspects of their marketing, they encourage the acquisition of their guns by members of society who are proscribed from having guns. Further, through their distribution practices they facilitate this. In short, their marketing practices foster the misuse of guns in the United States.

The second feature of the contribution condition is that it applies not simply to individual gun makers but to them collectively as well. It is the combined effect of their marketing practices (design, advertising, and distribution) that promotes the harms noted above. Indeed, in some cases it is not known which guns are actually being used to harm this or that individual or to commit a particular crime. They might come from Navegar, Colt, Beretta, or some other manufacturer. What is known is that some gun was used. F n makers have not taken steps to alter the marketing practices noted [. . .] As such, the combined marketing contributions of these various manufacturers renders them both individually and collectively responsible for the harms their products cause.

Quite clearly, the preceding charges rest upon a number of factual claims. If the facts are mistaken, then the contribution condition against the gun makers would have to be modified or said to fail. The point here is not to ascertain the correctness of these factual claims. Rather it is to capture them as one part of the charge that, if correct, would substantiate the view that gun manufacturers have a responsibility for the harms and costs that their products cause. For it is with the assumption that these charges are correct that some (cities) have claimed that gun manufacturers bear a responsibility for the results of their marketing practices. Gun makers are said to have responsibilities to take special actions to curb some of the violence those using guns have engaged in.

V. FORESEEABILITY

The preceding two conditions, harm and contribution, do not, by themselves, allow for responsibility to be attributable to an agent. Some agent might be unable to anticipate or foresee where such harm might occur. Accordingly, another condition for such responsibility to be attributed to them is that they could foresee (not necessarily that they did foresee) the occurrence of the harm that their products produce and the way this harm is fostered by their own marketing. Foreseeability does not require that the agent planned or conspired in this train of events, although that is possible. It may also simply be that the agent's actions unwittingly were part of this train of events. Once this occurred, however, foreseeability may be attributed to the agent in other similar kinds of situations. This situation is further exacerbated when the agent does not, in a particular set of circumstances, take mea-

sures comparable to those taken by agents in other relevantly similar situations to protect downstream individuals from harm from their products.

Accordingly, it is claimed that gun manufacturers can foresee that their marketing practices contribute to the harms created by their products. The dealers who sell their guns permit persons to obtain them "who are not eligible to possess them or who do not wish to be identified as a purchaser on a firearm in official records, and who are likely to use the handguns that they obtain in the commission of crimes."[16] "If a buyer purchases five handguns of the same or similar make, the inference that the buyer intends to traffic the guns (or is a straw purchaser) outweighs any inference that the buyer intends to use the guns personally for legitimate reasons."[17] In effect, gun manufacturers initiate a process over which they exercise little or no control and yet which they should be able to foresee will lead to raised levels of harm by those who are able, inappropriately, to obtain the guns they purchase. "This failure to implement sufficient controls over the methods of firearm distribution has fueled the illegal market for handguns, which, in turn, has fueled crime."[18] Consequently, the manner in which gun manufacturers distribute handguns encourages a situation in which thousands of handguns come to be possessed and used illegally in the cities resulting in a higher level of crime, death, and injuries.[19]

However, gun makers have objected that they are not responsible. They invoke some version of what might be called "the veil of choice." This is the claim that those who buy the guns have a choice to make with regard to how they use the guns. This choice is all-important. And it shields or masks those who manufacture the guns from responsibility for what those individuals choose to do with them. The responsibility is theirs alone. Maybe this does not fully work with children. Their free choice is not yet fully developed. But with normal adults it is and we must, out of respect, treat them as adults. A veil of choice separates the two.

But does it? Suppose that John has good reason to know what the nature of Joe's choice will be. Whether Joe has a "free" choice or not, John has good reason to believe that he will use it to harm someone or to break the law. What then about John's responsibility? It is false that a "veil of choice" functions as an absolute barrier to John's complicity or responsibility. John does not acquire the full responsibility, but does acquire some of it. In short, the choice of others does not shield a manufacturer from responsibility when the manufacturer and distributor may and should know that their product will be used to harm and impose great costs on others.

However, the special nature of social products liability needs to be noted. For in this case the gun manufacturer does not know that some specific person will act in a particular harmful manner. Further, the manufacturer does not sell to the person doing the harm; even the retail gun dealer may not do this. Instead, the claim is that gun manufacturers should be able to foresee that making and marketing guns in the manner that they do will lead other, unspecified individuals to act in unspecified, but harmful and illegal manners. It is true, then, that gun makers cannot control the specific "outlaws" who illegally trafficked in guns or who misused them in crimes, once licensed dealers legally made the first sales of weapons. And as James P. Door, firearms industry lawyer, has noted, "[t]here has been no evidence that negligence by any manufacturer was the proximate cause of these shootings."[20] But it is false that they play no role and that the role they play is one that cannot be foreseen by them. In short, the contributory role they play is foreseeable.

VI. EFFECTIVE ALTERNATIVES

These preceding three conditions require a final condition to make an attribution of responsibility plausible. For agents to be held responsible according to social products liability, they must be able to do something else that will make a difference with regard to the occurrence of the harms and costs. Such alternatives may include altering the product or the service they provide, altering the way in which they offer or market it, or even (in extreme situations) simply stopping the production or marketing of that product.

There are two aspects to the claim that gun makers must also be able to take actions to reduce the harm their products are producing. First, there are actions gun makers could take that would reduce the harm and costs. These might include monitoring the actions of others or not selling to certain dealers. They could set certain standards that dealers of their guns would have to follow. They

could even institute spot inspections of the operations of those dealers. In addition, they could stop or modify other actions they engage in that encourage people to act in potentially dangerous ways or to look with favor on the use of their guns in inappropriate ways. Even the design of guns themselves could be modified to make them less likely to kill high numbers of people. They might even support various gun laws that would take some of this moral burden off themselves.

On the contrary, present gun makers rarely make any effort to keep their guns from being sold at gun shows or by independent dealers who operate out of their homes or cars. Those kinds of sales are a major source of weapons to the illegal market.[21] For example, one distributor's accounts showed sales to 1,929 gun dealers in Florida alone even though fewer than 40 dealers operated full-scale retail outlets where regulations on waiting periods and background checks are observed more faithfully than by solo dealers.[22]

David Stewart has compared the distribution system in the handgun industry with those for other products that are potentially harmful. The manufacturers of herbicides and other farm chemicals, for example, strictly limit the number of dealers for their products so that sales personnel can be carefully trained and monitored to ensure that purchasers get full instructions on the appropriate use of the chemicals. "There is a very deliberate effort to prevent accidents or misuse of the products, Steward said, but he found no such effort in the gun industry."[23] Similarly, the paint industry tried to limit the sale of spray paint to juvenile graffiti.[24] On the other hand, gun makers have failed to exert their power to stem the flow of illegal guns to the black market.

Of course, some will argue that this will mean that some people will not be able to acquire the guns they have in the past. Of course this is true and is the very point at issue. However, this would not mean that people could not lawfully have guns. They might not have the same full range of guns. It would be a different range with guns that are not available today (with safety features). On the other hand, the burden of taking measures to stem this flow of illegal weapons is not an undue one for gun manufacturers. The main burden would be the loss of sales to those likely to use or possess a gun illegally.[25]

VII. CONCLUSION

The upshot of the preceding is that agents may be held responsible in far broader ways than in the past. Social products liability says that if you (together with others) make a product line that is used to cause significant harm to a no-table portion of society, you (and they) will be held collectively responsible for those harms, even if the product is not defectively manufactured or designed, when you have foreseeably contributed to this harm and avoided taking effective counter steps to prevent it. In short, products are not simply physical, but social, objects. The harm caused by some using them may come from a combination of their physical characteristics and the social circumstances in which they are made available to the public. This extended sense of responsibility applies to gun manufacturers.

Accordingly, gun manufacturers should do something about the harms and costs caused by the use of their products. They can no longer hide behind the sale. The "veil of choice" does not shield them from later sales and uses of their products. They participate in, and benefit from, this economic system. Their responsibility follows upon their partaking in this system and the responsibility of those in this system for the well-being of this system. Otherwise they are a form of free rider. In this sense, the present issue is also one of distributive justice, of the just sharing of benefits and burdens in an ongoing economic and social system. Gun makers are not sharing the burdens that are created by their products, though they are enjoying the benefits. If times were different, these claims would not be made. Instead, we see the effects of guns on society marketed in the ways described above. Gun manufacturers must recognize new responsibilities in light of this situation.[26]

NOTES

1. Cf. Cicero, "On Duties," in *Selected Works* (New York: Penguin Books, 1971).
2. Cf. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).
3. "Complaint: Mayor Joseph P. Ganim and the City of Bridgeport v. Smith and Wesson, et al." Bridgeport, Connecticut. March 23, 1999, p. 11.

4. Mark D. Polston, "Civil Liability for High Risk Gun Sales: An Approach to Combat Gun Trafficking," *Seton Hall Legislative Journal* .19, no. 3 (1995).
5. Bridgeport v. Smith and Wesson, p. 11.
6. Cf. Penelas v. Arms Technology. The quoted text is from "Liability Suits Against Gun Manufacturers, Dealers and Owners," http://www.handguncontrol.org/legalaction dockets/
7. "The Economic Costs of Gun Violence," http://www.psr .org/econ.htm (April 2, 1999).
8. Beretta Defeats Handgun Control, Inc. in California Lawsuit," http://www.nrawinningteam.com/beretta.html (April 1, 1999).
9. "Embassies and Foreign Crime Reporting Agencies," *FBI Uniform Crime Reports* (1992); cf. "Handguns," http://www.ceasefire.org/html/handguns.html (April 2, 1999).
10. Kelley v. R. G. Industries, 497 A.2d 1143, 1154 (Md. 1985).
11. This assumes, of course, that carrying a handgun in one's purse does increase one's self-protection.
12. Cited in Dennis Henigan, "Victims' Litigation Targets Gun Violence," *Trial*, February, 1995. Cf. http://www .handguncontrol.org/legalaction/dockets/A3/a3vetmlg .htm (March 25, 1999).
13. Daniel Wise, "Claim Against Gun Industry on Trial in Federal Court," *New York Law Journal*, January 7, 1999, p. 1.
14. Cf. "Complaint: City of Chicago v. Beretta U.S.A. Corp., et al." Chicago, Illinois. November 12, 1998.
15. Vanessa O'Connell, "Jury in Suit That Blames Gun Makers for Shootings Doesn't Reach Verdict Yet," *Wall Street Journal*, February 5, 1999, p. B6.
16. Bridgeport v. Smith and Wesson, p. 25.
17. Ibid.
18. Ibid., p. 3.
19. Ibid., pp. 28f.
20. Cited in Joseph P. Fried, "9 Gun Makers Called Liable for Shootings," *The New York Times*, February 12, 1999, p. A1.
21. Roberto Suro, "Brooklyn Case is First to Put Firearms Industry Practices on Trial," *The Washington Post*, January 19, 1999, p. A2.
22. Ibid.
23. Ibid.
24. Ibid.
25. Bridgeport v. Smith and Wesson, p. 31.

Decision Scenario A

TOBACCO COMPANIES UNDER FIRE

On June 13, 1988, the tobacco industry suffered its first real loss in over three hundred product liability cases. In previous suits, the industry was able to emerge victorious. The industry usually carried the day through appeals to smokers' voluntary assumption of the risks of smoking, to the clear warnings present on the cigarette package since 1966, and to the "lack of conclusive scientific proof of a causal link between smoking and lung disease." In the case of Rose Cipollone, deceased, a Newark, New Jersey, jury found a single tobacco company partially responsible for injuries suffered by a consumer of its products. It awarded her husband $400,000 in damages.

The plaintiff's lawyer in the Cipollone case brought suit on a number of separate grounds. The Liggett Group, Inc., producers of the L&Ms and Chesterfields smoked by Mrs. Cipollone, was charged with failure to warn consumers prior to 1966 about the dangers of their product and with a breach of express warranty that the product was healthful. Those warranties were purportedly presented through ads associating cigarettes with health; some of those ads touted the brands as those most smoked by doctors. Liggett, together with two other tobacco companies, was also charged with conspiracy to conceal evidence about the health effects of smoking and with fraudulent misrepresentation.

The jury did not accept the charges of conspiracy or misrepresentation against any of the three

This case was prepared from the following sources: the Bureau of National Affairs *Product Liability Reporter* 16, no. 25 (June 17, 1988); *Cipollone v. Liggett*, 893 F 2d 541 (1990); Sylvia Nasar, "Smokescreen: The 16 and Butts of the Tobacco Settlement," the *New York Times*, November 29, 1998; the *New York Times*, February 18, 1995; "Effort to Revive Tobacco Bill Fails—Democrats Vow to Keep Measure Alive," the *Seattle Times*, June 18, 1998; John Schwartz, "Jury Awards Ex-Smoker $51.5 Million," the *Washington Post*, February 11, 1999.