A PRINCIPLED BASIS FOR PRODUCT LIABILITY REFORM

by W. Kip Viscusi

America's product liability system is a costly failure that discourages product innovation, raises product prices and functions as a random lottery for those accident victims who legitimately merit compensation. Today, individuals, businesses and governments spend more than $80 billion a year on direct litigation costs and higher insurance premiums, and a total of up to $300 billion indirectly, including the costs of efforts to avoid liability. The costs of product liability are not limited to corporations. The general public confronts costs of many kinds—including higher product prices, and the loss of necessary products such as vaccines and contraceptives which are withdrawn from the market. However, these costs are often hidden as are the substantial litigation costs that are roughly equal to the value of the compensation received.

Efforts to reform the system have been a high priority for business and government since the mid-1980s, although some of the intensity of the effort seems to have diminished in recent years. Despite the many attempts at reform, not much has changed, largely because past reform efforts have been too diffuse and have concentrated on the more obvious symptoms—the high cost and frequency of awards—and not on the fundamental problems that drive the system or have rendered it outdated and unresponsive to a changed environment.

It is the purpose of this paper to focus on the fundamental flaws of the system rather than to develop a


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The increased focus on product design questions and the uncertain implications of new technologies led to the imposition of substantial liability costs on the most innovative firms.

produced vaccines for a set of five serious childhood diseases in 1981, by the end of that decade the number of firms producing vaccines had declined to three.\(^3\) U.S. research on contraceptive devices fell behind that of Europe, and a National Academy of Sciences panel singled out liability costs as a principal deterrent to innovation.\(^3\) Product liability had invaded the board rooms of the Fortune 500.

The mid-1980s liability crisis led to widespread calls for reform. Companies, running for cover, embraced virtually any liability reform that promised to lower costs. Tort liability reform groups proliferated, including those sponsored by the U.S. Department of Justice, the American Bar Association, the American Law Institute and a variety of policy-related think tanks. Liability reform bills also surfaced both at the Federal and state levels. Although several states enacted reforms, for the most part little progress was made. Interest in reform abated somewhat after insurance rates stabilized in 1986. Although insurance rates did not return to the lower levels that prevailed before the rate explosion in the mid-1980s, the absence of a continued surge in insurance costs appears to have induced some complacency.

The liability reform agenda that emerged during the peak of the crisis was quite simple. Liability costs were substantial and uncertain, and firms sought to control these costs. The two basic avenues for limiting liability costs are to decrease the frequency with which one will lose liability verdicts and to decrease the size of the verdicts in the cases that are lost. Decreasing the frequency of losing can be achieved by measures that make it more difficult for plaintiffs to find the firm responsible for the injury costs by, for example, abolishing the strict liability doctrine that imposes substantial duties on the firm to serve as the insurer of the losses of accident victims. Most of the efforts to control damages focused on proposed caps on the pain and suffering component of damages.

The major limitation of proposals that arise from a crisis atmosphere is that they are directed primarily at the most visible manifestation of the liability problem—rising liability costs—rather than at the underlying causes. It is now clear that what appeared to be a temporary short-run crisis reflects instead a fundamental change in the functioning of our product liability system.

As a careful review of experience indicates, today’s liability crisis has been the result of a long-term
These liability cost crises should not distract attention from the steady upward trend in the liability burden over the past three decades. The rising insurance burden is a manifestation of the underlying change in the role of tort liability in our society...

Source: W. Kip Viscusi, Reforming Product Liability (Cambridge: Harvard University Press, 1991), Table 2.3.
most important consequence for firms is that the total price tag associated with adverse liability verdicts had greatly increased. The result is that liability costs have become a central component of corporate decision making rather than a concern that can simply be relegated to the legal or governmental affairs offices. Riders on the Philadelphia Mass Transit pay 17 cents of every fare dollar to cover the insurance cost of passengers who might be injured and sue the transit company. Every time a consumer purchases a ladder, from 15 to 25 percent of the ladder’s cost is devoted to paying for the liability insurance burden arising from ladder-related accidents. The private aircraft industry has been particularly hard hit. Cessna Aircraft produced 9,000 private planes in 1979, but by the end of the 1980s had ceased production. Rising liability costs had made producing planes unprofitable. What is perhaps most striking is that faulty plane designs were not the source of the liability burden. Even though pilot error accounts for 85 percent of all accidents, the manufacturers of the aircraft are sued in 90 percent of all crash cases. Even if the company is well suited to persuade the jury not to raid the corporation’s deep pocket to pay for the losses of the accident victims, the firm must pay for the associated litigation costs.

The problems caused by the rising role of product liability are both real and permanent. Moreover, the source of these problems can be traced to the underlying functioning of the liability system, which has failed to keep pace with the changing role of social institutions in the latter part of the twentieth century.

The reform proposals discussed in this article are intended to remedy the underlying substantive problems by redesigning the liability system to better conform to the institutional environment that now characterizes the American economy. These reforms are not designed specifically to reduce the costs of product liability, although that may be an effect of these changes. The objective is to base our liability reform approach on the principal deficiencies in the liability system rather than on simply a desire for cost relief. In presenting these reforms, the article will focus on three components of our liability system: the development of the design defect doctrine, the rise of mass toxic torts and the increased prominence of hazard warning cases.
DESIGN DEFECTS

Under the design defect doctrine, products can be found defective either because they are manufactured improperly (e.g., the automobile brakes were installed incorrectly) or were defective in terms of the safety design (e.g., the brake system for the entire automobile model year was not safely designed). When the courts formerly focused only on manufacturing defects, the firm only had to worry about the consequences of the occasional production errors. Design defects, however, raise a different class of issues. Rather than having a prospective liability burden that was a rare event, design defects affected entire product lines, thus exposing the firm to potentially large costs.

In the extreme case, the entire product could be found too risky to be marketed. Among the products that have been challenged on these grounds are cigarettes, three-wheel all-terrain vehicles and above-ground swimming pools. In other instances, the design issue is more limited. Should Ford have relocated the gas tank in the Ford Pinto to decrease the risk of explosion upon rear end collision? Should Honda motorcycles have crash bars that will better protect riders from injury?

A survey by the Conference Board indicated that product liability has real effects on the design of products. The survey respondents indicated that product liability led to safety improvements in the case of 35 percent of all firms, the redesign of product lines for 33 percent of the firms, and improvements for product warnings for 40 percent of all firms. Firms discontinued product lines in 36 percent of the cases and decided against introducing new products 30 percent of the time because they feared liability costs. Moreover, some firms even closed production plants (8 percent) or laid off workers (15 percent) as a result of liability costs.

Such effects alone do not imply that the liability system has exceeded its bounds. We would want a well-functioning liability system to deter firms from introducing and selling unsafe products. However, if the underlying criteria being applied to assess liability place inordinate financial demands on firms, then the evidence of such economic effects will serve as an index of the extent to which efforts should be devoted to rectifying inadequacies in the liability system.

In examining design issues, juries, in effect, function as regulatory agencies. Their task is to ascertain whether the overall merits of a change in design of a product are warranted from a safety standpoint given the cost. The test they use to determine whether a defect is present is a criterion known as the risk-utility test. The risk-utility approach is in many ways similar to a very loosely defined benefit-cost analysis used by economists.

There is, however, an additional component that makes it more stringent. The rise in the role of strict liability as a legal doctrine established greater responsibilities on firms to bear the costs of product injuries. The rationale for this strict liability concept was that firms could serve as the insurer of the losses of accident victims and spread these costs across all consumers by incorporating the cost in the product price. For accidents that are rare events, such as manufacturing defects, this de facto insurance system is appropriate. However, for design defects, the role of the producer as insurer is infeasible, because the scale of the potential losses is too great to be easily incorporated into the price of the product. These problems become particularly acute for firms with several years of products that potentially may be found to be defective at some later date, as in the case of pharmaceutical devices that are subsequently found to cause birth defects.

There is also a second more fundamental difficulty with the design defect test—the serious mismatch between the competence of juries and the tasks they are being asked to undertake. The merits of a design defect test do not turn on the plight of a single accident victim and the specific characteristics of the product being used. Rather, the issue is whether, from a society-wide standpoint, the benefits to all product users of a safety-enhancing design change outweigh the societal costs. The highly technical issues related to health, science and engineering raised by such cases place substantial and inordinate demands on the competence of juries.

This difficulty is most extreme in the case of design defect questions involving the threshold issue of the product’s marketability. Are three-wheel all-terrain vehicles too risky to be marketed? The fact that a particular plaintiff became malnourished after consuming his vehicle too quickly tells us very little about how the company should alter the product. What is needed is a comprehensive regulatory analysis of the merits of design changes.

The performance of such analyses is generally the task of regulatory agencies, such as the Occupational
Safety and Health Administration (OSHA) and the Food and Drug Administration (FDA). Ascertaining the costs of the safety improvements and the safety benefits frequently involves thousands of hours of analysis by economists and engineers who have developed expertise in such issues. To ask juries to resolve these issues without the benefit of the needed technical expertise or the appropriate substantive input will not lead to a sound product risk policy.

Over the past two decades there has been a dramatic increase in the role of government agencies in the risk regulation area. Before 1970, there was no OSHA, no Environmental Protection Agency (EPA), no Consumer Product Safety Commission (CPSC), and no National Highway Traffic Safety Administration (NHTSA). Moreover, the scope of the efforts of existing agencies, such as the FDA, was not as great as it now is. Because of the increased role of these risk regulation agencies, there is less of a need for courts to assume the role of ensuring safe product designs. What is needed is a greater recognition of the appropriate institutional responsibilities to reflect the greater competence of regulatory agencies in addressing these issues.

In an ideal world the functions of the liability system and regulatory agencies would be coordinated to eliminate overlaps. Instead, the current system works to exacerbate the abundant defects of the American liability and regulatory systems. The existence of a regulatory violation, for example, can serve as evidence of producer negligence, but compliance with the regulation is not exculpatory and offers no relief in any subsequent liability case. Indeed, the targeting of particular products in liability lawsuits often serves to spur additional government regulation. In the situation of asbestos, for example, the rash of lawsuits against asbestos companies was followed by increasingly stringent, and often counter-productive, government regulation. Although asbestos regulation was non-existent during the World War II era when many of the asbestos-related ailments were first induced, once the cases hit the courtroom, government agencies followed with stringent regulations. OMB estimates that the cost per life saved under the new EPA and OSHA asbestos regulations is in the range of $100 million dollars per statistical life. The absence of regulation of asbestos in the pre-regulatory era subsequently gave way to regulatory overkill.

In contrast to the cumbersome system that has evolved, the appropriate role of our social institutions should be to attempt to divide responsibilities to ensure broad coverage over a wide range of risks rather than to isolate a few hazards and over-regulate them. To this end, the first necessary reform in the design defect area would be to introduce a regulatory compliance defense. If a firm’s product design is in compliance with a specific government safety standard for that product, then this compliance should be exculpatory in all design-related liability actions.

The main rationale for this approach is not simply to scale back the role of tort liability, although freeing up judicial resources to target other hazards would be a benefit. Rather, the main justification for this reform is to establish the principle that compliance with the government regulation will generally satisfy the firm’s obligation to provide an appropriate level of safety. Indeed, the typical legislative mandate of a government agency that regulates risk is that it go beyond the point at which incremental benefits of safety improvements equal the incremental costs. Thus, if firms are in compliance with the Federal regulation they will have met the obligation to provide a level of safety that achieves an appropriate balance between the costs of providing safety and the benefits derived from safety improvements. Under this proposal, accidents victims claiming design defects will no longer be entitled to compensation once firms have met the Federal regulatory obligations.

Consider the situation of automobiles. Even a well-designed automobile could conceivably be made safer by making it more like a tank. Making firms responsible for automobile-related injuries that occur because cars resemble the current automobile design rather than that of tanks would provide insurance to accident victims, but would not be a sensible liability policy. The firm would have already met its legitimate obligations by providing an efficient level of automobile safety.

The role of government regulations has not been sufficiently recognized by the courts. In part because these regulatory agencies, and their increased responsibility, are recent developments. It has only been in the past two decades that risk regulation agencies have begun to assume a prominent role. This enhanced role should now be recognized through an appropriate regulatory compliance defense rather than continuing the current duplicative and uncoordinated functions of the courts and regulatory agencies.

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Not all product defects are covered by government regulations, and for these a role would remain for the courts. However, even in this case one can make sound arguments for restricting the domain of responsibility of the courts. Judging where the product should have a specific design feature, such as a punch-press guard, is relatively straightforward. A jury can simply compare the incremental risk improvement with the costs of the device and make an overall judgment as to its desirability. Much more difficult is the fundamental question of whether a product as a class is too risky to be marketed. Should lawn darts be continued to be sold? Should youths continue to be allowed to play baseball? Are convertibles too risky to be marketed? These threshold questions of marketability involve society-wide judgments that are inappropriate for courts to make and which are beyond their competence.

There also should be an elimination of the mistaken notion that firms can serve as insurers of all product-related accidents. In the case of design defects, which by their very nature affect an entire product line, the insurance analogy breaks down. The firm does not incur a series of isolated, independent losses, but rather highly correlated impacts. It is, however, feasible for firms to insure the risks associated with rare events linked to manufacturing defects. For these outcomes a strict liability approach remains sensible. Many reform efforts that have called for the repeal of strict liability are overly broad. What is needed is a narrowing of the applicability of strict liability doctrine rather than its complete elimination.

**MASS TOXIC TORTS**

Changes in the character of liability law, including the development of the design defect test and the application of strict liability, greatly increased firms' responsibility for broad classes of accidents. The main difficulty raised by the design defect doctrine is that it imposes responsibilities on the firm to insure accident victims' losses that it cannot feasibly bear. These same types of difficulties are even more pronounced for mass toxic tort litigation.

Mass toxic torts now constitute the dominant share of all product liability litigation. According to the American Bar Association's count of mass tort personal injury claims, the suits against the Marvile Corporation alone include 190,000 claimants, with 150,000 additional claimants against other asbestos producers. The Dalkon Shield litigation, which arose because of a variety of alleged reproductive hazards associated with this intrauterine device, involves 210,000 claimants. The American Bar Association's estimate of the Agent Orange claimants is 125,000, although others put the tally higher. The number of claimants for other mass toxic torts, such as DES and Bendectin, is about 2,000, but the stakes in these pharmaceutical claims are nevertheless substantial.

Given the magnitude and number of mass toxic torts, the previously accepted view of firms serving as insurers of accident victims' is simply not feasible. Fulfilling the insurance function is workable only for random manufacturing defects that are a recurring phenomenon. However, for instances such as those events for which a major product risk has been identified, the market for the product will be greatly diminished once the hazards have been identified. If, for example, a pharmaceutical product is identified as being a significant contributor to birth defects, then demand for the product will be reduced, and the company will not be able to shift the costs of these liability suits to the current consumers. Instead, it will be forced to pay for the damages out of general corporate funds. In the extreme case, these costs may be so substantial that they may entail a reorganization of the company under Federal bankruptcy provisions.

The primary mechanism for dealing with the costs of these suits has not been to spread the cost through higher product prices but to reorganize and set up a compensation fund supported by the company's remaining assets. The Marvile Corporation, for example, established a $2.6 billion dollar trust fund in 1988 to fund the losses of asbestos victims. Eighty percent of the company's total not worth as well as the insurance premiums that it received from its insurers, went toward funding the asbestos claims. In addition to this fund, Marvile set aside another $300 million dollars to cover asbestos-related property damage claims because not all of these resources were liquid. But, within a year after the fund was established, the company encountered difficulty in paying off the claims. Beginning in 1990, the company offered to pay claimants settlement amounts up to forty percent of the value of the claim in an effort to meet the shortfall in funds. Moreover, the total resources that would ultimately be available to pay for the claims would in all likelihood be inadequate because the liability burden had
been underestimated. The fund’s remaining resources in 1990 were almost $1.5 billion dollars, whereas estimates of the liability burden at that time put the claims and administrative costs yet to be paid as equal to $7.5 billion dollars. Additional funds were added in 1991, but this rescue operation in all likelihood will prove inadequate.

This experience is not unique to the asbestos industry. The A.H. Robins Company also underwent reorganization and established a similar type of fund to deal with the massive lawsuits against its contraceptive device, the Dalkon Shield. In 1989, the fund had resources of between $2.5 and $2.7 billion to pay for prospective claims, where claims were paid using schedules that established set payment amounts by type of injury. Even these substantial resources may prove to be inadequate. One consulting firm has estimated that A.H. Robins will need $7.2 billion dollars to compensate the Dalkon Shield victims.

These financial arrangements are enormously expensive and complex. As a substitute for genuine insurance, they perform very poorly, owing in part to the current system’s gross inefficiencies in compensating the accident victims, and the legal system’s claim to a large portion of the compensation. Studies of asbestos litigation indicate that 41 percent of the total compensation which plaintiffs received goes to pay plaintiffs’ legal fees. This amount is augmented by the expenses of defendants, who have devoted an amount equal to 58 percent of the award to fund their own litigation expenses.

The experience under the Dalkon Shield fund is not much different. The attorneys for women collecting from the fund are estimated to be receiving $700 million dollars in legal fees, and the administrative and legal costs of establishing the compensation fund came close to $100 million dollars.

From the standpoint of insuring the needs of accident victims, these funds are hardly a satisfactory solution under any reasonable circumstances. The creation of these funds has bankrupted the affected companies, provided uncertain and often inadequate compensation to accident victims, and consumed substantial litigation costs.

Another possible rationale for such compensation of victims in mass toxic tort claims is that of deterrence. Even though there are important practical problems with using the tort system as an insurance mechanism, surely we would want to provide firms with a financial incentive to avoid inflicting harms.

Unfortunately, these mass toxic torts have a quite different character than conventional accidents that have long been the staple of tort liability cases. Ailments such as cancer and genetic damage occur with a lag time of a decade or more. Few of these ailments represent diseases with a single cause. As a result, no precise linkage can be made between the risk exposure in question and the ultimate health impact. At the time of the exposure to the risk, companies often had little or no knowledge of the presence of the risk, and almost no knowledge of the extent of the risk. Moreover, the tort liability regime faced by the companies has been highly uncertain. The companies which produced the asbestos used during World War II, for example, could not anticipate the tremendous expansion in the tort liability system that they would face in subsequent decades. Indeed, the legal structures that have led to the substantial imposition of liability on these firms did not emerge until long after the period of exposure.

The causality problems are problematic even in the case of asbestos, which is unambiguously a potent carcinogen, and may represent the best example of a signature disease. Lung cancer can be caused by asbestos exposures, but also by environmental exposures, cigarette smoking and other factors. Some forms of cancer attributable to asbestos, such as mesothelioma, are in all likelihood caused by asbestos exposures, whereas other forms of lung cancer are not. If we were to compensate all cases of lung cancer of asbestos workers as opposed to only those cases specifically attributable to their asbestos exposure (if we knew which ones those were), then the cost of compensation would be increased by roughly an order of magnitude. But for all practical purposes, it is difficult to distinguish those cases of cancer attributable to the product and those which are not. As a consequence, product liability awards often end up serving as a broadly based national insurance scheme for classes of injuries tangentially associated with a product, but not necessarily caused by it.

Wholly apart from the efficiency problems arising under this approach, which will be explored below, there are also equity issues. Individuals who have been able to document a risk exposure that qualifies them for
compensation will be able to receive payments through the tort liability system irrespective of whether the exposure caused their ailment. Victims of risks that cannot be traced to a product will not fare as well. A more equitable solution would be to utilize our existing social insurance mechanisms to meet the needs of all those who suffer from disease and illness, rather than to limit compensation to those who qualify for the tort liability award. Insurance alone cannot be a justification for such compensation. It must also be coupled with some kind of deterrence rationale.

Causality problems are inherent with respect to almost all disease-related issues. Diseases create difficulties in ascertaining causality not only for the courts, but also for the workers' compensation system and any other mechanism that is designed to transfer income to those who have suffered occupational or product-related diseases. Unless the causality linkages can be better understood, compensation cannot be targeted in a manner that will create appropriate incentives for safety.

Compounding these difficulties are the long time lags involved. Companies faced with a prospective liability burden will face liability costs of uncertain future magnitude. The role of discounting deferred payoffs will greatly diminish the present value of the incentives created by distant future liability costs, so that there is likely to be little substantial effect of tort liability on current business decisions. The main practical consequence is that tort liability has created an environment of uncertainty for firms which run the risk of insolvency should they embark on an uncertain product, such as a new prescription drug, that may later be found to have adverse repercussions that are not yet well understood.

For the most part, tort liability reformers have taken a myopic view of the problems caused by mass toxic torts. The major concern has been how the current approach could be amended to make it more effective. While some would experiment with different kinds of compensation funds, proportional liability schemes, science courts and similar measures, the fundamental reality is that the tort system is simply not well suited to dealing with diseases for which there is highly uncertain causality, problems of multiple causation and a long time lag between the period of exposure and the onset of the illness.

Fortunately, as a society we are not restricted to reliance on tort liability. Over the past two decades, the government has instituted sweeping regulations of health, safety and environmental quality. Regulation of carcinogenic exposures, for example, requires technical expertise that the specialized governmental agencies are much more likely to possess than are juries. Moreover, regulatory agencies can regulate exposures to control the risk before its adverse implications become apparent. In the case of cancer, for example, tort liability mechanisms came into play three decades after the damage was done, whereas regulation can eliminate the exposure and the build-up of successive cohorts of individuals who have been exposed to risks that have not yet been manifested.

A regulatory compliance defense would, for example, eliminate the mass toxic tort actions against pharmaceutical companies, except in situations in which the company withheld information from the government agency. Companies would no longer be reluctant to introduce new vaccines or contraceptive devices, as occurs all too frequently now. Under the present regime, for example, the general counsel of Johnson & Johnson indicated that he would advise his company to not introduce an AIDS vaccine, should it develop one, because of the substantial uncertainty regarding future liability.

Coupled with the introduction of a regulatory compliance defense should be an elimination of the underlying principle that firms should serve as the insurer of accident victims' losses. Their duty instead should be to provide an efficient level of safety, and amending the product defect test as indicated above would further serve to reduce the role of tort liability in the mass toxic tort area.

The solution to the mass toxic tort quandary is to eliminate the involvement of the product liability system rather than to amend it. Deterrence for current and future risks is best provided through regulatory structures now in place. Moreover, reliance on regulation will avoid the inequities and inefficiencies of relying on a tort liability system that provides compensation to victims in situations where causality is not well understood. If society as a whole wishes to meet the legitimate needs of those in ill health, it should do so through more broadly-based insurance efforts rather than by awarding substantial prizes to the lucky few who succeed in the litigation lottery.
HAZARD WARNINGS

One way in which a product can be found to be "defective" is to provide an inadequate warning to users. For example, many asbestos cases have focused on the question of whether the firm gave adequate warning to the workers of the hazards and necessary precautions. Hazard warnings have a constructive role to play because the responsibility for safety is not solely the producer's. How the product is used may affect the degree to which it could result in injury.

Ideally, the presence of hazard warnings should diminish the responsibility of firms by reallocating some of the responsibility for safety to product users. If properly used, such warnings would establish an appropriate sharing of responsibilities for safety between product users and producers. Unfortunately, the opposite has occurred because of the absence of clearly defined criteria for judging warnings. In effect, the presence of requirements for hazard warnings has simply created another way in which plaintiffs can demonstrate that products are defective.

Warnings clearly have a constructive role to play in situations where hazards might be hidden or which require special precautions. In some instances of actual warnings cases, however, no clearcut informational gap can be identified. Tire manufacturers, for example, have been found liable for not warning purchasers of the risk of a blowout that might result if the vehicle carries excessive weight. In one Federal case, the court ruled that Unisoy was liable for the death of a professional truck driver because it had not provided a warning of the risks from underinflated tires. An Indiana jury awarded almost $500,000 to a woman who claimed that inadequate warnings precipitated her fall on her patio and thereby led to her injuries following the collapse of her improperly opened chaise lounge. The court ruled that the firm was remiss in that it had not warned consumers of the risks of collapse from improperly opened chaise lounges.

The expansion of product liability to include such tests for hazard warnings over the past two decades has greatly increased the responsibility of firms. Not only must they meet design standards for efficient levels of risk, but they must also convey to consumers information about the risks that remain.

Moreover, the nature of the judicial process is not conducive to assessing whether the warning was adequate, because juries tend to focus on the particular risk that contributed to the accident. For example, a prominent warning on lift trucks might alert forklift drivers to the potential risk of tipovers. However, there are roughly three dozen other ways in which fatalities could result from the use of lift trucks, and if one were to provide a comparable warning for all types of risk, then this product would be completely plastered with warnings.

Plaintiffs frequently make the argument that a bolder warning, with bigger letters and perhaps an orange background, would have made a stronger impact. Efforts such as these would, however, distort the existing warnings vocabulary. If we have the boldest possible warnings on all products for all possible risks, then no distinctions will be made regarding relative riskiness. However, because incentives provided by the courts foster the notion that stronger warnings are better, firms are encouraged to overwarn so as to reduce their liability burden. Concern with hazard warnings is a legitimate liability issue, but more precise guidelines are needed for judging and assessing warnings.

Specifically, firms need some reference point that they can use to determine whether a warning is adequate. Voluntary industry standards, such as the ANSI guidelines, provide some assistance in standardization. However, what is needed is a set of guidelines—a national warnings vocabulary—that will constitute a legitimate defense for the firm. Once the firm has met these guidelines, it should be freed of any subsequent liability. Once such a vocabulary is established, the role of the courts would be to determine whether the firm selected the appropriate warning from an approved warnings vocabulary.

Such a vocabulary does exist in the case of warnings mandated by Congress and regulatory agencies. Institution of a regulatory compliance defense for warnings would make the courts' responsibilities more feasible. In some instances, such as for pharmaceuticals and medical devices, the warning is not written by the company, but by a government agency. The Food and Drug Administration drafts the warnings for these products. In other instances, such as for pesticides, the U.S. Environmental Protection Agency must approve any warning language that is given. Congress mandates the warning language for cigarettes, alcoholic beverages and saccharin.

In situations in which there is a strong regulatory oversight component, compliance with the warnings guidelines of the regulatory agency should be exculatory.
The impetus of these proposals has been to alter the incidence of liability burdens rather than their extent. Many liability reform proposals have featured various efforts to control damages, such as dollar limits on pain and suffering awards. However, the rise in the damage awards can be traced primarily to the effect of inflation on the lost earnings and medical costs of accident victims. Additional guidance is, of course, needed. Juries could profit from further guidelines with respect to appropriate levels of pain and suffering compensation, and there is a need for greater certainty with respect to the setting of punitive damages. However, the major source in the growth of the liability burden has not been an explosion in the damage amount per claim but rather the increase in liability claims arising from the expansion of liability into new areas.

Somewhat paradoxically, this expansion in product liability occurred simultaneously with the increased role of government regulation. In a situation in which government regulatory agencies became increasingly active in mandating safety devices and ensuring levels of health that would meet any reasonable demands on firms, we also increased the role of the tort system. The net effect is that firms are now hit twice, both by an expanded regulatory burden and an additional tort liability cost that does not fully recognize the constructive role played by government regulations.

ENDNOTES


6. George Frazza, General Counsel of Johnson & Johnson, indicated that he would advise that his company withhold an AIDS vaccine until Congress passes protective legislation. See the Bureau of National Affairs, Product Safety and Liability Reporter, August 12, 1988, p. 768.